ASSESSING THE EVOLVING CONVERGENCE & INTERSECTION OF INTERNATIONAL ECONOMIC LAW AND PHILIPPINE DOMESTIC LEGAL AND INSTITUTIONAL FRAMEWORK*

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INTRODUCTION

Prof. John Yoo's trenchant remark that "[w]e live in a world of treaties,"[1] is probably gospel truth in today's globalized world on a number of levels. Treaties pervade and invade, regulating aspects of politics, economics, and law that affect everyday lives of people on a global scale.[2]

Equally true is the reality that economic globalization[3] is moving forward, around, and sideways, at breakneck speed, but never backwards. Over the last 60 years, the breathtakingly complex web of international economic activity has led to an equally complex and multi-jurisdictional web of rules, guidelines, and governmental regulation over a wide range of economic subject matter[4] involving the economic sovereignty of states. It

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[1] John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1957 (1999).

[2] *Id.*, at 1957-58.

[3] The economist Joseph Stiglitz defines globalization as "the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders." JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 9 (Penguin Books 2002). This paper however borrows the definition of economic globalization from Professor and now WTO Appellate Body member Peter Van den Bossche: the gradual integration of national economies into one borderless global economy, encompassing both (free) international trade and (unrestricted) foreign direct investment, affecting people everywhere and in many aspects of their daily lives in the process. *See generally* PETER VAN DEN BOSSCHE, LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 9-15 (Cambridge University Press 2nd ed., 2008).

[4] International Trade and Investment Treaties: Some Basic Guidelines for Recognizing Issues, *Christopher J. Kent, Christopher J. Cochlin, Olivia Wright, and Shaun Brown, Fraser Milner Casgrain LLP*, 2009 LEXPERT/ AMERICAN LAWYER, at

has become a system of such breadth and depth, involving obligations and standards of an increasingly binding, intrusive, and at times compulsory character, that it has evolved into something that can be considered as "international law," or more precisely, "international economic law."

The World Trade Organization (WTO), including the General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS) and all related agreements, is the grand matrix of the rules-based international trade regime, the "the loom that weaves thousands of mercantilist strands into the tapestry of free trade."[5] The "spaghetti bowl"[6] or "noodle bowl"[7] (depending on country of origin) of Preferential Trade Agreements (PTAs), Preferential Trade and Investment Agreements (PTIAs), regional trade agreements (RTAs), customs unions, bilateral investment treaties (BITs) form yet another intricate maze of market access preferences, standard of treatment, rules of origin, guarantees, and other commitments tailored to the specific economic and political needs of countries that forego the multilateral track.

International Economic Law—"IEL" for brevity—is without any serious question a branch of Public International Law, and in relation to Philippine law is entirely treaty-based. Much of public international law, in the end, is economic law.[8] The Philippine government has resorted to economic agreements to keep up with the developments in global trade and investment and further improve international economic relations. However, globalization is occurring at a time when the common understanding of economic sovereignty, as the fundamental rationale for the state in entering into economic agreements, remains oriented around traditional concepts of non-intervention and domestic autonomy, with great resistance to the allocation of power to international institutions.[9] The foreign affairs and commerce powers, as the primary constitutional modalities for IEL, remains

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law.com/upload/en/publications/2009/International_Trade_Investment_Treaties.pdf, (last accessed Feb. 12 2010).

[5] "The real cost of a failure in Doha: Multilateralism must trump short-term interests to survive," *Financial Times*, at 16, May 15, 2006.

[6] Report by the Consultative Board, chaired by Peter Sutherland to the WTO Director-General, "Sutherland Report" (2004). It is widely believed however, that the term was coined by Dr. Jagdish Bhagwati, one of the foremost economists who believe trade can be a tool for development, who has expressed pointed criticism of the FTA phenomenon.

[7] As applied endemically to Asia, where a great majority of FTAs and RTAs have proliferated

[8] *See* Thomas Cottier, *Challenges Ahead In International Economic Law*, 12 J. INT'L ECON. L. 3, 13 (2009); JOHN JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (MIT Press 2nd ed., 1997).

[9] Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 878 (2003).

confused and contradictory.[10] Because IEL principles impact economic sovereignty in increasingly incursive ways, there is an urgent need to take a long, hard look at the way treaties are entered into, accepted, and form part of domestic law and become binding upon states.

This is especially important for developing countries such as the Philippines. Of the eight (8) major trade agreements[11] negotiated and signed by the Philippines, two have been challenged in the courts: the WTO Agreement in *Tañada v. Angara*,[12] and the JPEPA in the pending *certiorari* petitions, *IDEALS v. Aquino* and *Fair Trade Alliance v. Aquino*.[13] Coincidentally, perhaps by reason of the Constitutional challenges, no other international trade agreement has been submitted for concurrence to and concurred in by the Senate. The Philippines' 30-odd BITs and PTIAs, which also contain economic sovereignty derogations, and are perhaps even more incursive and democratically illegitimate as they reach far into segments of the domestic law,[14] have never been submitted to the Senate for concurrence. These high profile forays of the Philippine government into the realm of IEL have been marred by bitterly contentious and polarizing debate, revealing divergent views on to what degree and extent has Philippine domestic law and the legal system, through its institutions, integrated international economic law. It is this intersection of powers exposes much of the friction evident in making IEL in the Philippines. These cases raise many sovereignty and constitutional issues that expose the fundamental conflict between the objectives of IEL and the Philippine domestic legal regime.

This paper will attempt to show that the Philippine domestic legal regime and institutional framework do not possess the optimal conditions necessary to withstand the rigorous demands of the global trading system. The legal system of the Philippines is not equipped to maintain full compliance with IEL obligations and commitments. Certain aspects of the domestic legal system hinder the government's ability to reap the benefits of

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[10] Yoo, *supra* note 1, at 1956.

[11] WTO Agreement (1995), ASEAN Free Trade Area (1994); ASEAN-China Free Trade Agreement (2002); ASEAN-Korea Free Trade Agreement (2005); ASEAN-Japan Comprehensive Economic Partnership (2005); ASEAN-India Free Trade Agreement (2005); Japan-Philippine Economic Partnership Agreement (2004); ASEAN-Australia-New Zealand Free Trade Agreement (2009).

[12] 338 PHIL. 546 (1997).

[13] In the case of *Akbayan v. Aquino*, although the JPEPA was the trade agreement in question, the main issue was not its validity or constitutionality, but the act of the executive in not divulging the requests and offers exchanged during the negotiations.

[14] For a list of Philippines' BITs, *see* www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1. RUDOLF DOLZER & CHRISTOPH SCHREURER, THE PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 9 (2008).

international trade through IEL and worse, the gaps and defects in the system may even prove to eviscerate the gains, if any, achieved from the government's engagement in international economic law.

I. THE NATURE OF INTERNATIONAL ECONOMIC LAW[15]

The body of academic work and expert literature on the subject of IEL[16] its conceptual and definitional elements, its constitution as a separate or sub- field of international law, the dynamics between and among participants, and other aspects of the subject at the theoretical and practical level is dauntingly substantial. Although IEL comprises a variety of sources, this paper will adopt the restrictive definition of IEL proposed by Prof. John H. Jackson, which embraces trade in goods and services and investment when these are involved in transactions that cross national borders and that establish within national borders economic activity of persons or firms originating from outside.[17] Specifically, this paper narrows its focus on two major strands of IEL: international trade law,[18] which encompasses multilateral, plurilateral, and bilateral instruments designed to govern

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[15] The term "International Economic Law" or "IEL" as used in this paper, does not cover the law and system of rules governing the international monetary system, as it will focus only on IEL related to market access. As Professor Andreas Lowenfeld observes, the discussion of the rules, practices, and institutions of the international monetary system is sometimes carried on without any mention of law—let alone international law—in a way that would be unthinkable in a comparable discussion of international trade (and international investment). Nonetheless, this writer is aware that, but for the limited time and scope of this paper, no discussion of IEL in the context of the Philippine experience would be complete without even touching upon the policies and interventions of the International Monetary Fund (IMF) and the World Bank (WB).

[16] There is probably little if not the complete absence of any formidable opposition to the proposition that IEL is PIL, and this writer adds nothing to the mature discourse other than by identifying some points relevant to the themes of this paper. Mild opposition however comes from Prof. Dr. Donald McRae, who in his lecture for The Hague Academy of International Law, noted that while public international law deals with the State and the issue of sovereignty, IEL (particularly trade law) is based on the tenets of comparative advantage, cross-border economic exchanges, and specialization, and should thus be considered separate from PIL. *See* Donald McRae, *The Contribution of International Trade Law to the Development of International Law*, RECUEIL DES COURS 260, 109–31 (1996). Prof. Schwarzenberger, however, even goes on to note that the same three historical premises of international law in ancient time also form the bases for IEL, namely: war as a state of normalcy, the rightlessness of foreigners, and the high seas as no man's land. Georg Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 RECUEIL DES COURS 1, 19-20 (1966). Even in the concrete text of the WTO treaty itself, all doubts as to whether WTO law is part of public international law are cleared. Article 3.2 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) explicitly directs panels and the Appellate Body to "clarify the existing provisions of [the covered WTO] agreements in accordance with customary rules of interpretation of public international law. *See* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 28-29 (2003). IEL being a part of contemporary international law, the sources enumerated in Article 38, Paragraph 1 of the Statute of the ICJ are also sources of IEL.

[17] JACKSON, *supra* note 8, at 25.

[18] ITL has been painted as one of the most significant branches of IEL. *See* ASIF QURESHI & ANDREAS ZIEGLER, INTERNATIONAL ECONOMIC LAW, (2nd ed. 2007). A distinction, however, must be made with respect to the private nature of international trade law, the principles of which undergo continuous development in the United Nations Commission on International Trade Law (UNCITRAL).

international trade relations and almost exclusively in the context of trade liberalization, and, international investment law,[19] which not only comprises a heterogeneous network of investment treaties but also includes key aspects of customary international law (CIL).[20]

A. The Primarily Treaty-Based IEL Serves to Codify Obligations Concerning Economic Sovereignty

1. Economic Sovereignty in IEL

The concept of "sovereignty" remains central to the discourse on international law,[21] and concomitantly, international economic law.[22] Although the erosion of sovereignty has been the subject of mature scholarship, in no context has this erosion gain greater attention than in international economic relations.[23] The traditional essence of sovereignty is the whole body of rights and attributes conferred upon a State and which it possesses in its territory, to the exclusion of all other States, and also in its relations with other States.[24] One scholar breaks down the concept of sovereignty in syllogistic fashion:[25]

> The world is divided among a large number of states. The governments of the states recognize, for the most part, the existence of all the other states. This means that each government has absolute or near-absolute power to govern people within its territory, and also that each government acknowledges that it has no power to govern people within the territory of other states. This is generally what is meant by "sovereignty."

This is the power-based, 17th century Westhpalian essence of sovereignty—no state claiming to be sovereign can recognize another state as having legal authority over it.[26] Indeed no state, developed or developing, North or South, would ever deny the proposition that it has and will not

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[19] *See* DOLZER & SHREURER, *supra* note 14.

[20] Anne van Aaken & Jürgen Kurtz, *Prudence or Discrimination? Emergency Measures, the Global Financial Crisis and International Economic Law*, 12 J. INT'L ECON. L. 859, 860 (2009).

[21] John Jackson, *Sovereignty: Outdated Concept or New Approaches*, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 3 (Wenhua Shan, Penelope Simons, and Dalvinder Singh eds. 2008).

[22] *See* QURESHI & ZIEGLER, *supra* note 18.

[23] JACKSON, *supra* note 8, at 79.

[24] LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACTER, & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 13 (1980), *citing* Corfu Channel Case (Individual Opinion by Judge Alvarez) ICJ 39, 43 (1949).

[25] Eric Posner, *International Law: A Welfarist Approach*, 73 UNIV. CHI. L.R. 487, 503 (2006).

[26] Ignaz Seidl-Hohenveldern, *International Economic Law, General Course on Public International Law*, 198 RECUEIL DES COURS 9, 44-45 (1986).

ever relent total control over all economic activity that takes place within its boundaries, as a self-evident principle of state sovereignty.[27] Sovereignty in the economic sphere relates mainly to a State's permanent resources, to its economic system and to the rules of engagement in international economic relations.[28] Thus a truly sovereign state—one whose acts are not subject to any rule other than those of international law[29]—ought to be the master of its own destiny in the economic field.[30]

Yet notwithstanding a revival of Westphalian sovereignty in the 21st century, intended to deal with the inequitable colonial arrangements and to reassert developing states internal competence over foreign economic interests within its territory,[31] and applied to what developing countries believe to be their rights against developed countries,[32] the policy shift of developing countries towards attracting foreign investment and trade liberalization[33] indicates a trend towards abandonment of the Westphalian view. The freer flow of information and technological advances as well as the realization that foreign direct investment has beneficial multiplier effects on economic growth and poverty reduction brought about by globalization has increased the capacity of capital-importing governments to regulate the inflow of investment and to contract out obligations related to such inflow through treaty.[34] It has since morphed into the desire to participate more effectively in the development of IEL.[35]

Indeed, as international economic law issues such as global trade and international investment increasingly arise to challenge the Westphalian system, it is being transformed.[36] Its basic concepts of sovereignty, of *domaine reservé*, of sovereign equality, and of territorial jurisdiction has changed.[37] Perhaps developing countries are beginning to realize that in an increasing globalized economic environment, the scope of their actions

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[27] M. SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 91 (2004).

[28] QURESHI & ZIEGLER, *supra* note 18, at 44.

[29] Seidl-Hohenveldern, *supra* note 26, at 44.

[30] *Id.*, at 46.

[31] QURESHI & ZIEGLER, *supra* note 18, at 45.

[32] For instance, the inherent right to nationalize industries without compensation and to prevent abuses by exploitative multinational corporations which was a recurring argument during the NIEO debates.

[33] HENKIN, ET AL, *supra* note 24, at 758.

[34] The question of whether a government is bound, in its investment treaty with another government, to recognize the claims of, or allow itself to be sued by, a private entity of the latter arising out of its investment in the former, has never been resolved in the NIEO debates and continues to perplex international investment lawyers today. *See* DOLZER & SCHREURER, *supra* note 14, at 11-17; *See generally* ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 486-89 (2nd ed. 2008).

[35] QURESHI & ZIEGLER, *supra* note 18, at 45.

[36] Joel Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 48 (1996).

[37] *Id.* (calling this phenomenon the "international economic law revolution").

within their borders can be managed with a moist eye towards involving the rest of the world and profiting therefrom. Doing so means that developing countries are in fact confidently asserting their sovereignty over economic resources by devolving certain aspects of it in exchange for the reciprocal devolution of other countries' sovereignty. There is judicial wisdom to that effect by the Permanent Court of International Justice held so in the *SS Wimbeldon* case:[38]

> The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.

The *SS Wimbeldon* case views the sovereignty question through the lens of contract. Professor Andrew Guzman gives a useful syllogistic hypothetical.[39] Individuals, he argues, are free to enter into binding contracts or agreements under their governing domestic legal system. Although these contracts limit the future actions of each party, it is not criticized as infringements on individual autonomy. In fact, these contracts are used as tools to further individual autonomy, because they allow individuals to advance their economic interests more effectively than would be possible in a world without binding contracts. International agreements can be viewed as contracts among sovereign states. Like domestic contracts, they restrict (or seek to restrict) future behavior, but, like contracts, they should be viewed as serving rather than undermining the interests of states.[40]

The logic of the PCIJ and Prof Guzman is sound to be sure, but it assumes players deal at arms-length, and a certain parity at the negotiating table. It ignores the reality that not all states are created equal, and that the agreements impacting economic sovereignty and entered into by developing states are more in the nature of adhesion contracts, designed for them by foreign bureaucrats having no connection whatever to their constituencies. The criticisms of economic globalization and IEL and its restricting effect on sovereignty of developing countries such as the Philippines has hitherto focused on its limiting effect on the freedom of states to act and to control

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[38] *S.S. Wimbeldon Case*, P.C.I.J. Series A, No. 1, at 25 (1923).
[39] Andrew Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L. J. 303, 346 (2005).
[40] *Id.*

its resources. Yet what is largely ignored is that a state's inherent capacity to determine policy and exercise decision-making authority is increasingly undercut by decisions or policies formulated or made for them. While some countries or NGOs decry the incursions of sovereignty of multinational corporations, they conveniently forget that they have already embraced free market concept under which these corporations operate and thrive. International agreements drafted by foreign ministry lawyers of developed countries, and based on principles agreed upon with other developed countries in an exclusive developed country forum, and are then fed to developing countries such as the Philippines, which are then sent to their respective parliaments for approval and for binding effect.

The power of a State to enter into economic treaties and international agreements that devolve certain aspects of its decision-making authority over its economic resources to an inter-governmental body, transnational entity, or supranational institution necessarily presupposes the existence of its sovereignty and the creation of a law-creating international entity. In the WTO, although there is no coercive enforcement mechanism within the organization beyond the retaliation provisions of the DSU, it seeks to affect state behavior, and its dispute resolution system is designed to limit the ability of states to violate their obligations. In this sense, the WTO system may be described as an authority above that of national law.[41] When supranational institutions such as the WTO shift some measure of effective control over policy away from national governments, there is still that palpable loss of sovereignty.[42] The argument is that countries can always get out of those arrangements, because countries always possess some veto power they can always exercise at any time. Although states are always free to resort to the exit strategy or wield their nuclear option, it is not without consequences and, almost always, politically costly ones.[43]

To be sure, the notion of economic sovereignty continues to evolve together with traditional notions of sovereignty, and a conception of it must be adopted that will be in harmony with the new conditions of social life. Today, owing to economic globalization, social interdependence and to the predominance of the general interest, the States are bound by many rules that have not been ordered by their sovereign will.[44] Prof. Georg Schwarzenberger put it best when he opined that while emphasis on interdependence, economic or otherwise, is the fashion, "economic

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[41] Guzman, *supra* note 39, at 346.
[42] Raustiala, *supra* note 9, at 849.
[43] *Id.*
[44] *See Corfu Channel Case* (Individual Opinion by Judge Alvarez) ICJ 39, 43 (1949).

sovereignty remains and will remain the starting point of IEL as is sovereignty that of PIL at large."[45]

2. IEL as a Treaty-Based Regime

Compared with the other two law-creating processes of international law—customary international law and the general principles of law recognized by civilized nations—the emphasis in IEL is on treaties or "conventional" international law.[46] As early as the 6th century A.D., Rome and Carthage and Byzantium and Persia had entered into treaties of commerce and frontier trade, showing that treaty-based IEL goes back to the very dawn of international law.[47]

Modern international law is now composed increasingly of treaty-based sub-systems,[48] and following this trend, IEL as a branch of PIL is no exception. In fact, much of international economic law is treaty-based,[49] and therefore many of the basic rules of international economic law are grounded in the law of treaties.[50] Conventional IEL as a sub-system of modern PIL derives mainly from agreements arrived at between States, either on a bilateral, regional, or multilateral level.[51] Although Prof. Donald McRae, as a counterpoint to Prof. Schwarzenberger, his predecessor at the Hague Academy, argues that what states had agreed to in their treaties was "in a sense, transitory and they could agree to something different tomorrow,"[52] in a treaty-based system, "it is in the discretion of parties to

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[45] Schwarzenberger, *supra* note 16, at 27.

[46] *Id.*, at 12.

[47] *Id.*, at 18-19.

[48] PAUWELYN, *supra* note 16, at 9.

[49] It has been argued that there also exists international economic law that is sourced from international custom, because most of the treaty-based obligations in IEL agreements have been developed through custom and practice of states. *See* Stephen Zamora, *Is There Customary International Economic Law?* 32 GERMAN Y.B. INT'L L. 9 (1989). "Real" international law was customary international law—that which emerged from the practice of sovereign states in their relations with each other. *See* McRae, *supra* note 16, at 116. This basic norm of international law, which institutes custom constituted by states as a law-creating fact, expresses a principle that is the basic presupposition of all customary law: the individual ought to behave in such a manner as the others usually behave (believing that they ought to behave that way), applied to the mutual behavior of states, that is the behavior of the individuals qualified by the national legal orders as government organs. *See* HENKIN ET AL, *supra* note 24, at 17, *citing* H. KELSEN, PURE THEORY OF LAW at 215-17. Prof. John Jackson argues however that customary international law norms are often vague and controversial, with much debate as to the meaning of the norm as well as their significance. In economic relations where certainty, predictability and stability are key values, it can reasonably expected that governments would prefer binding themselves through international obligations on paper, via treaty. It has also been observed that many customary international law norms applicable to economic transnational activity have already been codified. *See* JACKSON, *supra* note 8

[50] Stephen Zamora, *International Economic Law*, 17 U. PA. J INT'L ECON. L. 63, 65 (1996).

[51] QURESHI & ZIEGLER, *supra* note 18, at 21.

[52] McRae, *supra* note 16, at 116.

any treaty to create legal principles endowed with all the characteristics of legal rules that bind them."[53]

Despite the certainty of diplomatic, clear-cut, and ink-dry legal rules between states, there are complications. The complexities and demands imposed by global markets and the corporations that thrive within that network, in which production of goods and services easily spans frontiers, require that the rules and norms follow the good, service, or investment wherever they go, but most economic regulation is of a national character and stops at the border. Even the international system of rules themselves, and the norms upon which they are based, can be at loggerheads with each other and be the source of conflicting positions, policies, or even jurisprudence. Part of this challenge is to harmonize national regulation, and part is to define which elements of regulation should take place in the international sphere.[54]

International economic agreements are thus becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient, and temporary, compacts to undertake state action.[55] As discussed in the previous section, treaties do have a restraining effect on economic sovereignty. The WTO agreements, the only multilateral agreement on trade, constitutionalize norms in international trade law and through its institutions, there is some devolution of external economic policy as well as judicial determination of breaches of those norms. Investment treaties constrain sovereign rights of control over the intrusive process of foreign investment, which takes place entirely within the territory of the host state. To this extent, the erosion of sovereignty in such treaties is considerable.[56] While "[s]uch treaties are formally among states, and the obligations are cast as state obligations... [t]he real object of the treaty... is not to affect state behavior but to regulate the activities of individuals and private entities."[57] This is the key dynamic that defines IEL over the other branches of international law, and the crux of the economic sovereignty debate in the 21st century.

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[53] Schwarzenberger, *supra* note 16, at 13.

[54] Zamora, *supra* note 50, at 66.

[55] Yoo, *supra* note 1, at 1958.

[56] SORNARAJAH, *supra* note 27, at 265.

[57] Yoo, *supra* note 1, at 1957-58, *citing* ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 14 (1995).

B. Fundamental IEL Elements Exemplifying the Derogation of the State's Economic Sovereignty

IEL as a discipline has existed for many years, and has developed norms and principles have survived despite mercantilist instincts reflected in every state's trade laws.[58] As international relations have become increasingly dominated by economic factors, the WTO system has moved away from its former, more power-oriented diplomatic approach to trade relations, and embraced rule-oriented approaches and impartial dispute settlement.[59] The development of international investment law on the basis of bilateral treaties as well as customary international law norms, contrasts significantly with the emergence of multilateral institutions in other areas of international economic law such as WTO and international trade law.[60]

The implications to states arising out of decisions of inter-governmental, *ad hoc*, or institutional tribunals and panels are extremely an onerous and intrusively derogating characteristic of IEL and will be discussed in detail in the next succeeding sections. Below provides some "nutshell" descriptions of basic norms and obligations under IEL that are sovereignty-derogating.

1. Market Access / Presence

If there is one objective common to all IEL branches, it is *market access*. The enabling set of rules and obligations that inter-state trade and investment happen is purely about negotiated market access. Countries negotiate trade and investment agreements at multilateral or bilateral level as a means of gaining access to each other markets for their own goods, services, and capital to promote their own national economic output.

In international trade in goods, either multilaterally through the WTO or bilaterally PTAs, countries negotiate market access through the reduction of tariffs and non-tariff barriers. The core feature of the WTO system has been the setting of rules on market access, together with the elimination of discrimination, and the periodic reductions in world tariffs, and even prior to its establishment in 1995, GATT members met roughly every decade in negotiating rounds that reduced tariffs on goods on a

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[58] LOWENFELD, *supra* note 34, at 33.

[59] James Cameron & Kevin Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT'L & COMP. L. Q., 248, 248 (2001).

[60] Stephan Schill, *Investment Treaties: Instruments of Bilateralism or Elements of an Evolving Multilateral System?*, Paper for the 4th Global Administrative Law Seminar, Viterbo, Jun. 13-14, 2008.

reciprocal basis.[61] The market access disciplines in goods similarly apply to trade in services.[62] The objective of services negotiations is thus to provide effective market access for services, where Members strive for a 'mutually advantageous' outcome, i.e. 'reciprocity,' achieving progressively higher levels of liberalization of trade in services through successive rounds of negotiations.[63]

Unlike the GATT, market access commitments under the GATS are negotiated through a request-and-offer mechanism, where access is ultimately granted only to services sectors or subsectors committed by members in their schedules, and those not on the list are not allowed access or is restricted.[64] This is the "positive list approach."[65] Prof. Lowenfeld commented that the market access mechanism in services is a kind of a reverse foreign investment code—it is more extensive than the GATT, but applicable only to the extent a member agrees to be bound,[66] and applies a positive rather than negative list. Market access in services has not yet reached the same level of ambition as goods, but is a sunshine industry for many developed countries. In fact, services trade has now become the engine of global economic growth and the growth of individual member-economies.[67]

Market access for foreign investment is the first step as a liberalizing tool. Foreign investments, however, go further than market access. Foreign investors require *market presence*—a firm foothold within states—as a

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[61] John McGinnis & Mark Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 544 (2000). ("As set out in the Preamble to the WTO Agreement, WTO Members pursue the objectives of higher standards of living, full employment, growth and sustainable economic development by '...entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.'") *See generally* VAN DEN BOSSCHE, *supra* note 3, at 34-35, 401-03.

[62] LOWENFELD, *supra* note 34, at 33.

[63] *See* VAN DEN BOSSCHE, *supra* note 3, at 481-84.

[64] At the initial stage of negotiations, Members first make requests for the liberalization of trade in specific services. The exchange of requests, as a process, is purely bilateral. It is simply a process of letters being addressed from the requesting participants to their negotiating partners. After Members participating in the negotiations have made requests, they submit offers. A Member submits an offer in response to all the requests that it has received, but does not necessarily have to address each element contained in those requests in its offer. Unlike a request, which is usually presented in the form of a letter, an offer is normally presented in the form of a draft schedule of commitments. While requests are addressed bilaterally to negotiating partners, offers are circulated multilaterally. Offers are to be open to consultations and negotiation by all negotiating partners; not only to those who have made requests to the Member concerned but also any other participant in the negotiations. In fact, offers are a signal of the real start of the advanced stage of bilateral negotiations, i.e. when negotiators come to Geneva to hold many bilateral talks with various different delegations. The submission of offers may also trigger the submission of further requests and then the process continues and becomes a succession of requests and offers. *See* VAN DEN BOSSCHE, *supra* note 3, at 481-83).

[65] LOWENFELD, *supra* note 34, at 126.

[66] *Id.*, at 126-27.

[67] Garry Hufbauer & Sherry Stephenson, *Services Trade: Past Liberalization and Future Challenges*, in THE FUTURE OF INTERNATIONAL ECONOMIC LAW 167 (William Davey and John Jackson, eds. 2008).

constituent element of real freedom to trade,[68] and *a fortiori*, to invest. Foreign investors are denied admission only to those areas that detailed in a "negative list," as opposed to a "positive list" for services. Once foreign capital obtains market presence within the boundaries of the national state upon establishment, it becomes exposed to internal domestic shocks: local instabilities, prejudices, and the vagaries of host state laws. Thus, capital exporting countries negotiate investment treaties and similar international agreements[69] with capital importing countries the investment rules to govern the investment through treaty, with a two-fold purpose: to obtain better market presence within the territory of capital importing states for investors and investment, or *pre-establishment*, and to obtain progressive development in the standards of investment protection, or *post-establishment*.[70]

The converse of removing barriers to market access—prohibition against increased or new trade and investment barriers—is also a key element the IEL system, and is perhaps the most derogating aspect of market access. Governmental restraints on the movement of goods should be kept to a minimum, and if changed, should be reduced, not increased.[71] It is of the highest importance for countries, traders and service suppliers to have predictable and growing access to markets of other countries for their goods and services. Hence when governments erect new restraints or barriers, or through its domestic measures violate any of the norms and principles, aggrieved countries can raise complaints using built-in dispute settlement mechanisms and, if such barriers are proven to be unjustified, can compel erring states to remove the restrictions or change its laws.

2. Non-Discrimination

The history of non-discrimination obligations concerning international economic matters goes back centuries, with various treaties called Friendship, Commerce, and Navigation treaties have contained a variety of non-discrimination clauses. Since after the Second World War, the principle norms have been those in the GATT 1947 and GATS in 1995.[72] In

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[68] DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 25-26 (2008).

[69] Unlike the WTO, there is no multilateral agreement on investment. It has been argued that the GATS Mode 3 or commercial presence actually involves investment in a service and is thus the closest the world could get to a truly multilateral investment agreement. ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 58 (Kluwer Law 2009).

[70] Also as a response to the uncertainties and inadequacies of the customary international law of state responsibility for injuries to aliens and their property. *See id.*, at 41.

[71] LOWENFELD, *supra* note 34, at 31.

[72] JOHN JACKSON, THE JURISPRUDENCE OF GATT & THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 57 (2000).

between, the so-called FCN treaties have evolved as BITs, which also contain non-discrimination provisions.

The essence of the non-discrimination obligations, as held by the WTO Appellate Body in the *EC – Bananas III* case,[73] is that like products should be treated equally, irrespective of their origin. The Appellate Body explains this further:

> As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member.

The next subsections will discuss the two basic non-discrimination norms applicable in both WTO and international trade law and international investment law, the different exceptions, and some recent developments.

a. Most Favored Nation (MFN)

MFN is actually an ancient concept, perhaps as old as commerce itself,[74] and when applied to IEL, it is simply this: what you give to one, you must give to another. States of old had used a conditional MFN clause, in which concessions are granted to other countries only if they grants reciprocal concessions.[75] Gradually states moved to an unconditional MFN, and today GATT rules require that MFN be extended unconditionally.[76] MFN has a basic two-fold purpose, simply put: prevent distortions in the market and prevent tensions with other states.[77]

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[73] *European Communities – Regime for the Importation, Sale and Distribution of Bananas* Panel Report, WT/DS27/R/[...], adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II.

[74] Of 12th century vintage, although it has been used in the 17th century, influenced by European traders and merchants. *See* JACKSON, *supra* note 8, at 158.

[75] JACKSON, *supra* note 72, at 58.

[76] *Id.*

[77] For the history and origins of MFN, *see* JACKSON, *supra* note 8.

The MFN treatment obligation embodied in Article I of the GATT and Article II of the GATS is the single most important rule in WTO law, without which the multilateral trading system could and would not exist.[78] Prof. Mavroidis calls MFN the "carrot" offered to outsiders;[79] the sales talk would go something like, "join the WTO, give us the best you can give, and you may avail of the best possible benefits obtainable from every other WTO member."

MFN does not distinguish between goods or between duties and charges of any kind, and apply to any measure by a WTO-member that confers an advantage to one or some, but every other member.[80] The object and purpose of GATT Article I, as explained by the WTO Appellate Body in *Canada – Autos*,[81] is "to prohibit discrimination among like products originating in or destined for different countries." GATS MFN follows GATT in its essence, but is slightly different in that a measure inconsistent with MFN may be maintained if it is listed in its MFN exemption schedule, subject to negotiation in subsequent liberalization rounds.[82] A senior economist at the WTO Secretariat describes the MFN requirement as the only core obligation with a status similar in both the GATT and the GATS.[83]

The MFN obligation is also a typical facet of investment treaties, and guarantees that the best conditions afforded by a country to investors from any other country must be extended to all investment treaty partners. Under such agreements, the coverage of the MFN principle extends beyond the treatment effectively granted to investors from third countries to capture as well the rights and obligations entered into by the country concerned

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[78] *See* VAN DEN BOSSCHE, *supra* note 3, at 321-23; MITSUO MATSUSHITA, THOMAS SCHOENBAUM & PETROS MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 202-05 (2nd ed. 2006), LOWENFELD, *supra* note 34, at 30-31.

[79] PETROS MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY 112 (2005).

[80] *See Id.*, at 113-15. ("The standard of review for MFN violations is quite favorable to the complainant: there is no need to demonstrate intent to discriminate, no need to demonstrate resulting trade effects, and applies to both actions and omissions that confer an advantage.").

[81] *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Appellate Body, May 31, 2000, WT/DS139/AB/R.

[82] LOWENFELD, *supra* note 34, at 130.

[83] *See* Rudolf Adlung, *Services Negotiations In The Doha Round: Lost In Flexibility?*, 9 J. INT'L ECON. L. 865, 868 (2006) (Adlung explains the difference in MFN in GATS and GATT: "However, in addition to traditional' exceptions, such as for economic integration projects and measures deemed necessary for health, security, and similar reasons, the GATS contains a sweeping exemption for all MFN-inconsistent measures that Members listed at the end of the Uruguay Round or, if later, the date of accession. Thus, derogations from MFN are unilateral, but only with respect to existing measures, not future ones. Further, all exemptions from MFN are to have a termination date, and in principle should not exceed ten years.") *See also* LOWENFELD, *supra* note 34, at 130.

under any other investment treaty.[84] As opposed to national treatment, which ensures that foreign investors are not treated less favorably than domestic investors in the host country, MFN treatment offers protection against discrimination with respect to investments from different foreign countries.[85]

MFN in the *pre-establishment phase*, also called admission or liberalization of investments, guarantees non-discrimination in the admission of investors and their investments as to other third-party foreign investors and their investments.[86] Once the investment is admitted and the MFN standard is hurdled, the NT obligations kick in, since the standard of treatment is now comparable to nationals than other foreign investments.

There are two critical related concepts that directly affect developing countries, Philippines in particular. First, in international trade, MFN is becoming more of the exception than the rule, in two ways of opposing implications for the Philippines. First, it is of great benefit that special and differential treatment, as an MFN exception for developing countries, continues to be discussed in the continuing Doha negotiations. Second, it is of great harm to the Philippines that preferential trade agreements, now evolving into combined investment treaty and trade agreement, have proliferated excessively, eviscerating the value of reciprocity and equality in trade liberalization. These issues will be discussed more thoroughly in the next few sections.

Second, an importance difference in the treatment of MFN for investment liberalization under investment treaty rules and under the WTO should be borne in mind. MFN is a core treaty norm in multilateral trade for purposes of ensuring reciprocity in market access commitments and to protect against tariff concession erosion, with immediate and unconditional application on all goods and upon all members across-the-board. The absence of a multilateral agreement on investment means MFN is stipulated as a treaty obligation under the BITs or PTIAs which is the subject of party negotiation on specific areas or sectors.[87] Applied to the pre-establishment phase, it means State A must extend to State C, which invokes the MFN clause in its BIT with State A, the favorable admission of the investments of

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[84] Rudolf Adlung & Martín Molinuevo, *Bilateralism In Services Trade: Is There Fire Behind The (BIT-)Smoke?*, 11 J. INT'L ECON. L. 365, 376 (2008).

[85] United Nations Conference on Trade and Development, Identifying Core Elements in Investment Agreements in the APEC Region 34 (UNCTAD Series on International Investment Policies for Development 2008).

[86] *Id.*, at 17-19.

[87] *See* DOLZER & SCHREURER, *supra* note 14, at 186-88.

State B, whether or not it is covered by an MFN clause in State B's BIT with State A. Thus, before a capital importing country such as the Philippines decides to enter into an investment treaty with a capital exporting state, it should not only be cognizant of its existing MFN obligations in its previous agreements, but also be keenly aware of the MFN commitments in the past BITs of its future treaty partner.[88]

There is an unsettled scholarly colloquy on whether the sheer number of BITs and heavy reliance of contracting parties on the BITs of their treaty partners is indicative of a customary international norm binding upon states even those who do not sign up for BITs. Some have argued that MFN has been used in bilateral FCN treaties between the 17th and 18th centuries in Europe as a short-hand means of "incorporating by reference" benefits granted in other agreements,[89] and to extend the same treatment to the other party. M. Sornarajah is of the opinion that it is doubtful whether there was much customary international law on the point. The existence of such customary international law is difficult to establish, as a large part of the world community of states objected to the creation of such customary law, particularly during the early decades of bilateral investment treaty practice.[90]

b. National Treatment (NT)

Lowenfeld quotes early 20th century U.S. statesman Elihu Root as laying down the principle of national treatment as early as 1910: "There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries so as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard."[91]

The modern NT standard in trade and investment law is an extremely powerful policy and legal tool, and a considerable portion of disputes before the WTO Panels and Appellate body[92] as well as institutional investment tribunals such as ICSID relate to violations of NT. NT is

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[88] *See id.*; LOWENFELD, *supra* note 34, at 572-73.

[89] JACKSON, *supra* note 72, at 57.

[90] SORNARAJAH, *supra* note 27, at 204.

[91] LOWENFELD, *supra* note 34, at 470, *quoting* Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L LAW 517, 521-22 (1910).

[92] National Board of Trade, CONSEQUENCES OF THE WTO AGREEMENTS FOR DEVELOPING COUNTRIES 270 (Sweden 2004).

basically a promise made by each WTO member to every other member and, opines Prof. Mavroidis, a "*sanction*,"[93] that is, domestic policies on trade will continue to be "unilaterally defined."[94] Pursuant to the national treatment obligation, a WTO Member or state-party to a PTA is not allowed to discriminate against foreign products, services and service suppliers.[95] A simple distinction is thus: MFN on trade goods and services applies beyond the borders, while NT applies within the borders. Once a foreign good or service passes the border, treatment should be no different than domestic goods or services. Simply stated, it prohibits discrimination against imports.

Specifically, the NT obligation as enunciated under Article III of the GATT and Article XVII of the GATS,[96] requires a WTO member-economy to treat foreign products, services and service suppliers not less favorably than it treats 'like' domestic products, services and service suppliers. The broad purpose of NT applied to trade on goods and services is to avoid protectionism.[97] It aims to prevent domestic tax and regulatory policies from being used as protectionist measures that defeat the purpose of tariff reduction commitments.[98] Once imported products have "paid their tariff ticket" to enter the market, they should be subjected to a regulatory regime identical to that applied to domestic products.[99] It also establishes the emphasis on tariffs as the sole "accepted" instrument of trade protection.[100]

NT is a core obligation in foreign investment law and a powerful obligation of non-discrimination. According foreign investors and their investments no less favorable treatment than nationals is a key issue in investment rulemaking and, for developing countries, a continuing struggle for control and policy space and the challenge of treating foreign investors and their investments as if they are domestic entities.[101]

There is however, a "trend of divergence" in the NT concept in trade law and investment law as interpreted by the tribunals.[102] Pre-

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[93] MAVROIDIS, *supra* note 79, at 129.

[94] *Id.*

[95] *See generally* VAN DEN BOSSCHE, *supra* note 3, at 344-45.

[96] The GATS however does not have a provision guaranteeing national treatment comparable to the GATT; instead GATS requires sectors or measures listed in the country's schedules, that such measures be applied in a reasonable, objective, and impartial" manner. *See* LOWENFELD, *supra* note 34, at 130.

[97] *Japan – Taxes on Alcoholic Beverages*, Panel Report, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I at 110.

[98] JACKSON, *supra* note 8, at 213.

[99] MAVROIDIS, *supra* note 79, at 127-28.

[100] *See* LOWENFELD, *supra* note 34, at 32.

[101] *See* UNCTAD, *supra* note 85, at 21.

[102] *See* DOLZER & SCHREURER, *supra* note 14, at 178-86.

establishment NT guarantees that in considering the admission of the investment, foreign investors are treated just as domestic investors.[103] NT liberalization language in today's BITs is mostly based on NAFTA Chapter 11, specifically its Article 1102, which requires foreign and domestic investors to be in "like circumstances," or "same" or "comparable" situations in order for the national treatment obligation to apply.[104]

The same guarantees of NT non-discrimination apply to post-establishment in accordance with that country's domestic laws and regulations, or once they have crossed the border.[105] Post-establishment is simply the prescribed treatment of a covered investor or investment *after* it has been admitted and established in another Party, to ensure that they do not suffer discriminatory treatment. Whereas pre-establishment primarily concerns liberalization, post-establishment refers to the protection accorded to investments upon their admission, more commonly based on national treatment.[106]

M. Sornarajah believes that these may have significant policy ramifications for the host state.[107] For one, NT covers both *de facto* and *de jure* discrimination.[108] One major policy ramification for host governments is that pre- and post-establishment national treatment in an investment treaty places the foreign investor on footing not only equal to the host state's citizen, but actually *superior*, because the rights of equal treatment are protected, not by local courts as in the case of the citizen, but by international *ad hoc* or institutional tribunals, and not in accordance with local laws but in accordance with external standards of treaty law or customary international law.[109]

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[103] UNCTAD, *supra* note 85, at 19.

[104] Adlung & Molinuevo, *supra* note 84, at 384.

[105] UNCTAD, *supra* note 85, at 33-34. *See however* DOLZER & SHREURER, *supra* note 14, at 188-91, arguing that although the weight of authority favors the view that MFN grants claimaints substantive protections afforded by BITS from a third party agreement, there is merit in considering the content of the protections first and the degree to which the claimant's treaty provisions are compatible or comparable therewith.

[106] Adlung & Molinuevo, *supra* note 84, at 381. The object of national treatment under the Calvo doctrine was entirely different. It evolved as a counter to the external international minimum standard advocated by the United States. The doctrine confined the foreign investor to the standards of the local entrepreneurs. There was an assumption that such standards were lower than those which prevailed in his home state and those which both the foreign investor and the home state would have desired. It is not to be confused with national treatment that is advocated in the more recent investment treaties. *See* SORNARAJAH, *supra* note 27.

[107] SORNARAJAH, *supra* note 27, at 324.

[108] Adlung & Molinuevo, *supra* note 84, at 381.

[109] SORNARAJAH, *supra* note 27, at 323-24.

NT has implications for local government units as well. An investor holding an investment within the territory of the host state would almost certainly have to deal with the local authority having regulatory jurisdiction over that area. A foreign investor would almost always be the dominant producer in the area of the sector it had entered in a developing country, and where regulatory control has to be exercised by the LGU, it will almost always be directed at the foreign operator and not at a small-scale national operator.[110] Any divergence in treatment by the LGU below the NT standard will also trigger the obligations under the investment treaty. If ethnic groups within the state are to be given preferences because of positive discrimination programmes, this too may violate national treatment provisions.[111]

3. Exceptions to Non-Discrimination

Special and Differential Treatment

The Doha Development Agenda envisages at least two intertwined but distinct ways of protecting the interests of developing countries: special and differential treatment (SDT) and less-than-full reciprocity.[112] SDT is a response to what is claimed to be an unintended effect of the tariff liberalization objectives of the WTO. Theoretically, developing or least developed countries can simultaneously enjoy, through MFN, the reductions in tariffs that have been agreed between other countries, thus foregoing their limited negotiating capacity and resources is maximized.[113] However, the emerging tariff structure after successive negotiating rounds culminating in the establishment of the WTO is considered as less advantageous to developing countries because their exports are often focused in sectors where market access is particularly restricted, such as agricultural markets in developed countries.[114]

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[110] *Id.*, at 324.

[111] *Id.*, at 320.

[112] Less-than-full reciprocity lays down in the context of Framework Package and multilateral trade negotiations a very specific principle reduction efforts by developing countries must be within their level of development and industrialization.

[113] National Board of Trade, *supra* note 92, at 269-70.

[114] *Id.*, at 44. The WTO Agreement on Agriculture is widely seen as one of the most iniquitous agreements in the WTO, in effect providing special and differential treatment to *developed* rather than developing countries. *See* FATOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS 25-31 (Zed Books 2004); Walden Bello, Multilateral Punishment: The Philippines In The WTO: 1995-2003 (Stop the New Round Coalition! Focus on the Global South, Jun. 20, 2003).

Consequently developing countries sought differential and more favorable treatment in the GATT/WTO to balance the trade liberalization objectives of the WTO and the developmental dimension. Initially, "special and differential treatment" or SDT was made an element of the trading system in 1979 through the "Enabling Clause."[115] By clear mandate of the Ministers in Doha, SDT now calls for preferential market access for developing countries, limits reciprocity in negotiating rounds to levels "consistent with development needs" and provides developing countries with greater freedom to use trade policies than would otherwise be permitted by GATT rules.[116] Furthermore, SDT goes beyond market access and limited reciprocity—it also spans the cost of implementation of agreements and the approach towards the possible negotiation of disciplines on new issues.[117]

Reservations and non-conforming measures

Capital-importing countries resort to reservations in international investment agreements as an indispensable remedy for balancing flexibility of national authorities with international obligations in the field of investment.[118] The capacity of a state to make reservations to an international investment treaty illustrates the principle of sovereignty of states; a state may always refuse to consent to particular provisions so that they do not become binding upon it.[119] Each state-party to an investment treaty typically is entitled to list specific reservations or non-conforming measures to a BIT, accomplished by means of a ***negative list***, where certain investment treaty disciplines will not apply.[120]

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[115] Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries. *See* Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT'L ECON. L. 405, 405-06 (2005)

[116] *Id.*

[117] *Id.*, at 406.

[118] *See* United Nations Conference on Trade and Development, Preserving Flexibility in IIAs: The Use of Reservations 11-12, UNCTAD Series on International Investment Policies for Development (2007).

[119] MALCOLM SHAW, INTERNATIONAL LAW 915 (6th ed. 2008). The reservation cannot be one that is excluded by the provisions of subparagraphs (a), (b), or (c) of Article 19 of the Vienna Convention on the Law of Treaties. First, the reservation cannot be one that is prohibited by the treaty itself. Second, if the treaty specifies that only a certain type of reservation is permitted, then the reservation cannot be of a different type. Third, the reservation cannot be incompatible with the treaty's object and purpose. Aside from these three limitations, the new state can make its own reservations. See Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July – 10 August 2001) available at http://untreaty.un.org/ilc/reports/2001/english/chp6.pdf. *See also* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (Cambridge University Press 2000).

[120] SCHNEIDERMAN, *supra* note 68, at 35.

With a few exceptions,[121] admission and pre-establishment provisions in existing investment treaties have largely followed the *negative list* approach,[122] i.e. those sectors or areas of investment that are specifically enumerated have equity restrictions, local equity requirements, and other limitations to foreign entry, thus not subject to NT. The use of a negative list of sectors is a common practice.[123] States enacting investment codes such as the Philippines normally include as an integral part of its law an annex with such negative lists, and it is sensible for government negotiators to include that list of sectors in the investment treaty as industries that are not subject to national treatment.[124]

Reservations in post-establishment are called non-conforming measures, which are allowed to host governments in order to counterbalance the reduction the policy flexibility available to host governments.[125] Thus, capital-importing states require that investment agreements contain a separate provision that sets out post-establishment national treatment for "covered investments" with a negative list of exceptions,[126] annexed to the treaty as a statement of non-conforming measures.[127] These non-conforming measures enumerate, generally in painstaking detail, each of the *existing laws and regulations* which are inconsistent with one or several of the obligations in respect of which the contracting parties may adopt reservations.[128] The effect of which is to allow the contracting parties to maintain the level of non-conformity existing between the domestic legislation of the contracting parties and the obligations of the investment agreement.[129] Under a negative list approach,

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[121] The Australia–Thailand BIT (2005) and New Zealand–Thailand BIT (2005) accord pre-establishment NT to a range of investment activity or sector in a positive list. UNCTAD, *supra* note 85, at 40.

[122] The positive list, by contrast, is more often utilized in market access provisions for trade in services, which in fact overlap with admission and establishment investment provisions. See United Nations Conference on Trade and Development, Investment Provisions in Economic Integration Agreement (2006).

[123] Thus, in NAFTA, which requires pre-entry as well as post-entry or post-establishment national treatment, Mexico incorporated all the sectors that it excludes foreign investment from under its Foreign Investment Law as sectors that are exempted from the obligation of national treatment. For example, the Canada–Thailand investment treaty contains in its appendix the Thai investment laws, which list the sectors into which foreign investment is not permitted and the sectors into which foreign investment is permitted in partnership with its nationals. *See* SORNARAJAH, *supra* note 27, at 235; UNCTAD, *supra* note 122.

[124] SORNARAJAH, *supra* note 27, at 235.

[125] UNCTAD, *supra* note 85, at 38.

[126] *Id.*, at 40.

[127] United Nations Conference on Trade and Development, BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING 24 (2007).

[128] *See Id.*, at 24, 40 ("Indeed, the negative list could be so extensive as to effectively eliminate any right of establishment, and, as a practical matter, the compilation of a lengthy negative list could prompt objections from another party to the treaty, which could delay or even prevent the eventual conclusion of the agreement.").

[129] *Id.*, at 24.

often no new measures can be listed after the agreement comes into force, implying a "standstill" commitment.[130]

Because of the prescriptive and immutable nature of the reservations, state legislatures and state entities with quasi-legislative functions are precluded from enacting laws and regulations that further regulate foreign investments that are not found on the list, completely eviscerating the sovereign law-making function in order to preserve treaty protections guaranteed to the investment partner-country. Thus, to counteract the severity of the nature of the obligations, a second kind of annex is envisaged, often known as annex of "*future measures*" or "precautionary reservations,"[131] which comprises a list of economic activities or sectors where the contracting parties may maintain *or adopt new measures* inconsistent with one or several of the obligations of the BIT. Thus, in the areas or sectors included in this annex, parties are not only allowed to maintain any existing non-conforming laws or regulations, but also reserve their right to adopt new non-conforming measures, which may not have existed at the time of negotiations.

Preferential Trade Agreements (PTAs),[132] Economic Integration Agreements (EIAs)[133] and Preferential Trade and Investment Agreements (PTIAs)

The phenomenon that is the proliferation of PTAs is one of the most discussed topics in IEL. This section will give a few basic bullet points on the legal basis (or lack thereof) of PTAs and touch upon one trend in particular that could prove to be very problematic for developing countries such as the Philippines.

PTAs, EIAs,[134] and PTIAs represent an exception to the principle of Most Favored Nation (MFN). GATT Article XXIV[135] characterizes the free trade area or more precisely the Preferential Trade Agreement (PTA) as

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[130] SCHNEIDERMAN, *supra* note 68, at 35.

[131] UNCTAD, *supra* note 127, at 24.

[132] For purposes of this paper, FTAs, regional trade agreements (RTAs), customs unions, economic partnership agreements (EPAs), will be referred to collectively as Preferential Trade Agreements (PTAs).

[133] The term "economic integration agreement" has been used in, among other instruments, the WTO Agreement on Trade in Services (GATS) (Article V) in relation to agreements that cover trade in services, and also in the Energy Charter Treaty in relation to agreements that cover *inter alia* trade and investment. The definition of "economic integration agreement" in this study is broader than that used in the GATS, as it encompasses all sectors. It therefore includes also "preferential trade agreements" dealing with trade in goods, referred to in article XXIV of GATT.

[134] Throughout this paper, EIA and PTA will be referred to as PTA, but shall not include PTIAs.

[135] GATT, 1994 Art. XXIV, §§ 8(a), 8(b), & 5(c). Preferences are also granted by way of other WTO provisions, such as the Enabling Clause of the WTO Agreement.

the abolition of internal trade barriers with each constituent party maintaining its respective external tariff regime, while GATS Article V sanctions EIAs as exception to MFN in services provided there is substantial sectoral coverage.[136] GATT Article XXIV and GATS Article V recognize two basic principles of preferential trading arrangements: the development of closer integration of economies through voluntary agreements; and, the facilitation of trade between the constituent territories and not to raise barriers to the trade of other Members.[137] These twin anti-MFN Article sets out a number of conditions and requirements, on the basis of which customs unions and FTAs are reviewed to determine their compatibility with the WTO Agreements.[138]

In order for a non-multilateral trade arrangement between WTO members to be "allowed,"[139] it essentially must conform to three basic criteria under WTO rules. First, substantial trade coverage. Under Article XXIV:8 of GATT, a PTA or customs union must be inclusive enough to cover substantially all the trade in goods originating within members of the PTA. A PTA on services must similarly provide substantial sectoral coverage under Article V:1(a) of the GATS. Thus, a supermarket or *à la carte* type of

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[136] Article XXIV also distinguishes between three types of preferential agreements in trade in goods: a free trade area, a customs union, and an interim agreement. A customs union is characterized by the internal abolition of trade barriers among the constituent parties and the creation of one common external tariff regime with respect to third parties. An interim agreement is a transitional arrangement, which provides for the formation of a customs union or a free-trade area within a reasonable length of time. *See* Anna Turinov, *Free Trade Agreements in the World Trade Organization: The Experience of East Asia and the Japan-Mexico Economic Partnership Agreement*, 25 UCLA PAC. BASIN L.J. 336, 340-41.

[137] Two major negatives of PTAs are well-documented: the "stumbling block" issue above and proliferation. PTAs become "stumbling blocks" to the multilateral trading system when they do not comply with the requirements of GATT Article XXIV and GATS Article V. Proliferation is a reality. Some 200 PTAs currently in force have been notified to the WTO and the number is rising. It has been estimated that close to 400 PTAs are scheduled to be implemented by 2010. Perhaps the best known complication that demonizes proliferation of PTAs is its trade diversionary effects, the concept of which was introduced to the world by the economist Jacob Viner in 1950. The theory is that overall global welfare is diminished significantly when countries grant preferences to some but not to others because countries would tend to gravitate towards those preferential regimes and reduce their trade with countries not so covered by such preferences. *See* Viet Do & William Watson, *Economic Analysis of Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 11 (Lorand Bartels and Federico Ortino, eds. 2006), *citing* JACOB VINER, THE CUSTOMS UNION ISSUE (1950).

[138] *See* World Trade Organization Legal Affairs Bureau, WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE 405, 1104 (1st ed. 2003), citing WTO *Canada – Certain Measures Affecting the Automotive Industry* Panel Report, WT/DS139/R, WT/DS142/R, adopted Jun. 19, 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R (holding that the "purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements.").

[139] Politically, WTO members consistently fail to check PTAs; in dispute settlement, WTO members shy away from challenging PTAs and where Article XXIV is raised as a defense, panels and the Appellate Body do everything to avoid it. No PTA has been disallowed under WTO rules, for political reasons: since everybody is doing PTAs, a country that questions another country's PTA invites questions as to his own PTA with other countries.

liberalization is inconsistent with the WTO.[140] Second, all PTAs must remove all tariffs and quantitative restrictions within a reasonable length of time. Third, any given PTA must not result in more severe trade barriers for WTO members that are not members of that PTA.[141] To this end, PTAs aim to become "building blocks" rather than "stumbling blocks" to free trade.[142]

Developed countries have created the "Frankenstein Monster" of IEL that completely suits their economic interests and that of the corporations that support it—the Preferential Trade and Investment Agreement (PTIA), a hybrid form of PTAs and BITs.[143] A fairly new but significant development in international investment and services rule-making in more recent years, PTIAs combine the disciplinary applicability of the "best of both worlds": the greater scope for liberalization for investment can be applied to services, while the substantive investment protections may be extend to services. Apart from obliging parties to reduce tariffs and liberalize services as an exception to relevant WTO rules, PTIAs may establish binding obligations for the contracting parties concerning the admission and protection of foreign investment, with comparable scope of the protection commitments to that found in BITs.[144]

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[140] It is still the subject of debate as to whether the substantiality of the trade coverage should be quantitative (volume of trade) or qualitative (actual goods i.e. each and every tariff line corresponding to a particular good).

[141] Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements*, *op cit. supra* note 137, at 47-49.

[142] There are also reportorial requirements, failing which, the PTAs shall not be "valid." Article XXIV.7 imposes on parties an obligation of full disclosure to the WTO members on the content of a future FTA. Once the parties notify the WTO, the PTA is reviewed by the WTO Committee on Regional Trade Agreements (CRTA). The CRTA may make recommendations to the parties seeking to form a PTA. The PTA cannot be put into force if the parties are not prepared to modify it according to these recommendations. *See* MATSUSHITA, ET AL, *supra* note 78, 560. Joost Pauwelyn, *Legal Avenues to "Multilateralizing Regionalism": Beyond Article XXIV*, Paper presented at the Conference on Multilateralising Regionalism Sponsored and organized by WTO – HEI, Co-organized by the Centre for Economic Policy Research (CEPR), Sep. 10-12, 2007, Geneva, Switzerland.

[143] Justice Feliciano considers these types of economic agreements as "Mega-FTAs" and express extreme reservations and the utmost caution for developing countries such as the Philippines in entering into them. Florentino Feliciano, Memorandum for Chairperson of Senate Committee on Foreign Relations Sen. Miriam Defensor Santiago regarding the Constitutional Law Aspects of the Japan-Philippines Economic Partnership Agreement (JPEPA), Oct. 5, 2007.

[144] Among the recent examples are the Economic Partnership Agreement (EPA) concluded between Japan and Thailand (2007), the FTA between the United States and the Republic of Korea (2007), and the JPEPA (2007). United Nations Conference on Trade and Development, International Investment Rule-Making: Stocktaking, Challenges and the Way Forward, UNCTAD Series on International Investment Policies for Development 26-27 (2009).

Many complications arise out of the proliferation[145] of PTIAs. The intersection or overlap of liberalization disciplines for services and investment is extremely complex and has developing country negotiators tied up in knots to harmonize them. The 3rd Mode of supplying a service—commercial presence[146]—is actually a foreign investment in a service within the host state.[147] GATS rules apply to government measures "affecting trade in services," including in the form of commercial presence, but only to the extent that the locally established juridical person is owned or controlled by foreign companies or nationals. All other service suppliers fall outside the scope of GATS.[148] In other words, service companies, in which foreign participation does not reach these levels, are not captured by GATS mode 3.[149]

GATS also does not contain investor protection provisions as not concerned with investors *per se* but does contain key obligations of MFN and NT. To the extent however that both GATS and an Investment Chapter (or a Services Chapter) of a PTA or PTIA regulate Mode 3 services, there is overlap and the potential for inconsistency.[150] As GATS is not primarily focused on investment, there are no equivalent provisions in the GATS (except for transfers); Like in GATS, NT and MFN also apply post-establishment.[151] Investment treaties, it is recalled, apply to all measures affecting the investments covered. In the great majority of treaties, "investment" is defined in broad terms, so as to encompass every kind of assets owned by foreigners, including minority participation in domestic companies and portfolio investments. Investment treaties tend to contain fewer sector- and policy-related reservations than liberalization treaties.[152] Therefore, in PTIAs with Services and Investment chapters, such as NAFTA, the liberalization and protection disciplines are combined into one

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[145] By end 2007, there are 254 PTIAs in force, involving 63 countries, nearly doubling over the past five years, with at least 75 agreements involving 110 countries under negotiation at the end of 2007. While the total number of PTIAs is still small compared with the number of BITs (less than 10 per cent), this trend suggests an even more pronounced increase in such treaties in the future. *See id.*, at 26-27.

[146] In turn, the term commercial presence refers to "any type of business or professional establishment, including through the constitution, acquisition or maintenance of a juridical person, or the creation or maintenance of a branch or representative office within the territory of a Member for the purpose of supplying a service," GATS Article XXVIII(d).

[147] GATS Article I:2(c). Trade under mode 3 is defined as the supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member".

[148] GATS Article XXVIII(m)(ii). *See* Rudolf Adlung & Martín Molinuevo, *Bilateralism In Services Trade: Is There Fire Behind The (BIT-) Smoke?*, 11 J. INT'L ECON. L. 365, 374-75 (2008).

[149] Adlung & Molinuevo, *supra* note 84, at 370-71.

[150] *Id.*, at 371.

[151] It appears, however, that some recent PTIAs are moving closer to the positive list approach also with respect to their investment liberalization commitments. *See* UNCTAD, *supra* note 122, at 79.

[152] Adlung & Molinuevo, *supra* note 84, at 374-75.

agreement, clearly reflecting and furthering the well-entrenched view of developed countries that trade and investment go arm-in-arm.

The MFN was intended as a guarantee against concession erosion, and PTIAs actually contribute to the further erosion of multilateral tariff concessions, that is, a country will lose the incentive to negotiate tariff reductions multilaterally with another country, and the current value of its existing concessions will diminish, when it knows it can offer and will get a better deal "outside."[153] This is one of the reasons why there seems to be no sense of extreme urgency and importance exhibited by developed WTO-members in concluding the Doha Round.[154]

Nonetheless, the political and legal reality is that PTIAs, the "bastard children of discriminatory trade" are here to stay, whether or not they comply with WTO rules.[155] Countries seem to have recognized the economic and political mileage accruing from membership in PTIAs, and governments continue to make PTIAs an important commercial policy strategy. However, developed countries continue to expand the scope of PTIAs to not only cover issues such as intellectual property, competition policy, and the environment, but also to non-WTO issues as well.[156]

For many developing states such as the Philippines, the WTO remains the fundamental option in the formulation of international trade policy. Just like other developing countries, the Philippines does not possess the resources and political wherewithal in negotiating bilaterally with developed countries, let alone mega- or plurilateral FTAs such as PTIAs. Furthermore, countries with similar and mutual trading interests can band together to form coalitions and blocs that are extremely effective in countering the negotiating might of the developed countries and levels the negotiating asymmetry attendant in one-to-one negotiation.

4. Dispute Settlement

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[153] *See* MAVROIDIS, *supra* note 79, at 113-14.

[154] The Doha Round of trade negotiations has been dubbed the "development round" because of its focus on the position of developing countries in the World Trade Organization (WTO). The Round has yet to come to completion, reflecting persisting uncertainty over developing countries' precise place in the WTO framework. *See* JAWARA & KWA, *supra* note 114; Suyash Paliwal, *"Development Needs" In The WTO Legal Order, available at*: http://ssrn.com/abstract=1566249.

[155] Pauwelyn, *supra* note 142.

[156] *See* REGIONAL RULES IN THE GLOBAL TRADING SYSTEM (Antoni Estevadeordal, Kati Suominen and Robert the, eds. 2009); *See* Bartels & Ortino, *supra* note 137.

It is impossible to simply encapsulate any discussion of the economic dispute settlement systems, and to do so would understate the importance of this critical pillar. It is also equally insufficient to divorce discussion of dispute settlement with any of the other major IEL obligations. This is because, in disputes of an international economic character, involving principles and obligations under international trade and investment law, the various modes and mechanisms of settling disputes may be the closest international law could ever come to having an effective and credible international judicial system,[157] in an area of general international law where its defining characteristic continues to be the lack of an enforcement mechanism. One of the reasons for this could be one that countries will almost certainly deny—that in the area of economic dispute settlement, there is no greater evidence of devolution of economic sovereignty and of international rule-making coming full circle. Thus, any analysis of the various dispute settlement mechanism built-in into the branches of IEL must be undertaken through its sovereignty-delimiting characteristics and developing countries' fitness and preparedness to defend its interests.

WTO DSU

The WTO dispute settlement system is based on that of the GATT, evolving during the late 1940s to the early 1990s from a system that was primarily a power-based system of dispute settlement through diplomatic negotiations, into a rules-based system of dispute settlement through adjudication.[158] Merrills notes that in the WTO dispute settlement mechanism's first six years of operation, member-economies have made more than 200 requests for consultations, leading to fifty-three panel reports and almost as many reports from the Appellate Body.[159] It has since been recognized as one of the most effective international dispute settlement and "enforcement" mechanisms.

The WTO's dispute resolution mechanism was to many the "jewel in the crown of the Uruguay Round,"[160] the apex of the judicialization of the GATT dispute settlement system.[161] The WTO Dispute Settlement Body (hereinafter DSB), especially the Appellate Body, has many characteristics of

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[157] Karen Alter, *Resolving or Exacerbating disputes? The WTO's New Dispute Resolution System*, 79 INT'L AFFAIRS 783 (2003).

[158] *See generally* VAN DEN BOSSCHE, *supra* note 3, at 169.

[159] J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 233 (4th ed. 2005).

[160] Alter, *supra* note 157, at 784.

[161] Alan Yanovich & Werner Zdouc, *Procedural and Evidentiary Issues*, INTERNATIONAL TRADE LAW HANDBOOK 346 (2000).

a domestic court, with a caseload typical of many appellate courts, and matched internationally only by the European Court of Justice and the European Court of Human Rights.[162] The Agreement establishing the WTO, its compulsory dispute settlement system, and the progressive development of WTO law by the already more than 240 panel, Appellate Body and arbitration reports adopted by the WTO Dispute Settlement Body (DSB) have legally and institutionally limited the "member-driven governance" that was so characteristic for producer-driven power politics under GATT 1947.[163] It aims to "provid[e] security and predictability to the multilateral trading system" by "preserv[ing] the rights and obligations of Members under the covered agreements" and by "clarify[ing] the existing provision in those agreements in accordance with customary rules of interpretation of public international law."[164] The rules are comprehensive and provide a procedure that ensures that disputes are settled amicably through consultations, then bilaterally, or if necessary, adjudicated by third parties in proceedings that are credible and generally lead to enforceable results.[165]

Typically, a dispute arises when one WTO Member adopts a trade policy measure that one or more other Members consider to be inconsistent with the obligations set out in the WTO Agreement, in what is called a "violation complaint,"[166] or even if it does not conflict with GATT, provided that it results in "nullification or impairment of a benefit"—a "non-violation complaint."[167] In the case of a "non-violation" complaint or another type of complaint, the rare "situation complaint,"[168] the complainant must demonstrate that there is nullification or impairment of a benefit or that the achievement of an objective is impeded. Given the admissibility of "non-violation" and "situation complaints", the scope of the WTO dispute settlement system is broader than that of other international dispute

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[162] Cameron & Gray, *supra* note 59, at 251.

[163] Ernst-Ulrich Petersmann, *De-Fragmentation of International Economic Law through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement*, 6 LOY. U. CHI. INT'L L. REV. 209, 227 (2008). *See also* MATSUSHITA, ET AL., *supra* note 78, at 104-08.

[164] Article 3.2, Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU).

[165] William Davey, *Dispute Settlement in the WTO and RTAs: A Comment, op. cit. in* Bartels & Ortino, *supra* note 137, at 349.

[166] Article XXIII:1(a), GATT 1994. This complaint requires "nullification or impairment of a benefit" as a result of "the failure of another [Member] to carry out its obligations" under GATT 1994. The panel decides whether there has been a violation of the invoked provision(s) of one or more covered WTO agreement(s). *See* World Trade Organization Secretariat, HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 31, 57 (2004).

[167] Article XXIII:1(b), GATT 1994.

[168] Article 26.2, DSU. *See* VAN DEN BOSSCHE, *supra* note 3, at 183-85 (Remarking that to date, there have, in fact, been few non-violation complaints, and no situation complaints.).

settlement systems which are confined to adjudicating only violations of agreements.[169]

Simultaneously, the WTO dispute settlement system is narrower than those other systems, in the sense that a violation must also result in nullification or impairment (or possibly the impeded attainment of an objective).[170] This particularity of the system for settlement of international trade disputes reflects the intention to maintain the negotiated balance of concessions and benefits between the WTO Members. It was GATT practice and it is now WTO law that a violation of a WTO provision triggers a rebuttable presumption of nullification or impairment of trade benefits.[171] In no case has the respondent been successful in rebutting the presumption of nullification or impairment, and Prof. Van den Bossche believes it is doubtful whether this presumption is even rebuttable.[172]

In such a case, any Member that feels aggrieved is entitled to invoke the procedures and provisions of the dispute settlement system in order to challenge that measure. If the parties to the dispute do not manage to reach a mutually agreed solution, the complainant is guaranteed a rules-based procedure in which the merits of its claims will be examined by a panel to be established by their peers and, if merited, the Appellate Body.[173] The requirement of prior exhaustion of local remedies is not readily applicable to trade disputes. No party under the GATT 1947, nor any WTO member, has ever raised the argument in a trade dispute.[174]

If the complainant prevails, the desired outcome is to secure the withdrawal of the measure found to be inconsistent with the WTO Agreement.[175] Compensation and countermeasures (the suspension of obligations) are available only as secondary and temporary responses to a

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[169] Prof. Peter van den Bossche concurs with Justice Feliciano's observation that the difference between the WTO system and other international dispute settlement systems on this point may, therefore, be "of little practical significance". *See* VAN DEN BOSSCHE, *supra* note 3, at 183-84; Florentino Feliciano & Peter Van den Bossche, *The Dispute Settlement System of the World Trade Organization: Institutions, Process and Practice*, in N. Blokker & H. Schermers (eds.), PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 308 (Kluwer Law International 2001).

[170] World Trade Organization Secretariat, *supra* note 166, at 30-31.

[171] Article 3.8, DSU.

[172] VAN DEN BOSSCHE, *supra* note 3, at 193.

[173] World Trade Organization Secretariat, *supra* note 166, at 2. The adoption of authoritative interpretations of WTO provisions is reserved exclusively to the Members acting through the Ministerial Conference (MC) or the General Council (GC) under Article IX:2 of the WTO Agreement. *See* Yanovich & Zdouc, *supra* note 161, at 346.

[174] Cameron & Gray, *supra* note 59, at 295.

[175] Article 19.1, first sentence, DSU. *See* DAVID PALMETER & PETROS MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION (2004).

contravention of the WTO Agreement.[176] Moreover, WTO decisions on trade disputes—called "Panel Reports" or "Appellate Body reports"—must be adopted by vote by WTO members for its "finality". Under the Dispute Settlement Understanding, decisions by member-economies on reports must be by "reverse consensus:" any member, including the prevailing party, may block consensus on a decision by the member states collectively to *not* adopt a panel or Appellate Body decision. Therefore, for an adverse decision to be "overturned," ALL members of the WTO must vote NOT to adopt the panel or AB report. It has never happened, because it is close to impossible.

Investor-State dispute settlement

"ISDS" to practitioners and negotiators, the investor-state dispute settlement process in investment treaties is perhaps the major selling point of any such treaty. One writer regards the international investment law system as having been predicated on the idea of developing countries giving investors access to international arbitration, serving as a confidence-building measure for investors to place their investments in that country.[177] Customary international law does not recognize any direct access in favor of investors to international remedies for claims against foreign states, largely depending on diplomatic protection by their home states.[178] For investment-related disputes, the ongoing trend towards more investment arbitration[179] is a clear indication that claimants prefer abandoning domestic judicial systems altogether for *ad hoc* or institutional adjudicative mechanisms. Until 1968, investment treaties only provided for state-to-state dispute resolution through the establishment of an arbitral tribunal or submission of the dispute to the ICJ.[180] Today, modern international investment agreements provide aggrieved investors with a direct right to resort to arbitration with regard to any disputes arising from alleged treaty breaches or more generally with regard to investments.[181]

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[176] Article 3.7, DSU. *See* World Trade Organization Secretariat, *supra* note 166.

[177] Christopher Ryan, *Meeting Expectations: Assessing The Long-Term Legitimacy And Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 754 (2008).

[178] DOLZER & SCHREURER, *supra* note 14, at 211. *See Nottebohm Case*, ICJ Reports (1955), *Mavrommatis Palestine Concessions Case*, PCIJ, Ser. A, No. 2, at 12, *Barcelona Traction Case*, ICJ Reports (1970) at 3.

[179] NEWCOMBE & PARADELL, *supra* note 69, at 44.

[180] The first reported investment award was *Asian Agricultural Products Ltd v. Sri Lanka* (*AALP*) a claim under the Sri Lanka-UK BIT arising from the destruction of a shrimp farm by Sri Lankan security forces. *See id.*, at 44-58.

[181] *Id.*, at 70. In 2007, the number of known treaty-based investor-State dispute settlement cases grew by at least 35, bringing the total number of known treaty-based cases to 290 by the end of 2007. *See* International Investment Rule-Making: Stocktaking, Challenges and the Way Forward, United Nations Conference on Trade and Development, UNCTAD Series on International Investment Policies for Development (2009).

Modern investment treaties now provide for unilateral remedies to the foreign investor,[182] and today investor–state dispute settlement or ISDS provisions are a common feature of most BITs and even PTIAs.[183] The foreign investor would like to see to it that the obligations of the host country which admitted his investment under the investment treaty are effectively implemented and enforced. Dispute settlement provisions increase the level of certainty and predictability that investors need, diminish political risk, and thus encourage investors of one contracting party to invest in the territory of the other.[184] In addition, it ensures that the investment dispute is separated from political considerations.[185] The benefits to investors of having their own "special lane" in resolving disputes that arise with the host government explains the sharp increase in investment treaties between developed and developing countries. In contrast to ISDS in investment agreements, there are no remedies available directly to *individuals* under the WTO dispute settlement system, which is exclusively state-to-state.

The legal certainty is magnified ten-fold by the so-called "*umbrella clause.*"[186] Capital exporting countries formulate umbrella clauses to protect their investors' specific private rights under contract against interference from a breach of contract or an administrative or legislative act. Normally located towards the end of BITs, umbrella clauses are catch-all statements that conditions and privileges peculiar to the investor and agreed upon by the state to a "private" investment contract will be protected by the investment treaty.[187] The simplified definition is that any breach of any contract between an investor and the host government on an investment covered by the BIT, if the investment falls under a broad interpretation or deliberately broad formulation of the investment treaty, would also be tantamount to a breach of the treaty.[188] The interpretive difficulty is whether the rights within an "umbrella clause" are "sufficient to override an ambiguity in international law and transmute a breach of contract into a

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[182] SORNARAJAH, *supra* note 27, at 310.

[183] *See* UNCTAD, *supra* note 127, at 100.

[184] *Id.*, at 99.

[185] *Id.*, at 100.

[186] *SGS v. Philippines*, ICSID Arbitration 02/1, Award of 29 January 2004; *SGS v. Pakistan*, ICSID Arbitration 01/13, (2004).

[187] SORNARAJAH, *supra* note 27, at 433.

[188] There are conflicting ICSID rulings on a liberal or restrictive reading of an umbrella clause in a BIT. *See* DOLZER & SCHREURER, *supra* note 14; Susan Franck, *The Legitimacy Crisis In Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORD. L.R. 1521 (2005); Jarrod Wong, *Umbrella Clauses In Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135 (2006).

treaty violation."[189] The broader implication is that the foreign investor, once his contract with the government is violated, is in effect becomes exempt from the ordinary judicial and arbitral process to which the rest of the population is subject.

More than in any other area of IEL is the derogable implications on a state's economic sovereignty, effective participation in the global economy, and meaningful contribution to the development of IEL norms more pronounced than in the dispute settlement mechanisms. The global financial crisis of 2009 exposed the care and circumspection demonstrated by many governments as they sought to craft and enact domestic measures with extraterritorial effect to curb the recessionary effects. Not only do states prefer to avoid disputes by acting more responsibly in times of economic crisis, but are keenly aware of the implication of adverse decisions both politically and economically. As will be demonstrated in the next sections, decisions of economic tribunals "chills" policy and decision-making and constrains policy space of developing countries such as the Philippines perhaps to a greater degree than by ordinary treaty-making.

II. MAIN ISSUES AFFECTING THE PROPER ASSIMILATION OF INTERNATIONAL ECONOMIC LAW IN PHILIPPINE LAW

Any lingering question about present and perhaps future direction of Philippine external economic policy has long been settled by the Supreme Court in *Tañada v. Angara.*[190] In yet another venture into judge-made economic policy-making, the *Tañada* Court in upholding the Constitutionality of the WTO Agreements, pronounced that the 1987 Philippine Constitution does not prohibit Philippine participation in worldwide trade liberalization and economic globalization, and that the WTO agreements have "become part of the law of the land." Yet more than ten years have passed since that ruling, and developments in the multilateral trading system have been moving briskly, with a new negotiating Round intended to be anchored on development but has not turned out that way, more non-trade and regulatory issues being folded under the agenda, and more and more countries going the bilateral or regional route in attaining their trade objectives.

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[189] Franck, *supra* note 188, at 1568-69 ("As a matter of general international law, it is unclear whether a breach of contract or other regulatory measure is sufficient to constitute a breach of an international obligation.").

[190] 338 Phil. 546 (1997).

Meanwhile the investment policy regime of the Philippines is perhaps one of the most inflexible and inexplicable in the developing world. With almost no change in an already restrictive Constitutional foreign equity regime, two versions of a still less-than-liberal Foreign Investments Act, and a judiciary dabbling in investment policy through conflicting decisions, the government then turns around and enters simultaneously into more than 30 BITs with developed countries and negotiating PTIAs with onerous investment provisions. Add that with a convoluted mix of incentives, Freeport zones and other investment promotion schemes, and a messy ICSID expropriation case, it is no wonder why foreign direct investment flows in the Philippines are one of the lowest in the region.

As the executive branch struggles to find its place in international economic regulation, Congressional vision withdrawing further into its own parochial interests, and the judiciary still tinkering like a mad scientist with economic policy, economic sovereignty is being compromised, decisions affecting nationals and local industries are being made at the supranational and institutional level by unaccountable diplomats and negotiators, and non-Filipino arbitrators render interpretations of international law that may become binding on developing countries such as the Philippines. It certainly raises questions about the extent of "economic nationalism" in the Philippine domestic system, how IEL is made into binding Philippine municipal law, and the institutional mechanisms that ensure policy consistency, coherence, and compliance with IEL norms.

A. Constitutional Framework for International Economic Law: Intrinsically Protectionist?

In its 2009 National Trade Estimate Report on Foreign Trade Barriers (NTE) in the Philippines, the Office of the Special Trade Representative of the United States reported that the current Constitution is the single most intractable barrier to liberalized trade and investment and to enhanced bilateral economic relations.[191] As the Philippines biggest trading partner and most important political ally, the United States' grim assessment of trade and investment opportunities in the Philippines carries much weight especially considering the Philippines competes with Vietnam, Singapore, Thailand, India and its other developing country-neighbors in Asia for foreign direct investment and trade from the biggest investor and trader in

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[191] 21st 2009 National Trade Estimate Report on Foreign Trade Barriers (NTE), accessed at http://ustraderep.gov/assets/Document_Library/Reports_Publications/2009/2009_National_Trade_Estimate_Report_on_Foreign_Trade_Barriers/asset_upload_file263_15500.pdf.

the world. Indeed, many other developed countries, corporations, and academics have surmised that the biggest non-tariff barrier (NTB) is the 1987 Philippine Constitution. Not only are the economic provisions *per se* protectionist, it has been argued, but even powers granted to important bodies such as the Supreme Court allows intervention into economic policy, fomenting instability and credibility fears. Practically none of the protectionist language of the 1935 Constitution has been repealed, revised, or amended. It has even been argued that the 1987 version is the most protectionist of all three Constitutions.[192]

Among the questions often asked is whether the Constitution crippling the Philippine economic development. Do the nationalist provisions of the Constitution needlessly limit development possibilities through economic integration and enhanced participation in the multilateral trading system? Are the outward-looking policies sufficient enough to establish conditions for greater investment flows and freer trade? Does the Constitution actually reduce possibilities for economic growth by tying the hands of policy-makers in making the Philippines more competitive and open to globalization? These questions may be summed up into one fundamental query: Is the Constitution a bar to IEL?

If Supreme Court decisions from *Ichong* to *L'Bugal* are to be followed, the answer is *sometimes*. As discussed *supra*, IEL principles become Philippine law by virtue of compliance with the requirements of Article II Section 2 of the 1987 Constitution. No treaty or executive agreement, however, can prevail over the Constitution because under the domestic legal hierarchy, nothing can be higher than the Constitution. But will every trade agreement involving derogation of economic sovereignty be constantly challenged at every turn, because the spirit and intent of the Constitution itself is anathema to the aims and purposes of IEL?

The 1987 Philippine Constitution, not only defines the structure of government, the relationship between the government and the governed through civil liberties, and ensuring the ideals of republicanism and sovereignty, but is quite unique among other constitutions in that it outlines in great comprehensive detail the goals, methods, and standards concerning the national economy.[193] Yet it may be too detailed for the people's own good. If the national constitution is protectionist, and with the knowledge that national law may not be used as a justification not to comply with

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[192] *See* Gerardo Sicat, *Legal and Constitutional Disputes and the Philippine Economy*, 82 PHIL. L.J. 1 (2007)
[193] *See Id.*

international obligations validly assumed through treaty, then negotiators have very little room for maneuver and to deal at arms-length.

1. Constitutional Economic Policy

Article II Section 19 provides that "[t]he State shall develop a self-reliant and independent national economy effectively controlled by Filipinos." It is an express declaration of the state policy on the national economy, stressing economic self-reliance, economic independence, and effective national control of the economy. Together with Section 20[194] of the same Article, acknowledging the necessity of investments, it represents the twin pillars of Constitutional economic policy.[195] These are new provisions in the 1987 Constitution that do not appear in the 1935 and 1973 versions.[196]

Article XII builds upon and elaborates Section 19-20 of Article II and constitutes the set of operative Constitutional provisions governing the National Economy and Patrimony. It is practically littered with clauses prescribing preferences for Filipino equity, participation, or control on a number of economic areas, with more or less a higher level of specificity. Article XII lumps together some[197] of the areas of the national economy, giving Constitutional importance to select areas of the economy over others. These specific provisions will be discussed in the next section.

The most curious aspect of the National Economy provisions of the Constitution is the first on the list. Article XII Section 1[198] states the national economic goals to be achieved and how to achieve them. And sets the

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[194] "Section 20. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments."

[195] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 95. (2003 ed.).

[196] CARMELO SISON, THE 1987, 1973, AND 1935 PHILIPPINE CONSTITUTIONS: A COMPARATIVE TABLE 7 (1999).

[197] It should be noted that other economic provisions are scattered in other parts of the Constitution. For example, mass media and advertising is under "General Provisions."

[198] "**Section 1.** The **goals** of the national economy are a more **equitable distribution** of opportunities, income, and wealth; a **sustained increase** in the amount of goods and services produced by the nation for the benefit of the people; and an **expanding productivity** as the key to raising the quality of life for all, especially the under-privileged.

The State shall promote **industrialization** and **full employment** based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.

In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given **optimum opportunity to develop**. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to **broaden the base of their ownership**."

Constitutional "guidelines for the various branches of government for the promotion of the common good in the economic sphere."[199] It is however a new provision, not found in either the 1935 and 1973 Constitutions.[200] Bernas witnessed during the 1986 debates on the national economy, a "struggle between ... liberal economic policy balanced by ... social justice and ... a more protectionist constitution because of distrust of foreign a local business magnates,"[201] which characterizes the economic divide in any modern but struggling developing economy.

The framers' vision in coming up with and debating extensively and passionately what should chart the direction of Philippine economic policy is perhaps laudable and incontrovertibly wise at that time. Although it is doctrinaire that the Constitution is not static, it should be interpreted to adapt to the changing times and needs of the people, and that is precisely the problem. This is because, borrowing from the learned economist-judge the Honorable Richard Posner, "the first task of interpretation... of the 'economic' clauses of the Constitution... is interpretation, rather than the choice of optimal policies."[202] Thus, setting aside for the moment the non-self executing character of Article II Section 19,[203] basic constitutional construction instructs us to interpret constitutional provisions, "first, *verba legis,* that is, wherever possible, the words used in the Constitution must be given their ordinary meaning except where technical terms are employed... [s]econd, where there is ambiguity, *ratio legis est anima.* The words of the Constitution should be interpreted in accordance with the intent of its framer... [f]inally, *ut magis valeat quam pereat.* The Constitution is to be interpreted as a whole."[204]

A bear reading of Sections 19-20 and the ordinary meaning of the words "self-reliance," "independence," and "effective control" reveals that the words are so clearly protectionist, at best insular and inward-looking, and does not appear to admit of any other interpretation. Looking at intent, notwithstanding the context of the then existing economic conditions that may not necessarily be present or true today, the protectionist stance may be

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[199] BERNAS, *supra* note 195, at 1130, *citing* III RECORDS OF THE CONSTITUTIONAL COMMISSION 252 (1986)

[200] SISON, *supra* note 196, at 119-20

[201] BERNAS, *supra* note 195, at 1130-31.

[202] Richard Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 20 (1987).

[203] In *Tañada*, the Court declared this Constitutional declaration of policy as non-self executing and serve as mere guidelines for legislation, and thus not judicially enforceable. 338 Phil. 546 (1997), at 580-81.

[204] La Bugal-B'laan Tribal Ass'n, Inc. v. Sec. of Environment and Natural Resources, G.R. No. 127882, Dec. 1, 2004, *citing* Francisco v. House of Reps., G.R. No. 160261, 415 SCRA 44, 126-27, 10 Nov. 2003.

gathered from the sponsorship speech of Constitutional Commissioner Bernardo Villegas:[205]

> Economic self-reliance is a primary objective of a developing country that is keenly aware of overdependence on external assistance for even its most basic needs. It does not mean autarky or economic seclusion; rather, it means avoiding *mendicancy* in the international community. Independence refers to the freedom from *undue foreign control of the national economy*, especially in such strategic industries as in the development of natural resources and public utilities. (emphasis added)

To be sure, autarky or economic seclusion is different from protectionism, and an economy may prove to be protectionist but not in "hermit-like isolation"[206] from the rest of the world. Thus textual and contextual analysis demonstrates that protectionism is not foreclosed by Section 19, but deemed to be included within the term economic self-reliance. It would be tempting however to overread "undue" foreign control to mean a return to the xenophobic days of *Ichong*. That case involved the constitutionality, upheld by the Court, of a retail trade act that expressly discriminates against Chinese immigrants in the Philippines. Undue foreign control is actually a circular argument, because foreign equity that is undue is what goes beyond the equity ceilings in the Constitution, the statutes, and what is listed in the Negative List of the Foreign Investments Law.

The statement of Commissioner Villegas in sponsoring the provision is probably ancient history, and no doubt brought about the onrush of renewed nationalism after a massive political upheaval colored the debates about the economy, depriving perhaps more meaningful and objectified discussion based on facts on the ground. For it cannot be emphasized enough that globalization continues to cause changes in the way people do business and in the basic fabric of international commerce. Constitutional policies that are clearly protectionist will definitely experience difficulties in giving policy-makers sufficient guidance to keep pace with the developments in IEL.

It is submitted that a more accurate reading of Article II Section 19, is that it also informs *directly* the provisions and sections under Article XII concerning the national economy and patrimony. But that is not the end of

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[205] III RECORDS OF THE CONSTITUTIONAL COMMISSION 252, *cited in* Tañada v. Angara, 338 Phil. 546 (1997).

[206] *See* 338 Phil. 546 (1997).

the matter, for as discussed in Part I, economic policy concerns economic sovereignty, and such sovereignty necessarily concerns all resources of the state—natural or man-made—that has economic value. Thus, as *policy* that serves as a guideline for the orientation of the state,[207] and not simply a non-enforceable guideline for legislation, Article II Section 19 should also be understood to inform *indirectly* all the other provisions apart from Article XII of the Constitution on specific areas of economic activity, economic resource, or economic value. It is submitted that while it may be considered non-self executing, the interpretation or implementation of a self-executing provision under Article XII or any other provision involving economic sovereignty must conform to Article II Section 19 standards of self-reliance, independence, and effective national control.

2. Constitutional International Trade

Trade policy is expressly made a Constitutional provision for the first time in the 1987 Constitution. Neatly tucked away towards the end of Article XII, and stated as one flowing sentence, it reads: "The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity."[208] It enunciates three basic qualifications for a Constitutional Philippine trade policy: *general welfare*, *equality*, and *reciprocity*.

The Philippines is unique among the members of the WTO in that in 1997, in *Tañada v. Angara*,[209] one of three major cases concerning Philippine international trade issues,[210] the highest adjudicative body made a pronouncement of the constitutionality of its membership in the WTO by validating the constitutive agreement, the WTO Agreement.[211] There the Supreme Court, faced with apparently contradictory Constitutional policies, upheld the Constitutionality of the WTO Agreements, holding that the 1987 Philippine Constitution does not prohibit Philippine participation in

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[207] BERNAS, *supra* note 195, at 37, *citing* IV RECORDS OF THE CONSTITUTIONAL COMMISSION.

[208] CONST., art. XII, § 13.

[209] 338 Phil. 546 (1997).

[210] The other two being *Akbayan et al v. Aquino et al* (G.R. No. 170516, Jul. 16, 2008) and *Ideals, et al, v. Senate* (G.R. No. 184635 and 185366 not yet resolved). Two other cases, *Southern Cross Cement v. Philippine Cement Manufacturers Corp.* (G.R. No. 158540, 434 SCRA 65, Jul. 8, 2004) and *Filipino Metals, Inc., et al. v. Secretary of Trade and Industry, et al.*, (G.R. No. 157498, Jul. 15, 2005), relate to specific trade issues involving agency implementation of legislation passed to conform to the WTO agreement. *Ichong v. Hernandez* (101 Phil 1155, 1957) concerning the constitutionality of major trade legislation, namely, the Retail Trade Nationalization Law, is not really about trade policy, but about Congress power to nationalize any sector and the Supreme Court's power to review it.

[211] H. Harry Roque, The *Philippines and the WTO: Survey of Current Practices with Emphasis on Anti-Dumping, Countervailing Duties and Safeguard Measures*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 229 (2006).

worldwide trade liberalization and economic globalization. Applying a "balancing test," the ponencia of then-Justice Artemio Panganiban held that there were "enough balancing provisions" in the Constitution to permit a Constitutional interpretation of the Executive branch's act of ratifying the WTO Agreement and the Senate's concurrence in the ratification.[212] In other words, the Supreme Court reconciled conflicting Constitutional policies concerning the national economy by harmonizing the policy aims of the executive in signing and ratifying the WTO agreement, and necessarily, trade liberalization at the multilateral level, with the economic nationalist provisions.

The two sets of conflicting Constitutional provisions are Section 1 and 13 in relation to Sections 10 and 12 of Article XII. The latter two Sections form the crux of the preference granted to Filipino nationals over non-Filipinos in two areas covered by IEL—investments and services. As will be discussed further, these Sections are, in principle, incompatible with the basic tenet of the WTO of non-discrimination.[213] Section 10 enunciates the Filipino First Policy in the formation and operation of enterprises and the grant of rights, privileges and concessions covering the national economy.[214] Section 12 advocates the preferential use of Filipino labor, domestic materials, and locally produced goods, and competitive-enhancing measures thereon.[215]

Under Section 1 on the other hand, the Constitution requires balanced economic development through the attainment of the goals of the National Economy, which are, as discussed *supra*:[216]

1. sustained increase in goods and services produced,
2. equitable distribution of wealth, and
3. raising the quality of life through expanding productivity.

To summarize the Constitutional trade policy of the Philippines as interpreted by the Court in *Tañada*, the national economic goals set by the Constitution itself may be attained through a trade policy that serves the general welfare and through exchanges on basis of equality and reciprocity.[217] This should be balanced, cautioned the Court, by taking into

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[212] 338 Phil. 546 (1997)
[213] Section 10 will be discussed under "Constitutional international investment."
[214] CONST. art. XII, § 10.
[215] § 12.
[216] § 1.
[217] § 13.

account the nationalist economic provisions of the Constitution, i.e. self-reliant and independent national economy effectively controlled by Filipinos,[218] Filipino First in the formation and operation of enterprises and the grant of rights, privileges and concessions covering the national economy[219] and in the use of labor and production of goods,[220] and the adoption of measures that help make Filipinos competitive, and guard against unfair foreign competition.[221] It should be remembered that what are being balanced by the test are not just guidelines, but actual textual standards.

One author believes the trade policy clause is broad and general enough to encompass several strategic options for international economic engagements, including a multilateral strategy for trade liberalization through the WTO.[222] But the *Tañada* "balancing test" presupposes all the relevant provisions balance each other out, and neither side prevails over the other. On one side is the trade policy clause, which does not even mention economic globalization, let alone trade liberalization. On the other side are the nationalist provisions, which set numerous qualitative and quantitative parameters. An image that it conjures is that of a horse trying to push forward while being held back by several reins, each opposing force balancing each other out, and resulting in the horse's immobilization. Constitutional trade policy, properly understood, means that the policy in favor of economic liberalization should outweigh, but not necessarily override, the inherent limitations and constraints. The horse should be able to move forward as the reins tug at it to move in a particular direction, and not to complete paralyze the animal.

The Court, looking at the merits of the case, held that Philippine commitments and obligations under the WTO agreements are not inconsistent with the trade policy clause, and that the nationalist economic provisions are not violated in spite of Senator Wigberto Tañada's confident reliance on the Court's own ruling in *Manila Prince Hotel v. GSIS*, which held that Section 10 of Article XII is *per se* self-executing and judicially enforceable.[223] Through a "judicial side-step,"[224] the Court differed with the contention that the NT provisions of the WTO Agreement "place[s]

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[218] art. II, § 19.
[219] art. XII, § 10.
[220] § 12.
[221] § 12.
[222] Laurence Rogero, *Trade Strategy Development: Insights from History, Economics, and Law*, 70 PHIL. L.J. 406, 449-51 (1996).
[223] G.R. No. 122156, 267 SCRA 408, Feb. 3, 1997.
[224] BERNAS, *supra* note 195, at 1172.

nationals and products of member countries on the same footing as Filipinos and local products, in contravention of the 'Filipino First' policy of the Constitution,"[225] holding that the Filipino First policy is enforceable only as to "grants of rights, privileges and concessions" covering national economy and patrimony but not to "every aspect of trade and commerce,"[226] which is not really even the issue in *Tañada* according to the Court. Thus, WTO reliance on "most favored nation," "national treatment," and "trade without discrimination" cannot be struck down as unconstitutional as "rules of equality and reciprocity that apply to all WTO members," which are not inconsistent with the Constitutional trade policy based on "equality and reciprocity."[227]

We borrow from the analytical framework proposed by Judge Posner.[228] Judges *interpret* as the first step, not rational choice theory. Assuming the three-part "test" of constitutional trade is judicially enforceable, its application would reveal fair compliance with the standard. Of the three standards in the trade policy clause, *general welfare* is the least objective and is essentially a determination for the political branches. The phrase may be sufficiently described as the greatest good for the greatest number of people, or generally any possible benefit that may be conferred upon the people. It would easily be hurdled by the appropriate showing by the Executive branch of economic data indicating it is beneficial overall, i.e. that trade promotes economic development.

Equality, the Court surmised in *Tañada*, refers to the IEL norms of MFN and NT, but not as compared with Filipino nationals, but as compared to other WTO members.[229] The Court is saying that to meet the equality standard for economic exchanges, it does not have to mean that same treatment to nationals shall be extended to aliens, and rightfully so. The Court may have confused the term with MFN, which more accurately involves reciprocity. Equality appears to be semantically closer to NT, the other half of the twin non-discrimination norms in IEL. But is the Court sanctioning NT? Absolutely not, if the various nationalist equity and ownership requirements scattered all over the constitutional text are to be considered. No national constitution would ever claim to textually allow equal treatment of nationals and foreigners in its territory. It is submitted that equality is more akin to *sovereign* equality as trading nations, and should

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[225] 338 Phil. 546 (1997).
[226] *Id.*, at 584-85.
[227] CONST. art. XII, § 13.
[228] Posner, *supra* note 202, at 20.
[229] *See* 338 Phil. 546 (1997).

be understood in this manner if the "beggar-thy-neighbor" policies so anathema to the framers then are to be expunged, and, borrowing words from Commissioner Villegas' sponsorship speech, to "avoid mendicancy."

Reciprocity is the engine of the WTO, the means through which to obtain concessions from trading partners.[230] It best describes the IEL norm of MFN, which is simply what you give to one should be given to another under like circumstances. Does it signify that MFN is recognized constitutionally? A negative answer is unlikely, given the history of MFN and that it is a key principle in the GATT negotiations starting in 1947. Conversely, non-reciprocity or less-than-full reciprocity is a key development during the Doha Round of putting into effect the special and differential treatment principle for the benefit of developing countries. It should be understood to mean however that less-than-full fails to meet the reciprocity standard; it simply obliges the other developed party to reciprocate if Philippines had given a fair offer.

In *Tañada*, the Court substituted its judgment for the political branches, under the guise of "balancing" economic provisions in the Constitution. This is revealed towards the very end of the decision, where the Court first demonstrates its restraint:[231]

> As to whether such exercise was wise, beneficial or viable is outside the realm of judicial inquiry and review. That is a matter between the elected policy makers and the people. As to whether the nation should join the worldwide march toward *trade liberalization* and *economic globalization* is a matter that our people should determine in electing their policy makers.

Then in the same breadth (in that same page), the Court makes this comment:[232]

> Notwithstanding objections against possible *limitations on national sovereignty*, the WTO remains as the only viable structure for multilateral trading and the veritable forum for the development of international trade law. The alternative to WTO is isolation, stagnation, if not economic self-destruction. Duly enriched with original membership, keenly aware of the advantages and disadvantages of globalization with its on-line experience, and

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[230] *See* Hoekman, *supra* note 115, at 406, arguing that overuse of the "non-reciprocity" clause has, in the past, excluded developing countries from the major source of gains from trade liberalization–namely the reform of their own policies.

[231] 338 Phil. 546, 606 (1997).

[232] *Id.*

> endowed with a vision of the future, the Philippines now straddles the crossroads of an international strategy for economic prosperity and stability in the new millennium. Let the people, through their duly authorized elected officers, make their free choice.

To be sure, the decision to join the "worldwide march towards trade liberalization and economic globalization" is indeed a policy matter for the political branches and thus outside the Court's jurisdiction. But when it is the Constitution itself that unequivocally sets the policy that the policy-branches should follow, and they do not follow it, should it not have called the Court's attention? That is precisely Senator Tañada's argument—that the irresistible force of trade liberalization has met the immovable object that is the Constitution because the nationalist economic policy it enunciates is not aligned with the policies of the bastion of trade liberalization that is the WTO. The government's ratification of the WTO agreement clearly disregarded the guidelines, albeit unenforceable and non-self-executing, set by Section 19 of Article II. Yet the Court's ruling says it is completely acceptable for government to eviscerate the Constitutional policy, so long as it can put forth other provisions that negate it. This is by no means an endorsement of the über-economic nationalism of the Constitution; nonetheless, it is the policy which should be faithfully observed by the Executive no less, as an express Constitutional mandate.

In fact, had the Court *declined* to take cognizance on the ground of political question or separation of powers, the result would have been the same at least judicially. The Court would have avoided the awkward position of having to disassociate itself from a strained interpretation of Article XII Section 10 in Manila Prince by straining the interpretation even further through hairsplitting instead of just overturning the ruling or declaring it as dicta. As Professor H. Harry Roque jocularly remarks, there shouldn't be any doubt about the holding when one considers that the *ponente*'s background is in private business.[233]

Finally, a strange non-assertion in *Tañada* was the right of the Philippines to make reservations in its schedule of tariff reduction commitments, its MFN and NT commitments, as well as non-conforming or future measures. As previously discussed, states are not barred from making reservations on obligations it is not prepared to assume, as in the case of the WTO agreements, provided such reservation complies with the requirements of the Vienna Convention.

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[233] *Roque*, supra note 211, at 229.

3. Constitutional International Investment

In analyzing the investment-related provisions of the Constitution, one should have an eye for context and history. Just like many similarly situated former colonies groping for a foothold in a post-colonial environment, the Philippines historical disinclination toward foreign investment had fueled strong "economic nationalist" sentiments.[234] In Part I.A of this paper, revivals of Westphalian notions of sovereignty and nationalism went hand-in-hand with the independence across the globe, and this phenomenon explains much of the Philippines' desire for more Filipino participation and protection of local interests in economic development. Nationalistic motives have dominated the legislative and administrative bodies, and led the Philippine government to create a legal framework that imposed limits on foreign investment in economic activities.[235]

That legal framework began with the 1935 Constitution, and the basic sectors sought to be "nationalized," reserved for or restricted to Filipinos in whole or in part have remain fundamentally unchanged until the 1987 Constitution. In revisiting the nationalist fervor evident in the 1935 Constitution, Dean Sinco observed that dangers from alien interests and control motivated the framers to consider the nationalization of economic resources as vital and indispensable to national survival, justifying the use of "patrimony"[236] as a concept embracing practically everything that belongs to the Filipino, including natural resources, the tangible and intangible.[237] Although foreign control is undesirable, Dean Sinco recognized that Filipino private capital is not big enough to wrest national economic control from alien hands, and even if there are some significant Filipino-owned capital, these are largely "inexperienced, timid, and hesitant."[238] Dr. Sicat remarked that the euphoria of independence influenced the drafting of the 1935 Constitution and the 1987 Constitution, while the 1973 Constitution was intended to provide the Constitutional framework for progress under a New Society.

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[234] John Pierce, *Philippine Foreign Investment Efforts: The Foreign Investments Act and the Local Governments Code*, 1 PAC. RIM L. & POL'Y J. 169, 173 (1992).

[235] *Id.*

[236] All Constitutional versions of the Preamble contain reference to patrimony.

[237] VICENTE SINCO, PHILIPPINE POLITICAL LAW 114 (1954).

[238] *Id.*, at 476.

All fundamental nationalist economic provisions in the 1935 Constitution were retained in the 1973 version.[239] Commenting on the 1973 Constitution, Ambassador Lilia Bautista observed that economic nationalism still presumably exists among majority of Filipinos, perhaps without the realization that economic conditions have so deteriorated though Filipinos are no longer the subservient people of colonial days.[240] Eventually economic and political upheaval was afoot. Dr. Sicat laments that the Philippines missed a golden opportunity during the 1986 debates on the new constitution to balance some of the über-nationalist provisions from the previous incarnations and to modernize and allow for policy flexibility by leaving economic policy to law-making power of Congress.[241] Nonetheless, not only were the nationalist economic provisions retained, but more language was added to cover other sectors of the Philippine economy.[242]

Dr. Sicat believes the restrictive economic provisions in the Constitution on foreign capital made the promotion of investments more difficult to pursue effectively and made it extremely difficult to attain capital formation. Since capital is often the scarce resource in an economy like the Philippines, restrictions on its use brought about many unintended distortions in the crafting of proper development policies. These policies in turn tied the hands of the executive and the legislature in encouraging the enlargement of capital formation in the economy.[243] Moreover, consequent economic legislation had to dovetail with the economic restrictions so as to be in compliance with constitutional provisions, then had to be translated into administrative practices in the absence of such laws. Subsequent actions of government agencies would have to be in line with the intent of the law.[244]

The major complications of Philippine constitutional economic provisions are thus exposed. The provisions on the role of foreign capital—seen simply as a case of protecting Filipino capital during the framing of the 1935 Constitution—produced distortions and economic inefficiencies that account for the poor economic performance of the Philippine economy in

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[239] There was however a major amendment in the 1973 Constitution which paved the way for joint agreements between Filipino and non-Filipino nationals on the exploitation of natural resources, and became the precursor of.

[240] Lilia Bautista, *Issues on Nationalization of Certain Traditional Areas of Investments*, 61 PHIL. L.J. 390, 391 (1986)

[241] *See* Sicat, *supra* note 192.

[242] *See* Gerardo Sicat, *Political Economy of Philippine Reforms 16*, Lecture on the occasion of the 25th Anniversary Celebration of the Philippine Institute for Development Studies (PIDS), Aug. 27, 2002, NEDA, Makati City.

[243] Sicat, *supra* note 192, at 32.

[244] *Id.*, at 17.

the long run and, as a result, for the economic misery of many Filipinos today. These provisions have remained essentially intact in the country's current 1987 Constitution although they were introduced in the 1935 Constitution—what Dr. Sicat calls the "original sin of Philippine economic development policy."[245] Among the "mortal sins" borrowing Dr. Sicat's metaphor are the following:

a. Article XII Section 10—Investments in general, the legislature's power over its regulation, and sets a floor of 60% Filipino equity.[246]
b. Article XII Section 2—Land ownership, utilization and exploration of all natural resources; use and enjoyment of marine wealth in Philippine archipelagic waters, territorial seas, and exclusive economic zone.[247]
c. Article XII Section 7 and 8—Ownership of private land[248]

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[245] *Id.*, at 29.

[246] **Section 10.** The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations **at least sixty per centum** of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, **certain areas of investments**. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

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

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

[247] **Section 2.** All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish- workers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

[248] **Section 7.** Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.

d. Article XII Section 11—Operation of public utilities[249]
e. Article XII Section 14, second paragraph—Practice of professions[250]
f. Article XII, Section 13—preferential use of Filipino labor, domestic materials, locally-produced goods
g. Article XVI Section 11(1) and (2)—Ownership of mass media and advertising[251]
h. Article XIV Section 4(2)—Educational institutions[252]

Congress "inherited" the mortal sins described by Sicat by enacting laws which hew too close to Constitutional restrictions. But the investment

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Section 8. Notwithstanding the provisions of Section 7 of this Article, a natural-born citizen of the Philippines who has lost his Philippine citizenship may be a transferee of private lands, subject to limitations provided by law.

[249] **Section 11.** No franchise, certificate, or any other form of authorization for the operation of a **public utility** shall be granted except to **citizens of the Philippines** or to corporations or associations organized under the laws of the Philippines, at least **sixty per centum** of whose capital is owned by such citizens; nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be **subject to amendment, alteration, or repeal by the Congress** when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

[250] **Section 14.** The sustained development of a reservoir of national talents consisting of Filipino scientists, entrepreneurs, professionals, managers, high-level technical manpower and skilled workers and craftsmen in all fields shall be promoted by the State. The State shall encourage appropriate technology and regulate its transfer for the national benefit.

The practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law.

[251] **Section 11. (1)** The ownership and management of **mass media** shall be **limited to citizens of the Philippines**, or to corporations, cooperatives or associations, **wholly-owned and managed by such citizens.**

The **Congress shall regulate or prohibit monopolies** in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.

(2) The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.

Only **Filipino citizens** or corporations or associations at least **seventy per centum** of the capital of which is owned by such citizens shall be allowed to engage in the **advertising** industry.

The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

[252] **Section 4(1)** The State recognizes the complementary roles of public and private institutions in the educational system and shall exercise reasonable supervision and regulation of all educational institutions.

(2) Educational institutions, other than those established by religious groups and mission boards, shall be owned **solely by citizens of the Philippines** or corporations or associations at least **sixty per centum** of the capital of which is owned by such citizens. The Congress may, however, require increased Filipino equity participation in all educational institutions.

The control and administration of educational institutions shall be vested in citizens of the Philippines.

No educational institution shall be established exclusively for aliens and no group of aliens shall comprise more than one-third of the enrollment in any school. The provisions of this subsection shall not apply to schools established for foreign diplomatic personnel and their dependents and, unless otherwise provided by law, for other foreign temporary residents.

climate in the late 80s to middle 90s remained overcast due to a flip-flopping policy formulation, execution, and enforcement from the Executive, Legislative, and Judicial branches respectively.

The Omnibus Investments Code of 1987 expressly declares it to be the policy of the State "to accelerate the sound development of the national economy... by encouraging private Filipino and foreign investments in industry, agriculture, forestry, mining, tourism, and other sectors of the economy."[253] The Code, a relatively more liberal step forward than previous Marcosian attempts, still contained "conservative" provisions which, coupled with inconsistent decisions from the Philippine judiciary, increased uncertainty, cost, and nuisance of judicial review of investment approvals that have dissuaded prospective investors.[254]

The Foreign Investments Act of 1991[255] aims to liberalize more areas of the economy to foreign investment, but retaining constitutional and statutory restrictions in strategic enterprises. The FIA governs and regulates equity investments in domestic corporations made by non-Philippine nationals, either in the form of foreign exchange or other assets actually transferred into the Philippines. Generally, a non-Philippine national may own up to 100% of domestic corporations, except domestic corporations engaged in any business activity included in the Negative List of the FIA.[256]

The Negative List of the FIA contains the areas of economic activities where foreign ownership is prohibited or limited. List A contains areas of investment where foreign ownership is limited by mandate of the Philippine Constitution and/or by specific laws. List B contains areas of investment where foreign ownership is limited for reasons of security, defense, risk to health and morals and protection of local small and medium scale enterprises. The following are included in the Negative Lists of the FIA:

- Operation and ownership of public utilities (up to 40% foreign equity allowed)
- Retail Trade (no foreign equity allowed)

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[253] Perfecto Fernandez, *Judicial Overreaching in Selected Supreme Court Decisions Affecting Economic Policy*, 67 PHIL. L.J. 332, 343 (1993).

[254] Pierce, *supra* note 234, at 174-75.

[255] Foreign Investments Act of 1991 (Rep. Act No. 7042, as amended by Rep. Act No. 8179) (hereinafter FIA).

[256] Discussion on the FIA and the Anti-Dummy Law is largely lifted from the factual antecedents stated in the Arbitral Award in *Fraport A.G. v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Aug. 16, 2007.

- The practice of licensed professions such as engineering (no foreign equity allowed)
- Ownership of private lands (up to 40% foreign equity allowed) and
- Advertising (up to 30% foreign equity allowed)

The "Anti-Dummy Law"[257] imposes criminal and civil penalties to those violating nationalization laws. The Anti-Dummy Law prohibits foreign nationals from: intervening in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration, except technical personnel whose employment may be specifically authorized by the Secretary of Justice. In addition, the Anti-Dummy law provides that: "the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially-nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities."

As a public utility, the operations and ownership of the Company are also covered by the Anti-Dummy Law. This means that any arrangements with foreign nationals by the Company will have to be considered carefully. Foreign nationals may only be employed in technical positions after prior approval of the Secretary of Justice. All executive and management positions must be occupied by Filipino citizens."

4. Future Trends and the Philippine IEL Regime

When the Charter seen as an economic document, what we find is an inward-looking and insular Constitution, embellished by empty policy verbiage with zero value-added as a set of workable, meaningful, and enforceable guidelines that citizens can pin against government officials in the conduct of external economic policy, and cluttered with numerous nationalist restrictions that have protectionist undertones and fodder for rent-seeking behavior.

Section 19 of Article II is the fulcrum of national economic policy, and as the overall guiding policy for government, it also informs Article XII on National Economy, as well as all other sections of the Constitution governing economic areas of the state. In other words, the economic sovereignty of the Philippines, one defined by the people in their sovereign

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[257] Commonwealth Act No. 108, *as amended by* Pres. Dec. No. 715.

capacity through the 1987 Constitutions, is extremely nationalistic, and is wholly inconsistent with the principles and aims of IEL. As an ideology, economic nationalism retards the country's political and economic maturity. At worst, as mentioned by Dean Agabin,[258] and anticipated by Prof. Raustiala,[259] it is abused by the elites, and disabuses politicians and policymakers.

The problem with express Constitutional language on economic issues as technical as international trade policy is that because of the expanded judicial review clause in the Constitution, the courts always have their fingers on the trigger of judicial power. Much has been written about the Supreme Court's judicial activism in economic policy, an area which, for the clearest reasons, is beyond the expertise and jurisdiction of the judiciary.[260] Following the trend in increasing judicial activism, the opposite seems to be true for political questions such as economic or trade policy issues, as less and less the Courts have not declined to rule on questions of a political nature best addressed to the political branches. The reason is simple: especially on economic policy, there is constitutional text from which such policy is directly derivable. Ricardo Romulo, a Constitutional Commissioner had pushed for judicial restraint in matters of economic and industrial politics, because, citing Abraham Lincoln, the Courts are electorally unaccountable except for impeachment offenses.[261]

But there are more pernicious problems. Judges say what the law is, but lawyers tell them what to say. Put less facetiously, this kind of constitutionalism or legalism in the crafting and interpretation of economic policy gives a lot of power to lawyers—who more often than not do not know much about economic policy in the first place—to persuade judges—who do not know any better either—of their legal interpretations of economic regulation or law which are not necessarily the policy that the law seeks to advance or protect. It continues to befuddle those that formulate policy, those that implement policy and negotiate agreements to that effect, and those that litigate disputes that inevitably arise because of the befuddlement of everyone.

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[258] *See* Pacifico Agabin, *Economic Interest Groups and Power Politics in the Philippines*, 70 PHIL. L.J. 291 (1996)

[259] *See* Raustiala, *supra* note 9.

[260] *See* Fernandez, *supra* note 253; *See also* Ricardo Romulo, *The Supreme Court and Economic Policy: A Plea for Judicial Abstinence*, 67 PHIL L.J. 348 (1993); Solomon Castro & Martin Pison, *The Economic Policy Determining Function of the Supreme Court in Times of National Crisis*, 67 PHIL. L.J. 354-411 (1993),

[261] Romulo, *supra* note 260, at 351.

Explicit Constitutional guidelines couched more or less in non-self executing language and expressly intended as guidelines and not primary sources of enforceable right of actions may have "felt good" at a time when the country emerged from despotic rule and reasserts itself as a nation-state, but it is really nothing more than political verbiage. It adds nothing to how the government can achieve development goals by looking outward, it is not aligned with managed global trade that the Philippines and its trading partners, through IEL, aim to govern, and it gives little comfort to the people who are directly affected by continuing engagements in the international economic system.

a. Post-Tañada: Doha and the Rise of PTAs

It has now been more than a decade since *Tañada*. Developments in the multilateral trading system have accelerated—and struggled—to keep up with the rapid pace of globalized economic activity. Yet the WTO continues to be hounded by substantial criticism from commentators who view it as a threat to democratic sovereignty, representative government, and even development. Critics deplore the fact that the WTO, "a remote institution with few ties to the populations of its member states, has the authority to displace the decisions of nationally elected legislatures."[262]

WTO bargaining remains power-based; for example, WTO members negotiate market access commitments, based on the size and diversity of their economies, in order to obtain binding commitments from smaller economies to change policies that adversely affect the welfare of larger member countries.[263] One scholar argues that the Members of the WTO have succumbed so completely to the pursuit of their commercial self-interest that the Doha Round has become a "monstrous mash of minutiae and lost nearly all links to its original purpose—trade liberalization to spur development in a post-9/11 context in which extremism is wrongly perceived by some disaffected, marginalized peoples as an alternative to the sinful temptations of global capitalism."[264]

The undercurrents of discontent and disillusionment by delegates, negotiators, leaders, NGOs and concerned groups can be felt in as many number of times that WTO talks have failed. Major Ministerial conferences

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[262] McGinnis & Movsesian, *supra* note 61, at 533. *See however* Guzman, *supra* note 39.

[263] Peter Gerhart and Archana Seema Kella, *Power and Preferences: Developing Countries and the Role of the WTO Appellate Body*, 30 N.C. J. INT'L L. & COM. REG. 515, 523.

[264] Raj Bhala, *Resurrecting The Doha Round: Devilish Details, Grand Themes, And China Too*, 45 TEX. INT'L L.J. 1, 4 (2009).

crashed twice: in Seattle in 1999 and Cancun in 2003. In between, a new round of negotiations was launched, the Doha Round in 2001, the first new round since the establishment of the WTO. Ministerial meetings in Hong Kong in 2005, and mini-Ministerials in Geneva, Potsdam, and India between 2006-2009 achieved little progress. G20 meetings in Pittsburgh in 2009, the annual World Economic Forum in Davos, and of course the yearly Asia-Pacific Economic Cooperation did little to provide some needed confidence in the system to make any significant progress in the development round negotiations. The criticism has been of such intensity that not all countries have fallen over themselves trying to sign up to join the WTO. Cambodia, Vietnam, Saudi Arabia, China, and Russia and several other small developing economies acceded to the WTO only after 1995. China in particular joined the WTO only after instituting major changes in its domestic system.[265]

Stirred to action by the horrific events of 11 September 2001, and with the bitter after-taste of Seattle still acrid, leaders of the WTO member-economies promised "development-centered" trade negotiations in November 2001 to launch the inaugural round for the WTO system.[266] The intervening tragedy of 9-11 and the unprecedented response by economic leaders would have vindicated Justice Panganiban's dictum in *Tañada* that the WTO "grants developing countries a more lenient treatment" and that "the weaker situations of developing nations like the Philippines have been taken into account."[267] Because indeed, if there were, as *Tañada* held, "built-in advantages to protect weak and developing economies,"[268] then why would it take a "Development Round"[269] to clearly map out the development dimension of multilateral trade? The Philippines was under no obligation to join immediately as an original member of the WTO, when the Philippines was not even part of the multi-country the GATT negotiations in 1947.

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[265] *See generally* JAWARA & KWA, *supra* note 114; WTO Membership information is *available at* www.wto.org. Opinion is perhaps universal that not much progress has been achieved under the Doha Round. The futility is well-documented. As of this writing the Doha Round is still under negotiation. Although the current state-of-play, pending issues, positions, and implications of possible outcomes of the Round is beyond the scope of this paper, it is hoped that the non-inclusion will not diminish the importance of the issues therein.

[266] It should be noted that the Doha Development Round took place six years after *Tañada.*

[267] 338 Phil. 546, 587 (1997).

[268] *Id.*, at 585.

[269] After failing dismally to do so at the Seattle Session of the Ministerial Conference in November–December 1999, the WTO decided at the Doha Session of the Ministerial Conference in November 2001 to start a new round of multilateral trade negotiations, commonly referred to as the "Doha Development Round". It is the first round of multilateral trade negotiations under the auspices of the WTO.

But even with the eponymous title, the struggle to resist the attrition of developed countries in eroding the developmental agenda promised in Doha persists in the view of many developing countries delegations. The Doha Development Round actually features tension between two major competing interests: for developing countries to correct the inequities and collect on promises delivered during the Uruguay Round, and an effort by developed countries to expand the coverage of the agreements to include issues of importance to developed countries, such as investment, intellectual property, competition policy, trade facilitation, government procurement. What has emerged from the Doha Round is a separate set of rules for nearly every WTO Member or grouping thereof. Multilateral trade law, because of the win-win game of trade played in pursuit not only of self-interest, but also of the common good, has become one chaotic zero-sum game. Bhala even claims the WTO seems less a community and more an environment with the hallmark of "social Darwinism,"[270] and too Member-driven—"a zoo run by the animals."[271]

The Philippines, as a developing country, always aligned itself with the developing country blocs, maintains its fealty with the system, and trumpets published gains since the start of the Round. But as Walden Bello writes, there is still a widespread sense in Philippine government circles that the Philippines had "lost badly with its entry into the WTO. Not only had nothing been gained, not only were key sectors of the economy dislocated, but revenues had been lost-revenues which could have gone to plug the government's worsening budget deficit. According to the Tariff Commission, unilateral WTO-related tariff cuts lowered tariff collections. The country badly needed a multi-pronged, coordinated strategy for the negotiations in agriculture, services, and industrial tariffs, and to meet the threat of a new round of liberalization that the trading powers threaten to launch."[272] Nearly ten years after the launch of the WTO round, and after several forays into PTAs and RTAs, the Philippine government still could not get its act together.[273]

Apart from the impasse in the Doha Round negotiations, the *Tañada* Court could also not have foreseen the rise of Asian regionalism which had prompted the Philippines to jump into the "bandwagon" of forging PTAs.

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[270] Bhala, *supra* note 264, at 4.

[271] *Id.*, at 168.

[272] *See* Bello, *supra* note 114; JAWARA & KWA, *supra* note 114; National Board of Trade, *supra* note 92.

[273] *See* Bello, *supra* note 114; *See also* Medalla, Erlinda M., and Lazaro, Dorothea, *What's happening in Philippine free trade agreements?* Policy NOTES, PHILIPPINE INSTITUTE OF DEVELOPMENT STUDIES (2004).

Today virtually all countries are members of at least one PTA.[274] The Philippines is a member of the ASEAN Free Trade Area, and through ASEAN agreements with dialogue partners, is also member of PTAs with China, Japan, India, Australia-New Zealand, and Korea. The Philippines also has only one, albeit controversial, bilateral PTA: JPEPA.

The JPEPA is extremely divisive. With faint echoes of *Tañada*, the oppositors once again protested the shameless surrender of sovereignty, the economic nationalism of the Constitution, and the one-sidedness of the deal. In a prelude to litigation on the more substantive issues, *Akbayan v. Aquino* pitted nationalist party-list Members of the House of Representatives against the JPEPA negotiators in the Executive branch over confidential information and the undisclosed text of the JPEPA.

The Court dismissed the petition, but one line of argument should be emphasized. Akbayan contends that the JPEPA negotiators cannot hide behind executive privilege and refuse to divulge the offers exchanged, because those offers (rates of reduction of tariffs) go beyond what is constitutionally permissible and authorized by Congress, and in fact encroaches on the Congress' inherent power to regulate commerce. Once the Court reached a finding that the exchanges of offers are covered by the privilege by virtue of the Executive's diplomatic and foreign affairs powers, it did not anymore reach the issue of encroachment. It is submitted that the issue of the Executive and Legislative branches on a collision course on IEL negotiations and economic agreements is of fundamental importance to the Philippines institutional and functional capacity to engage in IEL. These are discussed fully in the next succeeding sections.

As a matter of economic policy, Philippines must be concerned about the proliferation of PTIAs. PTIAs continue to grow in number and complexity, at times even replacing tradition FTAs and BITs due to its administrative expedience and policy coherence-enhancing qualities. It becomes more and more challenging for developing countries to keep their PTA and investment treaty network, if any, coherent and to avoid major inconsistencies.[275] More importantly, the desire to retain some policy space should always be foremost in the minds of negotiators and policy-makers.[276]

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[274] Except one: Mongolia. *See* Martin Roy, Juan Marchetti, & Hoe Lim, *Services Liberalization in the New Generation of Preferential Trade Agreements: how Much Further than the GATS?*, *op cit. in* Estevadeordal, et al (eds.), *supra* note 156.

[275] UNCTAD, *supra* note 144, at 3-4.

[276] United Nations Conference on Trade and Development, Preserving Flexibility in IIAs: The Use of Reservations 23, UNCTAD Series on International Investment Policies for Development (2007).

While host country negotiators in the executive branch can define the agreement's scope and substantive disciplines, they must keep in mind their state's recourse to certain policy measures and decisions.

Although Philippines has not negotiated any other bilateral PTIA after JPEPA, its other PTIAs have been entered into through its membership in ASEAN. As will be threshed out *infra*, these agreements did not go through the Senate, but have been reported to the WTO Secretariat and to the Committee on Regional Trade Agreements (CTRA). If PTIAs and PTAs embody the same IEL norms (market access, dispute settlement) in the multilateral trading system, and are recognized as valid exceptions to MFN provided the requirements of Article XXIV of the GATT are complied with, does it follow that such agreements are also constitutional if they are declared by the CTRA as consistent with WTO law and thus valid?

b. Of Negative Lists, Sovereignty, and Policy Space for Philippine International Investment Law Regime

While BITs, in and of themselves, may not have directly and substantially liberalized FDI, there is strong evidence to show that they both protect and promote FDI in developing countries.[277] BITs have a particularly strong effect on encouraging FDI in developing countries. In short, the grand bargain between developing and developed countries that underlies BITs, the bargain of investment promotion in return for investment protection, seems to have been achieved, although the effect of the bargain is only realized slowly after the BIT is signed.[278]

It is indeed evident, Prof. Dolzer admits, that rules on foreign investment set forth in investment treaties reach far into segments of the domestic law, traditionally the *domaine reserve* of developing countries.[279] This evolving characteristic fuels continuing concerns not only of the sovereignty-derogating implications of the Philippines' own investment treaties, but also the democratic legitimacy of the process by which international investment law is developed and imposed.[280] The current trend of investment rule-making is so incursive that it has even crossed the line of what is considered acceptable, covering or affecting not only purely investment regulation but also domestic laws governing labor, the

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[277] Jeswald Salacuse & Nicholas Sullivan, *Do BITS Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT'L L.J. 67, 111 (2005).

[278] *Id.*, at 111.

[279] DOLZER & SCHREURER, *supra* note 14, at 9.

[280] *Id.*, at 7.

environment, and even civil law.[281] Such intrusiveness weakens the demand for the rule of law and the creation of appropriate protections domestically.[282] Thus the degree of influence on domestic law and of national sovereignty is more severe when international investment law and the rules of foreign investment are applied.[283]

The real danger of BITs and investment chapters in PTAs as observed by Nobel laureate Joseph Stiglitz is that they introduce an element of "reverse discrimination"—foreign firms are treated more favorably, with greater protections, than domestic firms, disadvantaging smaller domestic firms and adversely affecting the development of the economy.[284]

Nonetheless, there seems to be a consensus among the scholarly writings that the limiting impact of investment treaties on the sovereignty of host states is a necessarily corollary to the objective of creating an investment-friendly climate. Investment treaties are seen as "admission tickets" to international investment markets,[285] by establishing market presence. Typically, while the practice of capital-exporting states has been to formulate model investment treaties and present to capital-importing states at the beginning of negotiations as "basis for subsequent negotiations,"[286] it should not stop capital-importing states from coming up with their own BITs using their own Model Investment Treaty as basis for negotiations.

If there is one IEL principle fundamentally important to international investment law that is the anti-thesis of a nationalistic national constitution such as the Philippines', it is NT. A cursory reading of the Constitutional and statutory nationality restrictions on foreign investment reveals pre-establishment NT restrictions, meaning nationality restrictions already apply when an investment is being considered for admission by the Philippine regulators. Thus, a Philippine BIT or PTIA with pre-establishment NT must enumerate the FIA, the Anti-Dummy Law and many other statutes that must be placed in a Negative List which was discussed in earlier this paper, otherwise, the liberalization obligations will start to kick in.

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[281] *Id.*, at 9.

[282] Joseph Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451, 549-50 (2007).

[283] DOLZER & SCHREURER, *supra* note 14, at 10.

[284] Stiglitz, *supra* note 282, at 550. Large domestic firms can easily get the same protection as large foreign firms, simply by incorporating abroad.

[285] DOLZER & SCHREURER, *supra* note 14, at 9.

[286] *Id.*, at 8-9.

It is in the pre-establishment NT that Philippine investment treaties buck the present trend. NT is more common in post-establishment treatment, i.e. after investment is admitted in most BIT's today. This shows that while perhaps more states have liberalized their pre-establishment regime, the Philippines has remained the same. This is due to the entrenched über-nationalism that is the by-product of the Philippines' past experience with NT obligations during its brief American occupation. According to Dr. Sicat, "after the Philippines declared its independence from the U.S., the parity amendment—which gave parity of treatment to Americans the rights reserved to Filipino citizens in the Constitution—was exacted as a price to be paid for the war damage act and the promised aid for rehabilitation. With the parity amendment, which required an amendment of the Constitution, Filipino leaders were made to swallow their pride and sank deep into the recesses of the national psyche. This reinforced the nationalist rhetoric about the problems of foreign economic domination."[287]

Notwithstanding the psychological trauma of foreign domination, the Philippine Congress through its Foreign Investments Act (FIA) had already determined that foreign investment is more than needed as a policy matter and that only those areas in the Negative List are either off-limits to foreign investors or comes with equity restrictions. The negative list approach, when attached to an investment treaty or PTIA with pre-establishment liberalization, comes with certain caveats. It is generally perceived as more demanding in terms of host government transparency, the level of obligations assumed, the extent of liberalization achieved, and the administrative burden of negotiating and implementing the commitments, with host countries compelled to provide full details on the nature and scope of the non-conforming measures they wish to maintain or to apply in the future.

Pioneered under NAFTA Chapter 11, it is a major feature of the Investment Chapter of the JPEPA, and taken lightly by the Philippine investment negotiators.[288] Justice Feliciano during the hearings on the Senate concurrence with the ratification of JPEPA, brought to the attention of the Committee—as a stinging rebuke to the government negotiators of the JPEPA—that the negotiating team failed to expressly make reservations on specific areas and commitments relating to Constitutional restrictions on either ownership or equity or operation of select areas of the Philippine

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[287] Gerardo Sicat, *Philippine Economic Nationalism*, DISCUSSION PAPER NO. 0201, University of the Philippines School of Economics (Jan. 2002). *See also* Sicat, *supra* note 192.

[288] *See* Feliciano, *supra* note 143.

economy. The effect of such failure, the Justice warned, is to "render commitments on those areas unconstitutional, and of such invalidity as to bring the entire JPEPA to the brink of unconstitutionality."[289]

The consequences of the Philippine JPEPA negotiating team's failure to make such reservations are dire. The implication is that unless a reservation is taken, all future measures are automatically subject to the agreement's liberalization obligations—without qualification and in sectors/activities that do not yet exist, or where legislation or regulatory frameworks are not in place at the time when the investment treaty enters into force.[290] Failure to lodge a specific reservation of future measures, as what the Philippine negotiators omitted to do in the JPEPA investment negotiations, is the failure to preserve the plenary power of Congress to enact legislation pursuant to Article XII Section 10 of the Constitution, and will result in the subsequent need to rescind the non-conforming measure, or run the risk of direct challenges under the built-in dispute settlement procedures.[291]

The concern over reservations and lack of administrative capability is magnified when one considers the trend in investment rule-making of developed countries resorting to comprehensive PTIAs. The United Nations Conference on Trade and Development (UNCTAD) has published advice for host developing countries such as the Philippines which deserves mention for its accurate description of administrative, coordinative, and resource problems faced by developing country governments:[292]

> [Government negotiators and policy-makers] must indeed have full knowledge of the rationale for, effectiveness of, and possible continued policy need for particular types of non-conforming investment measures (including, where relevant, at the sub-national level). While deficiencies and weaknesses in internal and external coordination and constraint mechanisms are by no means unique to developing countries, the associated administrative burden tends to weigh more heavily on resource-constrained administrations. This not only demands a sound system of inter-agency coordination within governments and equally effective consultative mechanisms with civil society and private sector organizations. The same applies to the consequences of making a mistake in completing such lists.

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[289] *Id.*
[290] UNCTAD, *supra* note 118, at 27-28.
[291] *Id.*
[292] *Id.*, at 28-29.

It is of paramount importance to the Philippines there should always be a balance maintained between national treatment and the ability to regulate the entry and subsequent operation of the foreign investment. How the balance is struck in the different treaties is a matter that the parties decide, with the language of the treaties will be construed carefully in determining the extent of the national treatment that is permitted.[293] To be sure, the problem is not purely one of administrative competence of the BOI. It is part of the larger problem of a lack of a deeper understanding of the onerous sovereignty-derogating norms of international investment law and a stark deficit in democratic legitimacy. Decisions and policies affecting domestic resources are being made by negotiators and technocrats *via* treaty. Investment treaties themselves are said to be mere codification of customary international law, which is binding upon states regardless of whether the Philippines signed up to them.

c. Philippines' Economic Disputes[294]

There is the unavoidable perception that the WTO is to international trade law what the UN is to general international law. As McGinnis & Movsesian write, the institutional mechanisms of economic dispute settlement go further than most majoritarian domestic systems. In the WTO, for instance:

> When possible, the WTO decides policy by consensus. When consensus is not possible, 'ordinary' matters are decided by vote, with each WTO member having one vote. Supermajority requirements and other procedural rules, however, help constrain the WTO's decision-making authority on important matters. For example, only the Ministerial Conference and the General Council have the authority to adopt binding interpretations of multilateral agreements. Any interpretation must receive an affirmative vote of three-fourths of the entire membership of the WTO. Similarly, only the Ministerial Conference can adopt amendments to multilateral agreements, usually by a two-thirds vote. Certain amendments require unanimous approval.[295]

So why is the WTO such a pernicious evil that eviscerates sovereign rights and economic self-determination? Raustiala believes the concept of sovereignty *vis-à-vis* supranational dispute resolution of violations of IEL

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[293] SORNARAJAH, *supra* note 27, at 328.

[294] For a more thorough discussion and assessment of the Philippines' dispute settlement cases before the WTO panels, *see* Paola Deles and Cesar Romano, *Philippine Participation in WTO Dispute Settlement*, 78 PHIL. L. J. 560 (2004); *Roque*, *supra* note 211.

[295] *See* McGinnis & Movsesian, *supra* note 61, at 533; Guzman, *supra* note 39.

norms looks to "veto power rather than revocability as the key criterion for evaluating the loss of sovereignty to international institutions. In other words, sovereignty may be said to be compromised by international institutions such as the WTO when states create a process that generates rules or decisions that they cannot veto *ex post*."[296] The extreme difficulty to appeal a WTO decision is veto-based conception of sovereignty, and WTO member states have surrendered their sovereignty to the WTO because of the political impossibility of vetoing adverse judgments, even though they can ultimately withdraw from the WTO if they choose.[297]

Arguably the bite of this lack of a veto depends in part on whether WTO rulings must be complied with or not. While the dominant view is yes, some analysts argue that the member states have no legal duty to comply but may simply except retaliation as a form of punishment. If the minority view is correct, then rulings in the WTO are not in fact generated without a veto by affected states, since states simply pay a price for ignoring those rulings.[298] But if WTO rulings must be complied with as a legal matter, under a veto-based conception of sovereignty the WTO indeed erodes sovereignty through its dispute settlement system.[299]

There remains at least one significant threat to current notions of sovereignty that should concern proponents and critics of the WTO alike: the rule-making power of WTO panels and the Appellate Body. The WTO agreements inevitably have gaps, and, because unforeseen issues arise, panels often find themselves making new law. This happens in domestic common law systems, of course, but in those systems the legislature may step in and override a judicial decision, providing a democratic check on the courts. At the WTO, however, the "legislature" acts through unanimity, making it very difficult (though not impossible) to change the rules laid down through the dispute settlement system. It is possible, therefore, that states will face obligations that are shaped by panels without the consent of all, or even a significant number of members.[300]

The immediate effect of the Philippines' ratification of the WTO agreements and their entry into force with the effect of binding municipal law is that national law should not derogate from MFN and NT obligations.

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[296] Raustiala, *supra* note 9, at 847-48.

[297] *Id. See also* VAN DEN BOSSCHE, *supra* note 3, at 116-117.

[298] Prof. Jackson has remarked that no state in its right mind would wage a war or an armed invasion of a country that ignores Panel or AB rulings. *See* JOHN JACKSON, WILLIAM DAVEY, & ALAN SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT (4th ed. 2002).

[299] Raustiala, *supra* note 9, at 847-48.

[300] Guzman, *supra* note 39, at 347.

Just like any other WTO-member, the Philippine domestic legal and regulatory system has not been immune from challenges at the panel and AB stages. Recently, the Philippines' excise tax regime on distilled spirits has been challenged by the EU and the US before the WTO dispute settlement system as inconsistent with NT obligations under Article III.[301]

The measure at issue is the 1997 National Internal Revenue Code (NIRC), as amended by Republic Act No. 9334.[302] Based on a scaffolding of tax tiers largely inherited from the Americans, under the NIRC, excise taxes for distilled spirits made from "the sap of *nipa*, coconut, cassava, *camote*, or *buri* palm, or from the juice, syrup or sugar of the cane" are at lower rates than those "produced from raw materials other than" the enumerated indigenous materials.[303] The EU argues that distilled spirits produced in Europe from materials not among those enumerated in the NIRC are not similarly taxed, thus constituting, in the EU's view, discrimination in violation of the NT principle underpinning GATT Article III:2.

The U.S. joined the dispute due to their concerns over allegedly discriminatory treatment of U.S. exports to the Philippines of Kentucky bourbon and other American spirits, which is similarly situated with EU spirits. Philippines merely inherited the excise tax system (including the classification and differential tax treatment for sugar-based distilled spirits) from the Americans to provide *protection* for RP-made sugar-based exports to the U.S. They are thus in a position to know more intimately the historical discrimination which may lend greater force to the EU's arguments.

As far as the WTO's ability to actually resolve trade disputes is concerned, judged by the extent to which the DSU is actually used, it has been largely successful[304]—for the plaintiff. The WTO "conviction rate" is very high, at almost 90 per cent.[305] Previous WTO rulings on the issues raised by the EU and the US have not been favorable to the respondent in similar factual circumstances[306] and in others involving the same legal

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[301] *Philippines – Taxes on Distilled Spirits, Request for Consultations by the European Communities*, WT/DS396/1, Jul. 30, 2009; *Philippines – Taxes on Distilled Spirits, Request for Consultations by the United States*, WT/DS403/1, Jan. 18, 2010.

[302] Rep. Act No. 9334 effectively increased rates of excise tax on the same alcohol products. The DOF has since issued Revenue Regulation No. 03-2006 to implement Rep. Act No. 9334.

[303] TAX CODE, § 141 as amended. The National Internal Revenue Code is Rep. Act No. 8424 (1997).

[304] MERRILLS, *supra* note 159, at 233.

[305] Keisuke Iida, *Why Does the World Trade Organization Appear Neoliberal? The Puzzle of the High Incidence of Guilty Verdicts in WTO Adjudication*, 23 J. PUB. POL'Y 1, 2-3 (2003).

[306] *Japan – Alcoholic Beverages II*, Panel Report, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I; *Korea – Alcoholic Beverages*, Panel Report, WT/DS75/R, WT/DS84/R, adopted

issues.[307] At the outset,[308] the outlook is grim. This pending case simply highlights the power of the dispute settlement body of the WTO. Congress may be persuaded effectively to pass a law amending the NIRC despite the lack of support from the personalities directly affected—the industry, and in a manner that no other domestic lobby group can ever achieve.

Investment Disputes

Bilateral investment treaties are *lex specialis* as between the parties, and they are likely to remain so. The *AAPL v. Sri Lanka* case shows that such a treaty is effective in conferring jurisdiction on overseas arbitration tribunals. Since then, the caseload of ICSID has multiplied largely on the basis of the invocation of jurisdiction on the basis of the provisions in bilateral investment treaties. The explosion of litigation under NAFTA also demonstrates that, from the point of view of the foreign investor, creative litigation strategies can be employed to secure the rights of foreign investors. Unless investment treaties come to reflect a balance between the rights of the foreign investors and the regulatory concerns of the host states, their future viability will continue to be contested.[309]

Despite the country's pitfalls in investment negotiation and regulation, only two foreign companies have sued the Philippines on investment issues: SGS and Fraport. Both cases actually involve burning issues in investment treaty law—the umbrella clause and lawfulness of the investment as a condition for protection.

SGS v. Philippines involves an umbrella clause in the Switzerland and Philippines BIT. The tribunal however did not reach the same conclusion in an earlier case, SGS v. Pakistan because the language in the Swiss-Philippines BIT is a little more susceptible to interpretation. Nonetheless, umbrella clauses can be so cunningly drafted that it does not identify the source of the breach, and broad enough to be read very broadly to cover treaty and contract breaches to expand jurisdiction of ICSID tribunals. The foreign investor will be able to sue the Philippine government in case of any dispute in relation to the investment made by the investor.

Feb. 17, 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I; *Chile – Alcoholic Beverages*, Panel Report, WT/DS87/R, WT/DS110/R, adopted Jan. 12, 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R.

[307] *Canada – Certain Measures Concerning Periodicals*, Panel Report, WT/DS31/R and Corr.1, adopted Jul. 30, 1997, as modified by the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I.

[308] To be sure, the issues in the dispute may increase as the case progresses. As of this writing, the parties are still in the consultations stage.

[309] SORNARAJAH, *supra* note 27, at 267.

The irony here is that the Philippines relied on the holding of SGS v. Pakistan penned by former Supreme Court Justice and eminent international jurist Florentino P. Feliciano, and still was not able to convince the arbitral panel to apply the reasoning of the renowned Filipino jurist in favor of its case.

In Fraport, the issue was the lawfulness of the investment. For such an investment to be protected under a BIT, it must be one that is lawful under the law of the host country in accordance with, and subject to the requirements of the host country's law. Moreover, the making of investment itself must not involve a violation of the law of the host country or through the utilization of unlawful criminal or prohibited means. Fraport, through secret shareholder agreements, circumvented the Anti-Dummy Law, thinking that in a country such as the Philippines, their investment in a company that operates the new airport would not make economic sense unless the investors have greater control. The ICSID rendered a decision declaring Fraport's investment as not protected by the Philippines' BIT with Germany. ICSID is basically reminding the parties that a country would not protect a foreign investment that is illegal under its own laws. It has proved to be a Pyrrhic victory for the Philippines, because the amount of compensation for the expropriation is still being hotly contested at the arbitral level.

Twice burned in the investment tribunals, and with a spotty record in the WTO DSU,[310] there is a palpable reluctance on the part of the Philippines to participate in the international arbitral system. This aversion may have influenced Philippine negotiators as evidenced by its one and only bilateral PTA, the JPEPA.[311] Despite the breadth of protections, JPEPA does not provide investors a right to international arbitration, and in lieu thereof, the parties shall continue to negotiate for a mutually acceptable dispute resolution procedure and that, in the absence of an agreement, an investor may submit a dispute to "international conciliation or arbitration" only after receiving the express consent of the state-parties to the JPEPA.[312] Although entitled to express investment protections, Japanese investors are limited either to the Philippine courts or to the Philippine government's

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[310] *See* Deles & Romano, *supra* note 294; Roque, *supra* note 211.

[311] Ryan, *supra* note 177, at 754.

[312] *Id.*, at 755 (2008). (Art. 107 of the JPEPA reads: "[i]n the absence of a mechanism for the settlement of an investment dispute between a party and an investor of the other party, the resort to international conciliation or arbitral tribunal is subject to mutual consent of the parties to the dispute. This means that the disputing party, at its option or discretion, grant or deny its consent in respect of each particular investment dispute and that, in the absence of the express written consent of the disputing party, an international conciliation or arbitration tribunal shall have no jurisdiction over the investment dispute involved.").

diplomatic protection as a means of resolving investment-related disputes, neither of which would be particularly attractive to Japanese investors.[313] Although the mere grant of rights without simultaneously giving investors means to enforce those rights would result in a hollow and ineffective system, it is nonetheless quite remarkable that despite the Philippines' firm position against investment arbitration and the absence of access to any international dispute-resolution forum, Japan still signed the JPEPA,[314] and is probably the saving grace of an otherwise flawed agreement.

B. International Economic Agreements in Philippine Law

As the Philippines participates in the global economic community, enter into trade agreements and negotiate market access with other countries, and make full use of international economic relations to promote the national economy, policy-makers and negotiators must be intimately and routinely aware that commitments made through agreements under IEL must conform to the Constitution. There should be an awareness that IEL governs economic relations between states evidenced by entering into economic treaties and international agreements, in the national law and policy of states it refers to the marriage of foreign policy and economic policy. Thus, in exercising its power to regulate Philippine foreign relations and negotiate with other states, the Executive must be vigilant that substantive commitments made in economic agreements primarily involve economic sovereignty, and nothing will be binding as Philippine law unless that other political branch having power to regulate subjects of economic sovereignty—the Legislature—is consulted and participates meaningfully.

One of the implications of Constitutional guidelines on the foreign policy and economic objectives and the means of achieving them is that the primary policy actors—the Executive and the Legislative—are bound thereby. If the Philippines is to attain the goals of its foreign policy, it must have efficient, flexible, and democratic procedures, responsible to the majority will, and to the whole nation, for the making, modification, and abrogation of international agreements.[315] Executive officers must be able to act promptly and, hence, must be able to ascertain promptly that their action will be supported and implemented by the other branches of the government when that action corresponds with the majority will of the

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[313] *Id.*

[314] *Id*, 754-55.

[315] *See* Myres McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy. I*, 54 YALE L.J. 181, 186 (1945).

nation.[316] Naturally, where that link with the majority will is diluted, or the government is not accountable to its own people, the lack of ability of citizens to influence the terms of the agreement makes the notion of being closer to the people an empty one.[317] In the JPEPA for example, when weak governments such as the Philippines face a superior counterparty (Japan) and seek internal support from domestic constituencies to validate a legally questionable bilateral agreement, one of two things can happen: the public voices their opposition through their elected Senators, who then thumbs-down the agreement, causing great international embarrassment and plummeting diplomatic credibility but keeping domestic integrity intact, or, the agreement sails through against the winds of dissent, building international confidence that Filipinos can keep their word, but tying the hands of government so long as the agreement remains in force. The assessment of this struggle begins with how the Philippines makes what is international law, as binding as national law.

1. The Making of International Law as Philippine Law

No assessment of the interplay between international law—and by association, IEL—and municipal law is adequate without a flip through the fundamental systemic issues. Straddling half of the surface of the core of this dynamic is the monist-dualist debate. Dean Magallona notes that "as a theoretical issue, the relation of the two legal systems—international law and national law"—is usually presented as a competition between monism[318] and dualism.[319]

This debate should not detain this inquiry any further, for the framers of the Philippine Constitution have already selected the dualist view of legal systems by the language of Article II Section 2, which states that the Philippines "renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[320]

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[316] *Id.*

[317] Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 366 (2008).

[318] *See* MERLIN MAGALLONA, A PRIMER IN INTERNATIONAL LAW IN RELATION TO PHILIPPINE LAW 27 (1997) ("Monism adheres to a unitary theory of law, where both international law and municipal law are part of one singular whole. The monists assert the supremacy of international law even in matters within the domestic jurisdiction of states."); *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 34 (1985).

[319] MAGALLONA, *supra* note 318, at 34.

[320] BERNAS, *supra* note 195, at 61.

The Philippines as a *dualist* legal system, makes a distinction between municipal law and international law, as they belong to "different spheres, dictated by the fundamental difference between inter-state and intra-state relations."[321] Thus, international law becomes Philippine law in two ways—by *incorporation* of customary international law, and by *transformation* of "international conventions" or treaties into municipal law through a positive act by the Senate.[322] This is the other half of the dynamic of international law and domestic law.

Incorporation

The second part of Section 2 is the so-called incorporation clause. In incorporation, norms of international law are deemed part of national law.[323] As a constitutional mandate, the incorporation clause assumes the existence of international law which binds the Philippines as a State. It thus becomes a method by which the Philippines can carry out its obligations under international law within its territorial jurisdiction. Its effect is that international law as Philippine law creates legal rights and obligations within Philippine territory and regulates conduct of government functionaries and institutions as well as the relations of individual citizens with each other and with the government. This is what Dean Magallona calls the "internalization" of international law to ensure compliance with international law obligations within the Philippine territorial jurisdiction.[324]

The incorporation clause recognizes customary norms of international law and general principles of law as "generally accepted principles of international law" and declares them part of Philippine law.[325] Dean Magallona stresses, however, that only general international law is understood as forming "part of the law of the land" through incorporation, thus only customary international norms and general principles of law[326] are covered by the incorporation clause.[327] Thus, when international law norms

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[321] MAGALLONA, *supra* note 318, at 27

[322] *See id.*, at 33 (Dean Magallona notes that in Gibbs v. Rodriguez, the Supreme Court makes a distinction between a "law-creating factor" and "evidence of law" in adverting to Article 38 of the ICJ Statute. Sources of international law under 38(1)(a), (b), and (c), are "law-creating" sources, while 38(1)(d) is "evidence of law" because of its subsidiary nature.).

[323] *Id.*, at 28.

[324] *Id.*, at 35.

[325] *Id.*, at 32.

[326] Vienna Convention on the Law of Treaties, Article 38(1)(b)-(c), (May 23, 1969), 1155 U.N.T.S. 331

[327] MAGALLONA, *supra* note 319, at 36-37. Bernas adds that the principle of incorporation applies only to customary law and to treaties which have become part of customary law, a distinction which is sometimes blurred in Philippine jurisprudence. *See* BERNAS, *supra* note 195, at 61.

are "found" in international custom, it can be said that international law is also "found" in municipal law.[328]

Transformation

The transformation mode is capsulated by Article VII Section 21, which states that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." Transformation defines the requisite act which must be fulfilled before they become part of national law.[329] Under the treaty clause of the Constitution, international conventions or treaties of which the Philippines is a party, are recognized as valid and effective as part of domestic law and as source of international obligations if concurred in by the Senate and they have entered into force by their own terms.[330] It can be thus said conventional international law is "made" into Philippine law by virtue of the Senate's concurrence in the President's ratification of conventions or agreements and its subsequent entry into force.

This "making" of international law as Philippine law through the exercise of the Executive power to make treaties and international agreements involves two distinct phases: the actual making of the treaty,[331] the concurrence of the Senate in the President's ratification, and the entry into force of the treaty.[332]

Justice Isagani Cruz, in his book on International Law, describes the *treaty-making* process:[333]

> The usual steps in the treaty-making process are: negotiation, signature, ratification, and exchange of the instruments of ratification. The treaty may then be submitted for registration and publication under the U.N. Charter, although this step is not essential to the validity of the agreement as between the parties.
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> *Negotiation* may be undertaken directly by the head of state but he now usually assigns this task to his authorized representatives. These representatives are provided with credentials known as full powers, which they exhibit to the other negotiators at the start of the formal

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[328] *See* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

[329] MAGALLONA, *supra* note 319, at 28.

[330] *Id.*, at 32.

[331] BERNAS, *supra* note 195, at 906.

[332] *See* MAGALLONA, *supra* note 319, at 51.

[333] Pimentel v. Exec. Sec., G.R. No. 158088, 462 SCRA 622, Jul. 6, 2005. A distinction should be made between making of treaties and the making of international law as evidenced by treaty as Philippine law.

> discussions. It is standard practice for one of the parties to submit a draft of the proposed treaty which, together with the counter-proposals, becomes the basis of the subsequent negotiations. The negotiations may be brief or protracted, depending on the issues involved, and may even "collapse" in case the parties are unable to come to an agreement on the points under consideration.
>
> If and when the negotiators finally decide on the terms of the treaty, the same is opened for *signature*. This step is primarily intended as a means of authenticating the instrument and for the purpose of symbolizing the good faith of the parties; but, significantly, it does not indicate the final consent of the state in cases where ratification of the treaty is required. The document is ordinarily signed in accordance with the *alternat*, that is, each of the several negotiators is allowed to sign first on the copy which he will bring home to his own state.
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> *Ratification*, which is the next step, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representatives. The purpose of ratification is to enable the contracting states to examine the treaty more closely and to give them an opportunity to refuse to be bound by it should they find it inimical to their interests. It is for this reason that most treaties are made subject to the scrutiny and consent of a department of the government other than that which negotiated them.
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> The last step in the treaty-making process is the *exchange of the instruments of ratification*, which usually also signifies the effectivity of the treaty unless a different date has been agreed upon by the parties. Where ratification is dispensed with and no effectivity clause is embodied in the treaty, the instrument is deemed effective upon its signature. [*emphasis supplied*]

Negotiation and treaty-making are purely Executive functions. However, once a treaty is made, it does not automatically bind the state. As the Vienna Convention itself states, ratification is simply one of several modes of the State's expression of consent to be bound by the treaty.[334] Once consent has been expressed through ratification, that consent has to be concurred in by the law-making body of the state.

Thus, so long as the Senate gives its consent to the ratificatory act by the President in signing, acceding, or accepting the international trade

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[334] *See also* AUST, *supra* note 119.

agreement or treaty, the Philippines will have completed all domestic requirements for that agreement's entry into force, and is, by virtue of the transformation clause, part of the Philippine domestic legal framework. So also, if the Executive determines that a trade agreement is an Executive Agreement not requiring Senate concurrence, after such agreement has been signed, it is also considered part of Philippine law.

A portion of the *Tañada* ruling touching on this issue must give us more than pause. The Court, disagreeing with the point of the petitioners that national sovereignty is eroded because of the ratification of the WTO Agreements, said "... as shown by the foregoing treaties (referring to the U.N. Charter, U.N. human rights conventions), a portion of sovereignty may be waived without violating the Constitution, based on the rationale that the Philippines 'adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of ... cooperation and amity with all nations.'"[335] This statement foments confusion, is doctrinally inaccurate, and should be treated as *obiter*. With respect, this is flat-out **wrong**. The issue is whether the government can, through economic *treaty*, "waive" sovereignty in violation of the Constitution. Article II Section 2 which the Court cites is of absolutely no relevance. A treaty becomes "valid and effective"[336] as opposed to "part of the law of the land"[337] when two-thirds of the Senate concurs in the President's ratification. Even indulging the strained argument by assuming a CIL norm were to be incorporated into Philippine law by virtue of Article II Section II, it cannot possibly trump the Constitution. For "part of the law of land" only refers to statutes and all issuances having the effect of law that are *inferior* to the Constitution.[338]

2. Executive Power over Foreign Affairs and Treaty-Making, Subject to Legislative Concurrence

The presidential foreign affairs power affecting international agreements is among the most important executive branch powers, and the globalization of economic and political relations has increased their importance.[339] The principal instrument by which governments can, and must, cooperate with other governments in that total institutional process of

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[335] 338 Phil. 546, 596 (1997).

[336] CONST. art. VII, § 21.

[337] art. II, § 2.

[338] *See* MAGALLONA, *supra* note 319; *See also* BERNAS, *supra* note 195.

[339] Phillip Trimble & Alexander Koff, *All Fall Down: The Treaty Power In The Clinton Administration*, 16 BERKELEY J. INT'L L. 55, 55 (1998).

reciprocities and counter-reciprocities which we call "foreign affairs" or "foreign relations" is, of course, the *agreement*, in all its many manifestations.[340] As the primary tool of the trade, as it were, in IEL is the treaty/international agreement, the foreign affairs power of the Executive has gained such prominence that the Congress has been bypassed in the formulation, negotiation, and making of international agreements to govern economic relations of the Philippines with other states.

The statement that the power to negotiate and enter into international agreements is a function of the foreign affairs power of the Executive involves the operation and harmonization of three Constitutional provisions: Sections 2 and 7 of Article II, and Section 21 of Article VII. The idea of the foreign affairs power of the Executive involves primarily two concepts: how international law is made, and the foreign policy behind it. The "making"[341] of international law through the exercise of the power to enter into treaties and international agreements involves two distinct phases: actual making of the treaty and negotiation.[342]

The Foreign Affairs Power

Article II Section 7 is a statement of state policy, the very first on the list of state policies. It is the foreign policy clause of the Constitution.

> **Section 7.** The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.

Bernas explains that the word "relations" covers the whole gamut of treaties and international agreements and other kinds of inter-state intercourse.[343] Thus, foreign relations necessarily includes not just international *political* relations, but also those of an *economic* character. Since international economic agreements are the ultimate expression of a state's foreign economic relations, therefore, pursuant to Section 7, the paramount consideration in entering such agreements shall also be national sovereignty, territorial integrity, national interest, and the right to self-determination.

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[340] *See* McDougal & Lans, *supra* note 315, at 186.

[341] As opposed to "finding," which is appropriate for customary international law. *See* Henkin, *supra* note 328.

[342] BERNAS, *supra* note 195, at 906.

[343] *Id.*, at 72.

As applied to IEL, all the above provisions dovetails with the Trade Policy clause,[344] which is in turn informed by Article II Section 19;[345] hence, they must be read and understood together. Applying the analysis in Part II.A *supra*, since the Philippines' "relations with other states"[346] includes "all forms and arrangements of exchange"[347] which may take the form of a "treaty or international agreement"[348] if it partakes of an instrument involving economic sovereignty, then apart from serving the "general welfare"[349] and on the basis of "equality and reciprocity,"[350] it must also take into account, as a "paramount consideration,"[351] "national sovereignty, territorial integrity, national interest, and the right to self-determination."[352] Doing so ensures that economic self-reliance, economic independence, and effective Filipino control of the economy are observed,[353] as the state tries to achieve balanced economic development through the sustained increase in goods and services produced, equitable distribution of wealth, and raising the quality of life through expanding productivity.[354]

This is of course a semantic harmonization that should not be entirely dispositive or determinative of the validity or Constitutionality of an economic exchange. It is merely illustrative of the hypothesis that, at least on a textual level, how contradictory, convoluted, and nebulous Constitutional provisions are with respect to IEL. This semantic confusion does not provide a meaningful, intelligible basis for Constitutional guidelines government policy-makers, negotiators, and implementors ought to observe and adhere to in conducting the international economic relations of the Philippines. This may also be one of the reasons why, during the JPEPA hearings in the Senate, trade negotiators fail to give reasoned and cohesive answers to queries from Senators on whether ratifying the JPEPA is truly in the best interest of the Philippines. In short, the Constitution, for its verbosity and comprehensiveness on economic areas, and perhaps by reason thereof, fails to provide the government any meaningful or reasonably sound guidelines and parameters in engaging in IEL.

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[344] CONST. art. XII, § 13: "The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity."

[345] "The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos."

[346] CONST. art. II, § 7.

[347] art. XII, § 13.

[348] art. VII, § 21.

[349] art. XII, § 13.

[350] § 13.

[351] art. II, § 7.

[352] § 7.

[353] § 19.

[354] art. XII, § 1.

The Making of Economic Treaties as law: an Executive-Congressional power

In Part II.B.1 *supra*, conventional international law that is sourced from international convention, treaty or international agreement is made binding and effective in the Philippines as law through transformation. Such transformation is done through a positive act by the Senate, as mandated by Article VII Section 21 of the Constitution.

It is unquestionable that the Executive branch, perhaps more through uninterrupted practice and custom, has the sole authority to negotiate, sign, and enter into treaties and international agreements,[355] which is generally characterized as "making" of the treaty.[356] The treaty-making process ends once the President ratifies the act of his diplomatic representative who signed the treaty. Ratification by the President is "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty."[357] But in order for international treaty law to become municipal law, i.e. become binding as law on the Philippines, the Senate must signify its concurrence. Hence the Senate, elected at large by the people in their sovereign capacity, must first consent to the Executive's ratification of the agreement by signifying its concurrence in order for any treaty to have the force and effect of municipal law.[358] Describing the Senate's role in the ratification process, then-Justice Puno, in his *ponencia* in *Pimentel v. Executive Secretary*, wrote that the Constitution provides a limitation to the President's treaty-making power by requiring the concurrence of 2/3 of all the members of the Senate for the validity of the treaty entered into by him.[359]

Yale Law Professor Myres McDougal wrote of the legislative-executive dynamic in the making of international law under the U.S. Constitution, which is very similar to the Philippine version:[360]

> The wise statesmen who drafted the Constitution of the United States not only gave the President a *permissive* power, "with the advice and consent of the Senate," "to make treaties, provided two-thirds of

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[355] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Pimentel v. Exec. Sec., G.R. No. 158088, 462 SCRA 622, Jul. 6, 2005. *See however* McDougal & Lans, *supra* note 315, at 203.

[356] It is emphasized that treaties and international agreements in and of themselves are not international law. As "international conventions," they are sources of international law, and constitute direct evidence of a state's consent to be bound by the obligations therein.

[357] Vienna Convention on the Law of Treaties, Article 2 (1)(b), (May 23, 1969), 1155 U.N.T.S. 331.

[358] MAGALLONA, *supra* note 318, at 32. The Vienna Convention on the Law of Treaties does not distinguish between treaty and international agreement.

[359] G.R. No. 158088, 462 SCRA 622, Jul. 6, 2005.

[360] *See* McDougal & Lans, *supra* note 315, at 186.

> the Senators present concur," but they also gave both to the President and to the whole Congress broad powers of control over the external relations of the Government which are meaningless if they do not include the instrumental powers, first, to authorize the making of intergovernmental agreements and, secondly, to make these agreements the law of the land.

Prof. McDougal's observation on the treaty power in the U.S. Constitution is highly persuasive when the treaty power in the Philippine Constitution is scrutinized. It is respectfully submitted that the Senate—more felicitous and deserving of role beyond a mere "limit" or "check"—is really the second prong of a two-prong process of making international law, in the plain language of the Constitution, "valid and effective," or having the effect of binding municipal law. Congress is not only a check on the executive from a separation of powers analysis, but as a functional analysis of the dynamic between international and municipal law, it is an indispensable cog of the larger process that makes "international law part of the law of the land."[361] For without the Senate's concurrence, which does not even have to be unanimous, and strictly speaking does not involve the lower house, the treaty would never bind the state. Unlike when the President's inaction on a bill submitted by Congress for his signature leads to its passage after a period of thirty days,[362] the Senate's inaction or rejection of the President's ratification will never lead to its entry into force. Thus the Senate's non-concurrence effectively kills the treaty as a matter of domestic law, and exposes the state to potential liability and leads inevitably to strained diplomatic relations with the foreign states affected.[363]

Treaty v. Executive Agreement

A major aspect of the interplay of foreign affairs and commerce power is the standards in determining the treaty-status of an international agreement. The vague and ill-fitting requisites for "treatifying" an agreement become all the more important in economic agreements which can be extremely onerous for the state and could expose it to litigation. It has been pointed out that under previous iterations of the treaty clause, Senate concurrence was required only in treaties, whereas in the 1987 Constitution, concurrence is now required for treaties and international agreements, which

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[361] CONST. art. XII, § 12.

[362] art. VI, § 27 (1).

[363] A prime example is the rejection by the Senate of the extension of the Military Bases Agreement between the U.S. and the Philippines. Amid a politically charged environment and public animosity, the Senate was not able to procure the necessary 2/3 vote.

begs the question of whether all international agreements are to be subject to the Senate's consent, and if no, which ones.[364]

In the case of *USAFFE Veterans Association Inc. v. Treasurer of the Philippines*,[365] a minor point was made that international agreements of a less formal type may be entered into by the Chief Executive and become binding without the concurrence of the legislative body. But the question posed in the above paragraph is the main issue in the 1964 case of *Commissioner of Customs v. Eastern Sea Trading*.[366] It was held that concurrence is required in the making of "treaties," which, the Court said, are distinct and different from "executive agreements," which may be validly entered into without such concurrence.[367] The *ponente* further quotes a 1940s U.S. State Department Assistant Secretary, Francis Sayre, to support the theory that there exists a type of international agreement that is lower in prestige than a treaty and that does not require Senate concurrence despite the fact that the 1935 Constitution does not make such a distinction.

But how do we know that a treaty or international agreement is one that requires concurrence or is an executive agreement that does not? Again, the Court in *Eastern Sea Trading* held: "[i]nternational agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangement of a more or less temporary nature usually take the form of executive agreements."[368]

Eastern Sea Trading and *USAFFE Veterans* were both decided under the 1935 Constitution, which does not distinguish between a treaty and an executive agreement.[369] The 1973 Constitution, however, contained a curious provision. Section 14(1) of Article VIII—the 1973 version of the treaty clause—still refers to treaties but contains a proviso not found in the 1935 version and not carried over to the 1987 version, "[e]xcept as

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[364] BERNAS, *supra* note 195, at 903.

[365] 105 Phil 1030 (1959) (hereinafter *USAFFE*).

[366] G.R. No. 14279, 3 SCRA 351, Oct. 31, 1961 (hereinafter *Eastern Sea Trading*).

[367] *Id.*, at 355-56.

[368] *Id.*, at 356.

[369] The treaty clause under the 1935 Constitution reads as follows: Section 10. ... (7) *The President shall have the power, with the concurrence of two-thirds of all the Members of the Senate to make treaties*, and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers, and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines.

otherwise provided in this Constitution."[370] That proviso refers to Section 15 of Article XVI, which is the Article on the National Economy and Patrimony.[371] Section 15 reads: "[a]ny provision of paragraph one, Section fourteen, Article Eight and of this Article notwithstanding, the President may enter into international treaties or agreements as the national welfare and interest may require."[372] This appears to provide textually demonstrable basis for the proposition that the President may indeed sign, ratify, and enter into force executive agreements during the effectivity of the 1973 Constitution without the need to secure Congressional consent. A reasonable inference would be that Section 15 of Article XVI in the 1973 Constitution expressly "constitutionalizes" the rulings in *USAFFE Veterans* and *Eastern Sea Trading*.[373]

The 1987 Constitution Treaty Clause now refers to "treaty or international agreement." The distinction of course is irrelevant under the Vienna Convention on the Law of Treaties. But it makes all the difference in the world as to how the treaty or international agreement binds the Philippines with the effect of law. The general rule is that a treaty or international agreement becomes "valid and effective" upon a two-thirds vote of the Senate. Bernas observes that the executive agreements doctrine that executive agreements become binding without needing Senate concurrence carried over into the 1987 Constitution.[374] Although the old Section 15 of Article XVI, which explicitly authorizes executive agreements, was left out from the 1987 Constitution, Bernas opines that the practice remained. Thus, even without express Constitutional mandate, when the President enters into executive agreements, i.e. those that fall under the criteria set in *Eastern Sea Trading*, of a less formal character under the *WHO* case, or merely implements other treaties or established national policy, he is merely carrying out his duty to "ensure that the laws be faithfully

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[370] The treaty clause under the 1973 Constitution, which is found under Article VIII (Batasang Pambansa), reads as follows: Sec. 14. (1) Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the Batasang Pambansa. SISON, *supra* note 196, at 62.

[371] now Article XII of the 1987 Constitution.

[372] SISON, *supra* note 196, at 62.

[373] In any case, in *World Health Organization v. Aquino*, a case decided under the 1973 Constitution, the Court did not dwell much into Section 14(1) of Article VIII in relation to Section 15 of Article XVI, satisfying itself with adherence to the precedent established in *USAFFE Veterans* and *Eastern Sea Trading* cases. *See* BERNAS, *supra* note 195, at 905, *citing* World Health Org. v. Aquino, 48 SCRA 242 (1972) and USAFFE Veterans Ass'n Inc. v. Treas. of the Phils., 105 Phil 1030 (1959).

[374] The only Supreme Court case *directly* touching on the treaty-making power of the President under the 1987 Constitution was *Pimentel v. Executive Secretary*, which concerns a *mandamus* petition to compel the Executive Secretary and the DFA to transmit the *signed* and *ratified* Convention creating the International Criminal Court otherwise known as the "Rome Statute" to the Senate for concurrence.

executed."[375] This presupposes that there is a law validly made and in force which establishes such policy and triggers the Executive's constitutional duty. More to the point, there should already have been a preexisting treaty or international agreement that has already passed Congressional muster and has the effect of domestic law, which would then the basis for the executive agreement, because as the name suggests, executive agreements merely *execute*. This has grave implications for the economic sovereignty of the Philippines which will be discussed in the next section.

The treaty-executive agreement issue in international law and domestic legal order of the Philippines is part of the larger debate of the legitimacy of executive policy and decision-making on matters of economic sovereignty that the people decide in their sovereign capacity. This debate is not endemic to the Philippines. As referenced to by the Court in *Eastern Sea Trading*, the executive agreement is an American creation used to facilitate consensus on divisive foreign affairs issues which required Congressional imprimatur.[376] It was however not without controversy, for the institutionalized bargain completely eviscerated the treaty clause, which had fallen into desuetude. The quandary is summed up by Prof. Ackerman, "[h]ow did Americans come to the point where they undertake the most solemn international obligations through a procedure in which the House of Representatives joins the Senate, and simple majorities in both Houses serve to commit the nation?"[377] His answer was three-fold: efficacy, democracy, legitimacy.[378] The congressional-executive agreement issue has attracted much scholarly exchange and sowed confusion among the academia. Two such academics deserve mention: Professor Laurence Tribe of Harvard Law and Professor Bruce Ackerman of Yale Law.

The Tribe-Ackerman Debate

The views of two preeminent legal scholars on the constitutionality of the hybrid congressional-executive agreement took center stage during the Congressional hearings on the approval of the Uruguay round results and the establishment of the WTO.[379] Prof. Tribe considers U.S. trade agreements effectuated by means other than by treaty, i.e. advice and consent through supermajority Senate vote, as unconstitutional because the

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[375] BERNAS, *supra* note 195, at 905-06, *citing* CONST. art. VII, § 17.

[376] *See* Francis Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 755 (1939).

[377] Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 HARV. L. REV. 799, 802 (1995).

[378] *Id.*, at 916.

[379] For a third person analysis of the two sides of the debate between two academic giants *see* Peter Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001).

Constitution itself speaks of no other method for binding the nation to international commitments.[380]

Prof. Ackerman and Prof. David Golove on the other hand believe that the congressional-executive agreement was introduced as a legitimate alternative to treaty-making, formulated by American legal scholars and legitimated in turn by the American people and the political branches, to find a way to avoid the central disaster of the aftermath of the First World War and probably set the stages for the Second—the defeat of the Versailles Treaty at the hands of a Senate minority and rejection of the League of Nations.[381] This hybrid agreement and the inter-branch approval and vetting mechanism to make it binding was designed to prevent deadlocks or paralysis between the Senate and the President on life-and-death issues of American foreign policy, and in a time of internecine relations and hotbeds of ideological divide.[382] Ackerman's thesis has pragmatist and realist undertones, and with keen insight into the history of U.S. foreign policy, highlights the instances when tension could have been avoided and decisions could have been made legitimately had the players recognized the lesser importance of legal formalism in American foreign relations law:[383]

> Rather than sacrifice the substance of foreign policy for a formal victory, the President and Congress modernized the treaty-making system by adapting the techniques they had used to transform domestic constitutional law in the 1930s. After all, it was these New Deal techniques that allowed the country to weather the economic storms that had destroyed democracy in Europe. It was therefore entirely appropriate to rely on them once again to express the will of the people rather than place undue pressure upon the peculiarly dysfunctional formalisms of Article V (providing for a procedure for amendments to the U.S. Constitution).

Ackerman argues that the global political (the two World Wars) and economic (Great Depression) crises also led to "constitutional" crises within the country, and the policy-makers realized the need for a mechanism that best ensures and promotes U.S. interests domestically and abroad. For a country such as the U.S. with its uncontested place in world affairs and the prime mover *par excellance* in international economic relations and its unique federal structure, a congressional-executive agreement made a lot of sense

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[380] Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

[381] Ackerman & Golove, *supra* note 377, at 808-10. *See also* Spiro, *supra* note 379, 79 Tex. L. Rev. 961 (2001).

[382] Ackerman & Golove, *supra* note 377.

[383] *Id.*, at 916.

and lends support for the further erosion of the "Senate monopoly" in the treaty-making process.

Though Ackerman's arguments are sound and highly persuasive, Tribe's thesis fits more squarely with the Philippine model. Prof. Tribe was right on the money when he remarked on the absence of any study by Ackerman on the substance of the trade agreements that can be subjected to the congressional-executive bargain:[384]

> They [Ackerman and Golove] need not do so under their broad theory, for that theory says that any international agreement related to foreign commerce, no matter how intrusive on state or national sovereignty, may be approved as a congressional-executive agreement through a simple bicameral majority. Under that view, if an agreement is related to foreign commerce, then precisely what the agreement would accomplish and how it would do so are irrelevant to whether the agreement must be processed as a treaty and subjected to the stringent requirement of supermajority Senate approval.

For Tribe, the issue of whether an economic agreement should rightfully be subjected to the Senate's advice and consent ultimately turns on the substance of the agreement itself, not on the historicity or circumstantial context for which deviating from the Treaty Clause in the U.S. Constitution would otherwise be justified. Using Prof. Tribe's framework, "what the [economic] agreement would accomplish" would refer to its market access and liberalizing character, and "how it would do so" point to provisions in the agreement that ensure legal certainty and protection of investments or further access in the host state, promises of non-discriminatory behavior, as well as consent to settling dispute outside the domestic adjudicatory system. These matters should have primary relevance to whether the agreement has to be conferred treaty-status and sent to the Senate. Thus whatever the other details are, the impact of an agreement on national economic sovereignty must ultimately determine whether the international economic agreement constitutes a treaty, a point forcefully developed by Professor Anne-Marie Slaughter.[385]

> The degree to which an international agreement constrains this [popular] sovereignty ... depends on the extent to which the provisions of such an agreement have a *direct impact* on *matters normally regulated* by state and federal legislative processes. Where an

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[384] Tribe, *supra* note 380, at 1252.

[385] *Id.*, at 1267-68, *citing* Letter from Anne-Marie Slaughter, Professor, Harvard Law School, to Sen. Ernest F. Hollings 2-01 (Oct. 18, 1994).

> international agreement effectively supersedes or directly constrains ordinary state and federal law-making authority, the people have in effect agreed to delegate their sovereignty, not to the state or federal governments, but to the federal government acting in concert with a foreign government or governments. ... The treaty-making process is an alternative legislative process to be carried out in conjunction with a foreign nation. The process involves both a delegation and a subsequent constraint on the sovereignty of the people of the United States under international law. It follows that the treaty-making process is hedged with special safeguards, requiring an unusual degree of deliberation and consensus... The Senate is accountable to the people as a whole, but also ensures the equal representation of the states, sovereign entities in their own right... Finally, the Senate must give its consent by a super-majority of two thirds, ensuring that the interests of the people and the states cannot be bargained away to a foreign nation by a simple majority.

The last line of the above quote is normally the stuff of protests of leftist groups, NGOs and economic nationalists rather than thoughtful armchair academics. It is actually the crux of the entire system upon which Philippines makes international agreements, arrived at through negotiations and bargaining away of economic resources and rights thereto, and subjects such agreements to an approval process sanctioned at least in theory by the people through their elected representatives. The "matters normally regulated" are the entire Article XII of the Philippine Constitution and the Article II guidelines, some of which even authorize Congress to pass a law regulating specific economic activity. These are matters that the Constitution mandates numerical equity restrictions and local capital participation or collaboration. These are matters which intrude into the very decision-making authority and policy space needed to exercise such authority.

Conversely, just because the broad and general subject matter of an economic agreement refers to the economic policy provisions of the Constitution does not necessarily mean that they automatically have the status of treaties. An agreement may be as broad and motherhood as the Framework Agreements of ASEAN, but if it states nothing specific on the modalities or merely serves as a prelude to other agreements with more direct impact on domestic economic matters, such agreement is less likely to be a treaty. The test should be that if, at some point in the process, the decision-making ability or area of effective control of the state over a particular economic area or sector is in any way impaired by the agreement, such that going against the agreement exposes the state to dispute settlement, or that future policy-making or law-making is already "colored"

by the norm enunciated in an existing agreement, it should be more or less considered a treaty.

It is submitted that the Ackerman model will not be feasible legally simply because the Philippine Constitution is explicit, and the Philippine negotiating and foreign affairs experience sees no mutual alignment with the aims and benefits of such an approach. Nowhere in the Philippine Constitution does it specify a procedure by which the Executive may enter non-treaty international agreements.[386] Bernas' view on the carrying over of the 1935-1973 Constitutional state practice of executive agreement perpetuates a flawed and ill-fitting device, picked up from an American State official source with a completely different world-view from his counterparts in the DFA for making IEL binding and effective as domestic law. The power-politics in international trade Americans are so accustomed to justify continuing inter-branch compromises in securing authority to bind the government through IEL. But as the IEL regime becomes more rules-based, with supranational institutions ready and competent to interpret policy and decide disputes, and given the inherent asymmetries in negotiating capacities and developmental inequalities between states in global trade and investment, it is much more important for developing countries such as the Philippines to involve their elected representatives, make them aware of the effect of these agreements, and convince them of the benefits.

C. Distribution of Powers over International Economic Affairs: Inevitable Collision between the Power of Congress to Regulate Commerce and the Power of the Executive to Enter Into and Negotiate Agreements

The major source of institutional and constitutive tension with respect to IEL is the intersection of the foreign affairs and commerce powers. While it is the Legislature that determines economic policy through the passage of laws that regulate commerce, it is the Executive that represents the Philippines in trade or investment negotiations and makes binding commitments in the exercise of its economic sovereignty.

Yet there is not always a bright-line distinction on what each branch can and cannot do when it comes to IEL. For as will be demonstrated below, the story of inter-branch cooperation on IEL focusing on the

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[386] Tribe, *supra* note 380, at 1267-68. ("Although this omission could in theory imply a genuine 'hole' in constitutional 'space,' whereby no branch of the federal government is empowered to enter the United States into binding non-treaty agreements with foreign nations, such a conclusion would radically limit the power of the federal government over foreign affairs.").

formulation, negotiation, and ratification of IEL instruments, as with many other political issues, is the story of inter-branch tension. The dilemma is that of the problem of a law-making body exercising its power and control over international economic policy while accommodating the necessity of the President acting and negotiating through spokesmen having authority to commit the entire nation's economic sovereignty.[387]

1. Congressional Power to Regulate Commerce as a Function of Its Constitutional Tariff-Setting Power and Delegation to the Executive

In Part II.A the provisions of the 1987 Constitution concerning economic policy—the specific guidelines to observe in formulating and executing domestic economic policy, trade policy, including Filipino preferences, equity reservations and limitations over important economic sectors were outlined. Some provisions of the Constitution directly impose equity restrictions. Some expressly instructs Congress to pass a law governing the implementation of policies on certain sectors.

Unlike the U.S. Constitution, which enumerates, under Article 1 Section 8, the many powers of Congress, including the power "to regulate Commerce with foreign Nations," and under Section 10, "to make all Laws which shall be necessary and proper for carrying into Execution the Foregoing powers,"[388] the Philippine Constitution does not make such explicit reference.[389] Although the Constitution is silent on which branch of government regulates commerce,[390] it may be inferred from the nature of the powers inherent in Congress and those express powers granted by the Constitution. As noted in an older work of Bernas, Congress has plenary power over trade and commerce.[391] The plenary power that most inheres in Congress is the police power.[392] It should not occupy much room for debate

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[387] JACKSON, ET AL, *supra* note 298, at 73.

[388] The Necessary and Proper Clause has been understood to be exceedingly broad, extending congressional authority to all "legitimate" ends and "appropriate" means. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[389] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2009) (Describing the Commerce Clause as being "interpreted today as applicable to economic interactions, a broader meaning referring to all forms of intercourse in the affairs of life, whether narrowly economic or mediate by explicit markets.").

[390] *See* Part II.A *supra*, enumerating Philippine Constitutional provisions where Congress is given the responsibility of enacting laws on specific economic subject matter.

[391] Castro & Pison, *supra* note 260, at 361, *citing* JOAQUIN BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 66. (1988 ed.).

[392] *See* Ichong v. Hernandez, 101 Phil 1155 (1957), where the Supreme Court viewed the nationalization of the retail trade industry by legislative fiat as an exercise of police power.

that the power to regulate commerce partakes of the police power, which is legislative in nature.[393]

The Tariff-Setting Power

Taxation is perhaps the most recognizable attribute of sovereignty, and the power to impose taxes is without question the strongest of all the powers of government.[394] As a purely legislative function, the power to tax is so powerful and sweeping in its reach that the Constitution imposes limits on the exercise of that power, as well as its responsible delegation.

Taxation is also an indispensable device for the regulation of international trade, and many of the constitutive functions and obligations in IEL deal with the power to tax. The tax imposed on products as they enter the territorial jurisdiction of a state—the tariff—is perhaps the single most talked about, debated, critiqued, praised, defended, and negotiated topic in international trade law. Tariffs are the conventional trade policy tool employed to regulate the entry of imports and thus are the primary instrument for international trade regulation, and the only "accepted" form of trade restraint.[395] As a domestic instrument used to promote the national economy, tariffs are still considered the primary tool for the internal regulation and external negotiation of trade. The raising and lowering of tariffs has the effect of restricting or liberalizing the flow of goods entering the state. Inter-country and multi-country tariff reductions still form the meat of trade negotiations, although after eight successive rounds of tariff reductions at the multilateral level, majority of tariffs on a majority of products are already at their lowest levels since 1947.[396]

Unlike the Foreign Commerce Clause of the U.S. Constitution, Philippine Constitutions recognize the inherently legislative character of the power to tax, and thus, merely sets limits on the exercise of the taxing power

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[393] In practice, it has always been a joint exercise. The President addresses both Houses and apprises the members of the state of the nation, including the economy. In charting the economic course for the fiscal year, the President sets out economic goals and how he plans to achieve them, the options of which may include trade strategies, countries to enter into agreements with, multilateral treaties to sign, alliances to be formed, and so. He then recommends legislation that would help him achieve those goals. Congress may or may not act, or acting, either swiftly or glacially, with the speed of action directly proportional to the political capital invested. Congress, for its part, rarely acts on its own; budget proposals, for instance, emanate from the Executive agency involved, then deliberated on in Committee, then in plenary, approved and submitted to the President to sign, then is passed into law and the money comes out. Proposals for legislation on economic matters do originate from the singularity of a vacuum; the Senator or Congressman usually acts as a sponsor of a bill the original draft of which is crafted by the agency involved or NGO or interest group.

[394] Hongkong & Shanghai Banking Corp. vs. Rafferty, G.R. No. 13188, 39 Phil. 145, Nov. 15, 1918.

[395] LOWENFELD, *supra* note 34, at 31.

[396] *See* MAVROIDIS, *supra* note 79.

and the parameters for its delegation. Article VI, Section 28 of the 1987 Constitution enumerates the limits on the inherent and otherwise almost unlimited power to tax.[397]

> **Section 28. (1)** The rule of taxation shall be uniform and equitable. The Congress shall evolve a progressive system of taxation.
>
> **(2)** The Congress may, by law, authorize the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government.

Section 28(2) of Article VI is the Philippines version of the Foreign Commerce Clause. With its essential elements almost unchanged from the 1987 Constitution down to the 1935 version, the Philippine Foreign Commerce clause authorizes Congress to delegate the power to impose tariffs to the President. The delegation has taken the form of the Tariff and Customs Code. The 1957 Tariff and Customs Code, or R.A. 1937, was the first tariff law drafted by an all-Filipino technical group, enacted by an all-Filipino Congress, and approved by a Filipino President.[398]

Tariff Legislation[399] *and International Trade Agreements*

Under the current Tariff and Customs Code, the President can modify tariffs in two ways. The first method is through Section 401,[400] the Flexible Tariff Clause. The Clause is an express delegation of the taxing power but contains limitations and restrictions as required by Section 28(2)

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[397] BERNAS, *supra* note 195, at 773.

[398] I MONTANO TEJAM, COMMENTARIES ON THE REVISED TARIFF AND CUSTOMS CODE OF THE PHILIPPINES (4th Edition 1983).

[399] The development of tariff legislation in the Philippines runs along the lines of U.S. tariff history. *See* Harold Hongju Koh, *Congressional Controls On Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191 (1986) at 1194; JACKSON, ET AL, *supra* note 298.

[400] "**SECTION 401.** Flexible Clause.

a. In the interest of national economy, general welfare and/or national security, and subject to the limitations herein prescribed, the President, upon recommendation of the National Economic and Development Authority (hereinafter referred to as NEDA), is hereby empowered: (1) to increase, reduce or remove existing protective rates of import duty (including any necessary change in classification). The existing rates may be increased or decreased to any level, in one or several stages but in no case shall the increased rate of import duty be higher than a maximum of one hundred (100) *per cent ad valorem*; (2) to establish import quota or to ban imports of any commodity, as may be necessary; and (3) to impose an additional duty on all imports not exceeding ten (10) *per cent ad valorem* whenever necessary: *Provided*: That upon periodic investigations by the Tariff Commission and recommendation of the NEDA, the President may cause a gradual reduction of protection levels granted in Section One Hundred and Four of this Code, including those subsequently granted pursuant to this section.

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of Article VI of the 1987 Constitution, the most important of which are: a 100% ad valorem ceiling, an investigation and public hearings by the Tariff Commission, and actual modification allowed only when Congress is not in session. There is also no floor, i.e. the tariffs are reducible to zero percent.[401]

The second method is through Section 402,[402] also known as the Reciprocal Trade Agreements Clause. The inclusion of Section 402 is a direct influence of the 1934 Trade Act and is also an express delegation of authority to modify import duties, but specifically in consonance with an express statutory authority to enter into trade agreements with other countries, for the purpose of expanding foreign markets for Philippine products.[403] According to a tariff commentator, Section 402 authorizes the President to enter into trade agreements with foreign countries without the necessity of submitting it to the Senate for ratification.[404] The Philippines does not have the complicated and highly political tariff policy structure of

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[401] In 1978, President Marcos, exercising his Martial Law Powers, passed Presidential Decree No. 1464, and effected a significant change in the law. Section 401 under P.D. 1464 removed all quantitative and time limitations on the President's delegated tariff-setting power, which is claimed to be in disregard of Article VIII, Section 17(2) of Marcos' own Martial Law Constitution. See Feliciano, *supra* note 143, at 17

[402] "**SECTION 402.** Promotion of Foreign Trade.

a. For the purpose of expanding foreign markets for Philippine products as a means of assistance in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relations between the Philippines and other countries, the President, is authorized from time to time:

(1) To enter into trade agreements with foreign governments or instrumentalities thereof; and

(2) To modify import duties (including any necessary change in classification) and other import restrictions, as are required or appropriate to carry out and promote foreign trade with other countries: Provided, however, That in modifying import duties or fixing import quota the requirements prescribed in subsection "a " of Section 401 shall be observed: Provided, further, That any modification of import duties and any fixing of import quotas made pursuant to the agreement on ASEAN Preferential Trading Arrangements ratified on August 1, 1977 shall not be subject to the limitations of aforesaid section "a " of Section 401.

b. The duties and other import restrictions as modified in subsection "*a*" above, shall apply to articles which are the growth, produce or manufacture of the specific country, whether imported directly or indirectly, *with which the Philippines has entered into a trade agreement*: Provided, That the President may suspend the application of any concession to articles which are the growth, produce or manufacture of such country because of acts (including the operations of international cartels) or policies which in his opinion tend to defeat the purposes set in this section; and the duties and other import restrictions as negotiated shall be in force and effect from and after such time as specified in the Order.

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[403] In the very first version of the Tariff and Customs Code (Rep. Act No. 1937) in 1957, Section 402 or the Trade Agreements Clause was granted a lifetime of only five years after the Code enters into force within which the President can use the authority to modify tariffs pursuant to trade agreements with other countries. Apparently envisioned to mimic the RTAA, it expired in 1962 without ever being used. It was revived by Pres. Marcos through Pres. Dec. No. 1464 but the renewal periods were removed. *See* IV MONTANO TEJAM, COMMENTARIES ON THE REVISED TARIFF AND CUSTOMS CODE OF THE PHILIPPINES 2179 (5th ed.1986).

[404] *Id.*

the U.S., but legal loopholes in the Tariff and Customs Code persist that are the subject of litigation in the courts.

In spite of the Constitutional delineation of the power over foreign commerce in the U.S. Constitution, and the express Constitutional authority granted to Congress to delegate the foreign commerce power—specifically the tariff-setting power—to the President and the tariff law that implements the delegation, tension occasionally persists between the Executive and the Legislature on the negotiation of trade agreements.

The congressional-executive agreement has become a concern for international lawyers in the U.S. because such an animal exists it seems only in international trade agreements.[405] Approval of U.S. trade agreements had taken one of three forms: as a treaty made with the advice and consent of two-thirds of the Senators, as a congressional-executive agreement authorized in advance by omnibus legislation, or as a congressional-executive agreement authorized after negotiation by a joint resolution or by implementing legislation approved by a majority of both houses.[406] Congressional-Executive clashes had become increasingly commonplace in trade matters ever since the first Trade Agreements Act in 1934 gave broad, delegated powers to the President to expand trade markets and obtain reciprocal deals with friendly countries.[407] Since then, it has been a tug-of-war between the two major political branches.

Things came to a head in 1964, when then-U.S. President Lyndon Johnson negotiated a sectoral free trade agreement with Canada and—without any prior consultation with Congress—presented it for congressional approval two months after the deal had been struck. This led numerous congressmen to protest that a *fait accompli* had denied them an opportunity to provide their views on the agreement at a meaningful time. Although Congress ultimately approved the agreement by legislation, and authorized the President to enter similar agreements in the future, Dean Koh saw the victory as a Pyrrhic one because Congress expressly

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[405] The debate started around the time the Uruguay Round agreements were presented to the United States Senate and deliberations on the ratification of the Agreement establishing the WTO. *See* John Jackson, The *Great 1994 Sovereignty Debate: United States Acceptance and Implementation of Uruguay Round Results*, in JOHN JACKSON (ed.), THE JURISPRUDENCE OF GATT & THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS.

[406] Koh, *supra* note 399, at 1200 n. 27.

[407] *See* Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 146 (1992).

conditioned that authority upon prior consultation with Congress, subsequent reportorial requirements, and the risk of a legislative veto.[408]

2. Creeping Transformation: The DFA's Determination of What Is and What Is Not a Treaty as Alienating Congress and Inviting Unaccountability

Having looked into the question of whether IEL instruments are treaties within the meaning of the Philippine Constitution by determining the breadth and depth of its sovereign intrusiveness, restraining or "chilling" effect on future policies or the exercise of domestic rule-making, likelihood of dispute settlement, a gap in the equation has to be addressed. It has been discussed that the difference between sending agreements to the Senate for concurrence and the President' ratification as binding the state, who decides whether an international agreement is in fact a treaty? The question of what makes a treaty a treaty invites two other questions: who decides, and what is the basis for his decision.

The existing standard in the determination of a treaty is actually judge-made law. In the previous section, the Court's ruling in *Eastern Sea Trading* introduced the concept of the executive agreement—an agreement between the Philippines and a foreign country that is not a treaty for purposes of its binding effect as municipal law. The three-fold test in *Eastern* is, in sum, if an agreement is: (1) political in nature, (2) changes national policy, or (3) an arrangement of a permanent character, such agreement is a treaty and thus requires Senate concurrence to have the effect of domestic law and bind the state.

The test this paper proposes is what may be called the Tribe-Slaughter test which was elaborated *supra*: (1) directly impacts an economic matter regulated by Congress, (2) effectively supersedes or directly constrains ordinary law-making function, (3) breadth and depth of obligations directly impairs or has a limiting influence on decision-making and flexibility in policy and action.

But who makes this determination? Neither Tribe nor Ackerman discusses this. Couched differently, under whose discretion shall international agreements be submitted to the Senate for concurrence? Three implementing issuances of the Executive branch say it is the Department of Foreign Affairs (DFA). The first was Memorandum Circular No. 89 series

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[408] Koh, *supra* note 399, at 1200 n. 27. (citations omitted)

of 1988 (MC 89), issued by the Executive Secretary in behalf of the President. Under MC 89, any "serious question as to whether an international agreement is a treaty which should be submitted to the Senate to be valid and effective, or an executive agreement which does not require such concurrence" shall be referred to the DFA, who shall consult with the Senate on the matter "[w]henever circumstances permit."[409] Under Sec. 2(d) of Department Order No. 34-96 series of 1996 (DO 34-96),[410] the Office of Legal Affairs of the DFA, before the agreement and the requisite ratification papers are transmitted to the President for ratification, it shall inform its liaison officer if such agreement requires Senate concurrence. The latest regulation in effect is Executive Order No. 459, series of 1997,[411] which clarifies the vague DO 34-96. Under Sec. 9 of EO 459, "[t]he Department of Foreign Affairs shall determine whether an agreement is an executive agreement or a treaty."

Attention is drawn to the latter two issuances. Unlike MC 89 which required the DFA to consult with the Senate when the situation permits, DO-34-96 and EO 459 did not retain the consultation requirement. The implication is that determination is now left solely to the Executive branch, as a purely Executive matter. This is a situation fraught with the most fundamental peril that is an open invitation for mischief. There are three reasons why this situation is fundamentally unacceptable.

First, *sovereignty*. The treaty-making power of the President is being used as a giant backdoor for international obligations to creep into the Philippine legal system as binding domestic law. The external policy arms of the Executive branch are under great pressure not only to keep up with the rest of the world but also to take advantage of gains from international trade and investment. These gains are protected, regulated, and managed through IEL rule-making in the form of international agreements. The substantive aspects of IEL agreements thus relate to economic sovereignty of states. The WTO agreements and PTAs, which comprise the majority of IEL instruments and primarily and traditionally involve tariff reduction as a means to liberalize trade, now extend to non-trade issues that further stretch the concept of economic sovereignty to its breakable limits. Agreements of such intrusiveness, while extremely technical in nature, cannot be left to the sole discretion of the Executive. Decision-making over economic resources are left to unelected bureaucrats and is inherently undemocratic.

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[409] Memo. Circ. No. 89, Dec. 19, 1988.
[410] Jul. 17, 1996.
[411] Signed on Nov. 25, 1997, 94 O.G. 3520, May 18, 1998.

Second, *separation of powers*. It alienates Congress from the process of transformation—i.e. making a treaty into binding domestic law—and is actually an encroachment by the Executive on legislative power. Congress has the power to make law. Congress, by law, wields the power over the regulation of inter-state commerce through tariffs. Although the Constitution authorizes Congress to delegate the tariff-setting power to the President, and the President is so authorized, by statute, to enter into trade agreements with other countries towards a reciprocal commitment to reduce tariffs, it does not follow that such agreements should be considered as executive agreements not requiring concurrence by the Senate. BITs for instance involve the grant of national treatment to investors in areas of investment, and provide for remedies for aggrieved investors whenever the covered investment is compromised. The Constitution either contains an explicit equity, control, or participatory limits for non-nationals or authorizes Congress to pass laws making such reservation. When the President negotiates and ratifies such agreements presumably under the vestiges of that authority, but refuses to submit the same to Congress on the ground that DFA has determined their executive agreement status, it is as if the President has made international law domestic law.

Third, *transparency, accountability and public participation*. After the treaty is signed by the state's representative, the President, being accountable to the people, is burdened with the responsibility and the duty to carefully study the contents of the treaty and ensure that they are not inimical to the interest of the state and its people. Thus, the President has the discretion even after the signing of the treaty by the Philippine representative whether or not to ratify the same.[412] The sovereignty-derogating nature of IEL instruments such as PTAs and BITs are approved and vetted by unaccountable and unelected diplomats and technocrats. After negotiations have been completed and signed by the chief negotiators of both sides, and an agreement is ready for ratification. Once the DFA determines an IEL instrument as a mere executive agreement, and submits it to the President for ratification, that is the end of the matter. The DFA certifies that domestic procedures for the agreement's entry into force are completed and the treaty's entry into force requirements begin to kick in. It becomes binding domestic law without it being subject to the democratic public debate and inquiry through a Congressional hearing, thus requiring greater transparency than that offered by the secret world of diplomacy.

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[412] Pimentel v. Exec. Sec., G.R. No. 158088, 462 SCRA 622, Jul. 6, 2005.

Related to the discretionary authority of the DFA to decide whether or not an IEL agreement is a treaty or an executive agreement is its capacity to make such determination. PTAs, for example, are voluminous, highly technical documents. A battery of lawyers is required to undertake a thorough review to find out if the three-fold test in Eastern Sea Trading applies. The Treaties Division of the Office of Legal Affairs is headed by one lawyer with three staff lawyers who review not just economic agreements but all international agreements negotiated by the Philippine government. Pursuant to existing Department regulations, the DFA-OLA relies on "Certificates of Concurrences" from the different line agencies attesting to an agreement's compliance with domestic law, consistency with policy, and gains to the Philippines (if any). It is basically a *pro forma* statement that the DFA-OLA attaches to the agreement to be reviewed and sent to the President for ratification.

This is also perhaps the unintended, but perverse implications of the ruling in *Pimentel.* Considering the volume of economic agreements that the Philippines is negotiating and may negotiate in the future, and the depth and intrusiveness of the obligations and the potential for derogation of sovereignty, it simply cannot be left to the sole determination of the Executive branch—let alone a three-person division—to make international economic law as binding domestic law and excluding Congress from the process. The process may be seen as serviceable considering that the Philippines is not as active as its neighbors in negotiating PTAs or BITs. However, in anticipation of heightened economic activity leading to requests for treaty negotiations, the administrative mechanism for ratification and treaty determination must not be as grossly inadequate as the present one.

Moreover, foreign affairs legal personnel, let alone seasoned diplomats and foreign service officers, are not wired to study economic agreements. Even in today's bureaucratic labyrinth, international economic law was of little concern to international lawyers, especially those in foreign ministries which added little definition to their discipline.[413] Part of the reason why IEL as a legal discipline had little currency with foreign affairs officials was because international lawyers have seen their discipline in terms of the protection of the territorial and political integrity of the nation state,

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[413] McRae, *supra* note 16, at 115. Particular social conditions may have played some role in this. In some countries the idea of commerce, of buying and selling, or of economic matters generally, was not viewed with favor. The professions of medicine and law were respectable; those engaged in business did not have the same social status. Also, the field of international economic law is seen as closely intertwined with the field of economics which is perceived as presenting a barrier to those without formal training in the discipline. This, no doubt, helped fashion the attitudes of international lawyers in international economic law.

and only those issues connected with or that arise out of questions of territorial integrity were considered relevant to their profession. Economic issues so far as they tangentially relate to the territorial, political and sovereign integrity of the State were as close as traditional international lawyers in foreign ministries could go. McRae's comment that "few lawyers in the foreign ministries were concerned with the technical trade legal issues; they were within the province of ministries concerned with financial and economic matters,"[414] remain more true in the Philippines than a decade ago.

III. TOWARDS A VIABLE AND EFFECTIVE INTERNATIONAL ECONOMIC LAW REGIME IN THE PHILIPPINES

There are very good reasons why developing country governments such as the Philippines should be protective of the policy and regulatory space that IEL undercuts. Laws and regulations are not only directed at improving efficiency, but also at promoting social justice more broadly defined, including protecting those who might otherwise not fare so well in the market economy if left to themselves. This helps explain legislation and regulation designed to protect consumers, workers, and investors. In addition, Prof. Stiglitz believes there are some areas in which rules are essential:[415]

> Every game, including the market game, requires rules and referees. There may be more than one set of "efficient" rules, but different rules have different distributional consequences. Society, in selecting a set of rules to regulate economic behavior, has to be mindful of these distributional consequences.

It is clear that both Houses of Congress are indispensable in the negotiation, implementation, and compliance with IEL. Congress has the Constitutional authority over policy and regulation of economic matters, both domestic *and* external. Not only is it found in a *penumbra* of Constitutional provisions and statutes, but it inheres in Congress as the body politic directly elected by the people as their representatives and to whom the sovereign law-making authority is delegated. The rapid pace of

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[414] International economic relations are usually the hunting ground of a few specialists, who often jealously hold for themselves the key to this abstruse admixture of law and economics. Trade law was a matter for the private sphere, not a matter for Governments (except to negotiate treaties of friendship, commerce, and navigation or to protect trading interests by the use of force). Since it was in the private rather than public sphere, and thus not seen as emerging from the practice of States international trade was not a matter of particular concern for international lawyers. *Id.*, at 117.

[415] Stiglitz, *supra* note 282, at 463-64.

globalization brings new-fangled international instruments such as the PTIA or the BIT and brings to the forefront of the discourse non-trade issues that create the political and economic conditions necessary to sustain the already unprecedented rate of growth of the world economy. The conflict lies at the point when such IEL instruments used to exercise a legislatively delegated power to regulate trade with other countries is one that is purely and inherently Executive because it also happens to be a treaty. In Philippine IEL engagements, Congress is so blatantly alienated that any IEL agreement being proposed, negotiated, or entered into runs the risk of being repudiated because it is illegitimately and undemocratically arrived at and force-fed upon the ordinary public without any meaningful opportunity for debate and understanding.

The looking-glass must also be viewed from the opposite direction. If there is any House that should have a primary interest in matters concerning the exercise of the foreign affairs power and the binding effect of agreements entered into by the Executive, it should be the Senate, not the House of Representatives.[416] When more than 270 oftentimes competing economic interests collide with one another, it is practically impossible to harmonize each and every interest into a coherent and articulable international trade and investment strategy. Legislators are surrounded by political forces that are parochial, rent-seeking, and protectionist, and could possible undermine gains achieved from positive engagement in IEL.[417] The legislative process has been described by another writer as a "competition among interest groups for policy outcomes, who not only want legislators to provide favorable policies, but also want those policies to be electorally stable."[418]

The government, in its dealings with another government, should speak with one voice and one voice only. This is the reason why it is the Executive who negotiates while Congress formulates the policy, based on national unity, supported by the idea of economic efficiency and representation reinforcement.[419] With respect to *negotiation* with other

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[416] CONST. art. VI, § 24. All appropriation, revenue, or tariff bills, bills authorizing increase of the public debt, bills of local application, and private bills shall originate exclusively in the House of Representatives, but the Senate may propose or concur with amendments. *See* BERNAS, *supra* note 195, at 748. The theory behind the rule requiring that these originate in the House of Representatives is that district Representatives are closer to the pulse of the people than senators are and are therefore in a better position to determine both the extent of the legal burden they are capable of bearing and the benefits that they need.

[417] Leanne Wilson, *The Fate of the Dormant Foreign Commerce Clause after Garamendi and Crosby*, 107 COLUM. L. R. 746, 751 (Observing that "[l]egislators, concerned about being reelected, will cater to political forces as these forces are the ones with the power to reelect them.").

[418] Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 523-24 (2004).

[419] Wilson, *supra* note 417, at 746.

foreign nations, which is a logical step to the power to regulate commerce with them, Congress is institutionally and fundamentally ill-equipped. This is because although Congress, specifically the House of Representatives, acts as one body, the members represent their own district's interest. Prof. John H. Jackson explains:

> It is perhaps impossible for Congress, as such, to negotiate economic subjects; its members are usually too beholden to particular parochial constituencies, and consequently have difficulty formulating overall negotiating positions and objectives that are in the broader national interest. In addition, who speaks for Congress? It is doubtful that even the duly constituted leadership of either House can speak for that House, much less for Congress as a whole, on international economic matters. Consequently, a foreign negotiator will not negotiate seriously with someone whom he feels cannot "deliver" on the commitments made. The commitments by officials of the Executive branch negotiating in behalf of the U.S. can be formulated so as to represent the commitments of the President and the Executive branch.[420]

The apparent Congressional disinterest is difficult to ignore. Perhaps the reason is because the individual interests have become too political or too insular that the bigger picture is far too often taken for granted. The House of Representatives, except for some party-list members, has practically abdicated the power to regulate commerce and has not kept pace with the rapid developments in the international trading system. This disinterest is evident in the omissions. The Tariff and Customs Code has not been amended since the Martial Law period. There is no single Congressional policy on multilateral trade in services. Congress liberalized selected investment areas during the time of President Ramos and has left the identification of investment priorities to the Board of Investments but has only occasionally exercised its oversight power. Even agricultural policy has been let to the Executive when majority of constituents of Congressmen outside the metropolitan areas are in farming and fisheries. Appropriations emanate from the House of Representatives and the agencies make their reports to the Congressmen present but they mainly turn a blind eye on the international engagements of the Executive, much less to the developments in the international trading system. The Senate meanwhile has taken aim at investigations in aid of legislation, but other than JPEPA has not assumed a more proactive role.

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[420] JACKSON, ET AL, *supra* note 298, at 61.

This apparent indifference from Congress has created a void in the joint exercise of policy-making on international economic relations which has become the playground of Executive branch negotiators to bind the Philippines upon signing to be justified as some later date. Once again, Prof. John H. Jackson describes this "zone of twilight": [421]

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or quiescence may sometimes, or at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.

In the Philippine system of government, that independent presidential responsibility has become a blank check for foreign affairs or trade officials to negotiate burdensome sovereignty-derogating IEL agreements, with only the Executive interpretation of vague or ambiguous domestic law or regulation to guide them in the formulation and articulation of Philippine negotiating positions. With no parameters, conditionalities, or *quid pro quo* bargains from the district representatives, the Executive is free to make concessions with only their own limited understanding to direct them. Worse, in the case of JPEPA, government negotiators used the Japanese draft as the basis for the negotiations, without even having the decency of coming up with a Philippine counterdraft. Worse still, the Japan-Singapore version was used as a basis of comparison.[422]

The buck, as it were, should stop at the Senate doorstep. No IEL agreement or treaty becomes binding as Philippine law without Senate supermajority concurrence. If no mechanisms exist for consultation or legitimation of the process of Philippine engagement in IEL, the Senate is Constitutionally mandated as the body that can concur with the Executive's final act of ratifying any agreement. If no supermajority is reached because Senators did not appreciate the Executive's railroading of the treaty without Congressional support, the agreement does not bind the Philippines. However, through the internal process of designating an agreement as an executive agreement, using ancient standards unique to the U.S. experience

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[421] *Id.*, at 68.

[422] *See* Magkaisa JUNK JPEPA Coalition, A Summary of Arguments against the Japan-Philippines Economic Partnership Agreement, submitted to the Philippine Senate Committee on Foreign Relations (2008). Japan-Singapore Economic Partnership Agreement, *available at* www.iesingapore.gov.sg.

as a major trade superpower and as a federal government and not found in the Constitution, the Executive has sidestepped the supermajority requirement, and IEL becomes valid and effective as domestic law.

It is suggested that the current system of integrating IEL into the domestic legal framework would be vastly improved through the following:

1. *Prior and broader Congressional authority to negotiate.* The Tariff and Customs code Section 402 is a standing delegation to modify tariffs in the context of entry into trade agreements. Congressional oversight, however, has never been exercised. Executive enactments on this basis no longer go through Congress; yet another instance of circumventing the Article VI Section 24 requirement.[423] This notwithstanding, the current climate of international trade negotiations has gone beyond mere tariff reductions, covering services, investment, competition, labor rights, and the environment. The trend will be a multi-disciplinary approach to trade. This has been resisted by developing countries, but it does not mean preparation therefor is dispensed with. The Philippines is no exception. Thus, the Tariff Code must be updated as the first step. Second, all economic statutes may be complied and updated as a kind of "National Economic Code," as the sourcebook for all equity, ownership, and operational restrictions on the various economic areas for trade and investment. In so doing, the Lower house engages in an exercise to ascertain what sectors may be liberalized further, what needs to be shielded, and what has to be promoted. More importantly, such an omnibus code will serve as the guidelines for Executive action in IEL. It will be an express authorization to the President to negotiate trade and investment agreements based on a pre-determined, thoroughly vetted, legitimately-sourced parameters of derogation. Succeeding authorizations need not be in statute form; a House Resolution may prove to be sufficient in conferring that authority.

2. *Joint determination of treaty-status of any IEL agreement.* The determination of whether an international economic agreement should be subject to the requirements of the treaty clause must not be left to the sole and exclusive whim of the Executive branch. It is for both Senate and the President to decide through a particularized inter-branch process, using the Tribe-Slaugther standard of review of such treaties *supra.* Thus, after the authority has been duly issued by the Lower House, and an agreement has

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[423] CONST. art. VI, § 24. All appropriation, revenue, or tariff bills, bills authorizing increase of the public debt, bills of local application, and private bills shall originate exclusively in the House of Representatives, but the Senate may propose or concur with amendments.

been negotiated, initialed, and signed by the President's subaltern, the Senate conducts a hearing to look into the agreement and decide whether it needs supermajority concurrence or not. To be sure, the Foreign Affairs, Trade, NEDA, Board of Investments, Agriculture, Labor and Justice Departments will present their own positions on whether the Tribe-Slaughter standards are met. In any case, even though the initial authority from the Lower House did not envision any change in laws, it could happen that the contours of the negotiation reveal a strong need to undertake changes in the domestic structure to promote the "general welfare." Thus the Senate could decide that it will be seized of the agreement, and, invoking the treaty clause, concur with the President's ratification.

This framework addresses the gaps mentioned throughout this paper. It legitimizes the derogations of sovereignty by involving Congress actively in the process, which shall make sure that their constituents get a fair deal out of what they could surrender to the other party. Congress would now be aware that once the Philippines accepts NT for instance, that the local government units and legislative councils within the Congressman's district or province cannot enact regulations that discriminate against foreign investments in its territory. It brings back the law-making process to within the Senate's fold, as a marriage of the outcome of the President's exercise of foreign affairs power with the binding effect on domestic law which only the Senate can legitimately allow.[424]

CONCLUSION

Professor Stiglitz, perhaps the best-known academic on the subject of globalization, observes that "[e]conomic globalization has outpaced political globalization."[425] He makes one other astute observation that could not be any more true for the Philippines: "developing countries have not developed the requisite democratic international institutions, either for drafting agreements or adjudicating disputes, and based on an incoherent set

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[424] Much has been written and discussed about proposals to create a trade superbody to address internal executive coordination in trade negotiation. It is opined that such an entity gives strong signals to the international community that the Philippines is more on offense than on defense in IEL. There is of course nothing wrong with that strategy, except that the Constitution as it is written and interpreted now is so insular and protectionist that such a trade super-entity does not square with the intrinsic conservatism of the Charter. In other words, the medicine may be too strong to treat the malaise. The proposed inter-branch mechanism ensures transparency, enough to spot nonfeasance by any Executive agency or department. *See generally* Gloria Pasadilla & Christine Marie Liao, *Does the Philippines Need a Trade Representative Office?* Discussion Paper Series No. 2005-26, Philippine Institute for Development Studies (Dec. 2005).

[425] Stiglitz, *supra* note 282, at 467.

of economic principles and ultimately a flawed understanding of the appropriate role of national regulation and policy space."[426]

The Philippine government boldly ventured into the realm of international economic law despite a flawed and incomplete Constitutional, regulatory, and institutional design and framework that is inadequate to withstand the pressures and demands of going global. Countries like the Philippines often realize too late that while that there is more to gain from economic globalization, they also find that much is taken. They soon learn that economic policy-making become increasingly constrained by the complex and multi-jurisdictional web or mercantilist strands referred to in the introduction to this paper, weaved by complicated economic treaties with onerous obligations and even more complicated transborder economic exchanges.[427] The result, opines Raustiala, has been a "substantial rise in the institutions of global governance" such as the WTO.[428] International economic norms are increasingly called upon to play the role that constitutional principles play in the domestic legal order, in what is increasingly termed as "global constitutionalism."[429]

As the Philippines selects a more forward- and outward-looking course of action in the global economic environment, the complex and subtle relationships between different countries' laws, and between different areas of public policy must be recognized and managed.[430] The government's economic bureaucrats, policy-makers, and diplomats must accept the reality that in today's global economy, decisions and policies made domestically affect the decisions and policies of other countries.[431]

The story of Philippine involvement in the global economic rulemaking is a cautionary tale where most developing states are still "rule-takers," receiving rules set by the "rule-makers," the more powerful developed states.[432] Great care and circumspection should still be the behavioral norm for Philippine policy-makers and diplomats, because as supranational economic lawmaking operates outside the internal systems of checks and balances and accountability ensured by the Constitution, it risks

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[426] *Id.*

[427] Dermot McCann, *Small States in Globalizing Markets: The End of National Economic Sovereignty?*, 34 INT'L L. & POL. 281, 281 (2002).

[428] Raustiala, *supra* note 9, at 878.

[429] *See generally* Ernest Young, *The Trouble With Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 528 (2003).

[430] Trachtman, *supra* note 36, at 37.

[431] *Id.*

[432] Blum, *supra* note 317, at 343 (2008), *citing* Edward Kwakwa, *Regulating the International Economy: What Role for the State?, in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 227, 232-240.

eviscerating the architecture of the state and its sovereignty.[433] While the fact that developing countries have a choice is itself a significant manifestation of sovereign power, once made, decisions to adopt market liberalization and the principles of IEL, and to join multilateral and/or regional groupings and to seek to attract foreign investment will be extremely difficult to reverse. As McCann notes, "[t]he weight of external legal and functional constraints on small states' autonomy to formulate national policy will only continue to grow dramatically while the power of regional and global institutions, over which small states will struggle to exercise any real influence, will expand."[434]

It is what Professor Trachtman calls the "revolution of international economic law:" although the world is moving closer towards a single economic system, both geographically and functionally,[435] domestic values are not rejected, but absorbed.[436] This transformed perspective recognizes that just as ordinary Filipinos must "think globally and act locally," they must also think locally and act globally and maximize Filipino values through international engagement. The Philippines as a state, as a member of the community of nations, should first put the pieces in place for a sturdier internal legal framework, must look outward, but negotiate inward.

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[433] Young, *supra* note 429, at 529.
[434] McCann, *supra* note 427, at 297.
[435] Trachtman, *supra* note 36, at 37.
[436] *Id.*, at 51.