

LETTERS TO SENATOR MIRIAM: CONSTITUTIONAL AND INTERNATIONAL LAW PROBLEMS OF THE JPEPA *

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BACKGROUND NOTE

There are three (3) letters or memoranda in this set of correspondence, all addressed to and received by Hon. Miriam Defensor-Santiago, Chairman, Committee on Foreign Relations, Senate of the Philippines. These three (3) items are the following:

1. A memorandum, dated 5 October 2007, entitled *Constitutional Law Aspects of the Japan-Philippines Economic Partnership Agreement (JPEPA)*;
2. Letter dated 30 October 2007 setting forth suggested texts of potential provisions of the then proposed JPEPA, that would address the constitutional law problems identified in the earlier memorandum dated 5 October 2007. These suggested amendatory provisions were drafted in response to the request of Chairman Defensor-Santiago. Attached to this letter is a copy of a letter from Prof. Maria Lourdes A. Sereno addressed to the Philippine Daily Inquirer responding to the 13 October 2007 column of Prof. Solita Monsod, School of Economics, University of the Philippines; and
3. A letter dated 12 November 2007 addressed to Chairman Defensor-Santiago addressing statements made by governmental representatives, submitted to the Senate Foreign Relations

* Cite as Florentino P. Feliciano & Ma. Lourdes A. Sereno, *Letters to Senator Miriam: Constitutional and International Law Problems of the JPEPA*, 84 PHIL. L.J. 838, (page cited) (2010).

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Committee, that took issue with the memorandum of 5 October 2007 on the JPEPA.

These letters and memorandum form part of the official files of the Senate Committee on Foreign Relations. They therefore constitute, in our opinion, public documents the publication of which, in our hope and belief, would be useful for understanding and re-negotiating the JPEPA as finally ratified by the Republic of the Philippines. The views of Chairman Defensor-Santiago of the Senate Foreign Relations Committee on the issues dealt with in these letters and memorandum may be found in the records of the debates in the Senate on the JPEPA and have been widely reported (Malaya, October 10, 2008, <http://www.malaya.com.ph/oct10/news4.htm>).

Reply memoranda from senior public officials were made, at least in part, available to us. We were not invited to submit rebuttal statements. But we feel it was necessary and potentially useful to submit the third letter in this set of documents. The memoranda of the senior public officials appear to rest on assumptions that, to us, are particularly vulnerable to application in some international law forum of well-known rules and doctrines of the law of treaties and of state responsibility, which constitute a fundamental part of contemporary public international law.

The JPEPA in art. 94, par. 2 provides for a one-year period after it shall have gone into effect as between the two (2) State Parties for adding items to the list of reservations with respect to measures applied by local governments. There is no similar one-year window for measures applied by the national government. This one-year period began on December 11, 2008, but has now lapsed. It will, therefore, be necessary to renegotiate the unfortunate incomplete list of reservations, applied by the Philippine national and local governments, that the Philippines made to art. 94.

The Senate concurred in the JPEPA in the form in which the treaty was sent to it by the President. The President ratified the JPEPA in the same form she had sent it to the Senate for the concurrence of the latter. The problems sought to be described here therefore persist today.

Those overarching problems may be outlined in the following relatively succinct terms:

Firstly, what legal effect may a Philippine court give to a treaty provision that purports to obligate the Republic of the Philippines to permit a non-Philippine national to acquire and exercise a right or privilege which,

under the Constitution of the Philippines, may be exercised only by a Philippine national or a corporation organized under Philippine law with a prescribed minimum quantum of Philippine equity?

Secondly, what legal effect may an international judicial or arbitral forum, that is bound to apply Philippine law and international law, give to a decision of Philippine court refusing to give domestic legal effect to a treaty provision purporting to entitle a non-Philippine national to exercise a right or privilege which, under the Constitution of the Philippines, is restricted to citizens of the Philippines or corporations organized under Philippine law having a prescribed minimum quantum of Philippine equity?

The answers we would give to the above issues are, hopefully, clear from the following “Letters to Senator Miriam.”

I.

To: Hon. Miriam Defensor Santiago
Chairman, Committee on Foreign Relations
Senate of the Philippines
Manila

Date: 5 October 2007

From: Florentino P. Feliciano
Senior Associate Justice (Ret.)
Supreme Court of the Philippines
c/o Willard Hotel International
1410 Pennsylvania Avenue NW
Washington, DC 20005
USA

Re: Constitutional Law Aspects of Japan-Philippines Economic Partnership Agreement (JPEPA)

1. This memorandum is respectfully submitted in response to the Invitation to deliver a statement at a Joint Committee Hearing of the Senate Committee on Foreign Relations and the Senate Committee on Trade and Commerce, scheduled for 10 a.m., Monday, 8 October 2007, at the Laurel and Pecson Rooms, 2nd Floor, Senate Building, Roxas Boulevard, Pasay City.

2. The above Invitation, received by me on 4 October 2007, directs me to prepare a resource paper on "Movement of Goods and Services and Constitutional Issues" and to provide a copy of the paper to the Secretary of the Committee on Foreign Relations before the hearing. I read the above topic to refer to constitutional law issues whether relating to the Investments part of the JPEPA, or to the Trade part thereof, and to legal issues related to those constitutional issues.
3. I reviewed the two Senate Committees' Invitation in Washington, DC, USA, where I have been since 22 September 2007. I believe the Invitation was sent to me in my capacity as a private citizen of our country, and is not in any way related to any legal work I am currently engaged in for the Republic of the Philippines. Accordingly, this memorandum is submitted in that capacity. I respectfully tender my very real regrets to the distinguished Chairman and Members of the two Committees for being unable to present corporeally at the scheduled joint hearing on Monday, 8 October 2007. My age (79 years) and the need to return to Washington, DC as expeditiously as possible after the 8 October 2007 joint hearing, render my physical presence at the Senate, in my belief, non-feasible. My hope is that the two Committees would accept in lieu of physical presence this memorandum – where I seek to set out as lucidly as possible my views on the constitutional aspects, and related legal aspects, of certain provisions in the Investment and the Trade portions of the JPEPA as it currently exists. I have requested Mr. Roberto C. San Juan, a personal friend and colleague, to read out this memorandum on my behalf.

A. CONSTITUTIONAL ASPECTS OF JPEPA CHAPTER 8 ON INVESTMENT

4. JPEPA Chapter 8 on Investment establishes certain obligations of the Philippines in respect of "investors" and "investments" of investors of Japan in the territory of the Philippines, and on Japan in respect of "investors" and "investments" of investors of the Philippines in the territory of Japan. The more important of these obligations, for present purposes, and so far as we are concerned, are:
 - (a) To accord "national treatment" to Japanese investors and their investments in the Philippines, under art. 89 of JPEPA;

- (b) To accord “most-favored-nation treatment” to Japanese investors and their investments in the Philippines, under art. 90; and
- (c) To refrain from imposing, as a condition for investment activities in the Philippines, “performing requirements,” upon Japanese investors and their investments in the Philippines, under art. 93.

5. Art. 89 of JPEPA reads as follows:

Article 89
National Treatment

Each party shall accord to investors of the other Party and to their investments treatment no less favorable than that it accords, in like circumstances, to its own investors and to their investments with respect to the establishment, acquisition, expansion, management, operation, maintenance, use, possession, liquidation, sale, or other disposition of investments (hereinafter referred to in this Chapter as “investment activities”).”

JPEPA Art. 90 provides:

Article 90
Most-Favored-Nation Treatment

Each party shall accord to investors of the other Party and to their investments treatment no less favorable than that it accords, in like circumstances, to investors of a non-Party and to their investments with respect to investment activities.” [Underlining supplied]

Art. 93, also of JPEPA, while lengthy, needs to be quoted in full:

Article 93
Prohibition of Performance Requirements

1. Neither Party shall impose or enforce, as a condition for investment activities in its Area of an investor of the other Party, any of the following requirements:
 - (a) to export a given level or percentage of goods or services;
 - (b) to achieve a given level or percentage of domestic content;

- (c) to purchase, use or accord a preference to goods produced or services provided in its Area, or to purchase goods or services from persons in its Area;
 - (d) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments related to such investment activities;
 - (e) to restrict sales of goods or services in its Area that investments related to such investment activities produce or provide by relating such sales to the volume of its exports or foreign exchange earnings;
 - (f) to appoint, as executives, managers or members of boards of directors, individuals of any particular nationality;
 - (g) to hire a given level of its nationals;
 - (h) to transfer technology, a production process or other proprietary knowledge to a person in its Area, except when the requirement:
 - i. is imposed or enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws; or
 - ii. concerns the transfer of intellectual property rights which is undertaken in a manner not inconsistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement (hereinafter referred to in this Chapter as "the TRIPS Agreement");
 - (i) to locate the headquarters of that investor for a specific region or the world market in its Area;
 - (j) to achieve a given level or value of research and development in its Area; or
 - (k) to supply one or more of the goods that the investor produces or the services that the investor provides to a specific region or world market, exclusively from its Area.
2. The provision of paragraph 1 above does not preclude either Party from conditioning the receipt or continued receipt of an advantage, in connection with investment activities in its Area of an investor of the other Party, on compliance with any of the requirements set forth in subparagraphs (g) through (k) of paragraph 1 above.

**“National Treatment” Obligation and The Philippine Schedules to
Parts 1 and 2 of Annex 7**

6. Most succinctly, the “national treatment” obligation requires the Republic of the Philippines (“ROP”) to treat Japanese investors as if they were Philippine nationals, and to treat Japanese investments in the Philippines as if such investments were owned by Philippine nationals. It is common knowledge that the entry into certain sectors of economic activity in our country is constitutionality restricted to natural persons who are Philippine citizens or to juridical persons which are at least 60% (in some cases, 70% and 100%) owned by Philippine citizens. The relevant provisions of the 1987 Constitution are:
 - (a) Art. XII, § 2 – ownership of land, utilization and exploitation of all natural resources; use and enjoyment of marine resources in the Philippine archipelagic waters, territorial seas and exclusive economic zone (EEZ);
 - (b) Art. XII, § 11 – operation of public utilities;
 - (c) Art. XII, § 14, second paragraph – practice of all professions, save in cases prescribed by law;
 - (d) Art. XIV, § 4(2) – ownership, control and administration of educational institutions;
 - (e) Art. XVI, § 11(1) – ownership and management of mass media; and
 - (f) Art. XVI, § 11(2), second paragraph – ownership of corporations and associations engaged in the advertising industry.
7. There are also a number of statutes and regulations which limit access to certain economic sectors to Philippine citizens and to juridical entities with a prescribed minimum Philippine equity content. Those appear too numerous to list down here.
8. Clearly, the constitutional and statutory provisions referred to above are inconsistent with the obligation to give Japanese investors “national treatment” established in art. 89 of JPEPA. However, JPEPA art. 94

provides for an option on the part of the Philippines to maintain the effectivity of the constitutional and statutory provisions referred to above despite their non-conformity with the “national treatment” obligation set out in art. 89. That option is exercised under art. 94 by listing down in the Schedule to Part 1 of Annex 7 of JPEPA, the existing non-conforming constitutional and legal provisions which the Philippines wishes to maintain in effect, notwithstanding the requirements of art. 89 of JPEPA.

9. The Philippines has exercised the option given to it in JPEPA art. 94 by attaching its Schedule to Part 1 of Annex 7 of JPEPA. It must, however, be stressed that the Philippine Schedule to Part 1 of Annex 7 is not a complete list of all the currently existing constitutional and statutory provisions in our legal system that provide for exclusive access to certain economic sectors by Philippine citizens and Philippine juridical entities with a prescribed minimum Philippine equity content. The most dramatic example of omission of a constitutional provision mandating exclusive access to Philippine nationals and juridical entities to a particular sector is art. XII, § 11 of the Constitution relating to the operation of public utilities. This omission in the Philippine Schedule to Part 1 of Annex 7 means that, should JPEPA come into legal effect, Japanese investors would be entitled to own more than 40% of a public utility enterprise in the Philippines under the JPEPA. This result would be in direct contravention of our Constitution.
10. Other existing constitutional reservations of exclusive access to certain sectors of investment and economic activity, which have been similarly omitted in the Philippine Schedule to Part 1 of Annex 7 (as it stands at present), are (a) art. XII, § 14 – relating to the practice of all professions, save in cases prescribed by law; (b) art. XIV, § 4(2) – relating to ownership and administration of educational institutions; (c) art. XVI, § 11 (1) – relating to mass media; and art. XVI, § 11(2) – relating to the advertising industry.
11. There are other Philippine constitutional provisions which are also inconsistent with the “national treatment” obligation established by art. 89 of JPEPA and which are also omitted in the Philippine Schedule to Part 1 of Annex 7. Those are:

- (a) Art. XII, § 10, second paragraph – providing that: “[i]n the grant of rights, privileges and concessions covering the national

economy and patrimony, the State shall give preference to qualified Filipinos.” [Emphases added]

- (b) Art. XII, § 13 – mandating that “[t]he State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive.” [Emphases added]

It may be noted that art. XII, § 13, refers both to the “national treatment” obligation in JPEPA art. 89, and the “prohibition of performance requirements” in JPEPA art. 93.

12. One conclusion that emerges clearly from the above is that, if JPEPA art.’s 89 and 93 are to be saved from unconstitutionality, the Philippines’ Schedule to Part 1 of Annex 7 must be amended so as to be a complete and detailed inventory of all existing constitutional provisions which are inconsistent with JPEPA with art.’s 89 and 93. In addition, our Schedule to Part 1 of Annex 7 must be amended so as to become a complete and carefully detailed listing of all existing statutory and administrative regulations, including provisions of existing Philippine treaties and other agreements with third countries, which are inconsistent with the obligations set out in JPEPA art.’s 89, 90 and 93.

Legal consequences of present Philippines Schedule to Part 1 of Annex 7

13. Assuming that the JPEPA goes into legal effect as it exists at present, what would be the legal effect of non-amendment and non-completion of our Schedule to Part 1 of Annex 7? The effect would be this: a Japanese investor would have a treaty right to insist on, *e.g.*, being given the right to own more than 40% of the equity of a public utility enterprise. The Philippine Government may not plead as a legal defense the provisions of art. XIII, § 11 of our Constitution in rejecting the application of that Japanese investor and in disregarding the requirements of JPEPA art. 89 on “national treatment.” The denial of the application of that Japanese investor would be a valid and constitutionally legitimate act of our Government as a matter of Philippine law since the constitutional provision would prevail over the JPEPA provision in the internal legal order of the ROP. But such denial would nonetheless be a breach of our treaty obligations under JPEPA and on the plane of international law, which would generate state responsibility under international law on the part of the Philippines and

probably liability for damages before an international judicial or arbitral forum.

**Legal consequences of present Philippines Schedule to Part 2 of
Annex 7**

14. We turn on another, and more serious, constitutional law aspect of JPEPA along with the Philippine Schedule to Part 2 of Annex 7, as the latter presently exists. Art. 94 of JPEPA authorizes both the Philippines and Japan to enter reservations as to their respective measures – whether existing or yet to be enacted or issued – which are non-conforming with respect to the obligations set out in JPEPA art.'s 89 ("National Treatment"), 90 ("Most-favored-nation Treatment") and 93 ("Prohibition of Performance Requirements"). In other words, JPEPA art. 94 grants to the Philippines (and Japan as well) the option to exclude from the operation of JPEPA art.'s 89, 90 and 93, future non-conforming measures that the Congress of the Philippines, or a local government legislative body, may enact. Our option to reserve the right to enact in the future non-conforming measures is exercised through the medium of the Philippines' Schedule to Part 2 of Annex 7.

15. It is critically important to note that our Schedule of reservations of future non-conforming measures does not in fact, as it exists at present, establish reservations for future measures. Our Schedule to Part 2 of Annex 7 actually refers to existing non-conforming measures and does not purport to reserve the Philippines' right to enact future legislation or regulations that may be inconsistent with JPEPA art.'s 89, 90 or 93. The result of this failure to reserve the right of Congress to enact in the future legislation that limits access to a particular sector, *e.g.*, the manufacture of footwear or garments to Philippine citizens or enterprises with at least 60% Filipino equity content is: such legislation would be violative of art. 89 of JPEPA and constitutes an international delinquency. Yet, again, such hypothetical future legislation would be entirely constitutional in the internal legal order of the Philippines; neither a treaty nor a statute can validly restrict the authority of Congress to enact such legislation as it may see fit in the interest of the nation. This is so, not only because such a restriction would be in direct collision with the fundamental principle of separation of powers, but also because of the explicit authorization to Congress found in art. XII, § 10, first paragraph of the Constitution which reads thus:

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 associates 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.

Once more, a future non-conforming Republic Act would constitute violation of our treaty obligations, and create an international law liability on the part of our country.

16. It is clear, therefore, that it is our own failure to make appropriate and complete reservations in our Schedule to Part 1 (with respect to existing non-conforming constitutional and statutory and administrative provisions) and our Schedule to Part 2 (with respect to future non-conforming measures) of Annex 7 of JPEPA that has created significant constitutional law problems.

Remedial Course of Action

17. At the same time, it is also clear what the appropriate remedial recourse is: the Senate in its Resolution may condition its approval of JPEPA upon:
 - (a) the amendment by our Government of its Schedule to Part 1 of Annex 7 by making this Schedule a complete and detailed listing and description of all existing constitutional, statutory and administrative measures which are inconsistent with JPEPA art.'s 89, 90 and 93; and
 - (b) the amendment of our Schedule to Part 2 of Annex 7 by setting out therein comprehensive reservations of future constitutional, statutory and administrative measures inconsistent with JPEPA art.'s 89, 90 and 93.
18. The amendment of the Philippine Schedules to Part 1 and Part 2 of Annex 7 will require the consent of Japan. It is respectfully suggested, however, that Japan's consent to those amendments should not be too difficult to secure, considering (a) that we would be asking only for what Japan has secured for itself in Japan's Schedules to Part 1 and Part 2 of Annex 7; and (b) that we would be asking only for what Japan has already conceded to Thailand, Malaysia and Indonesia in their respective recent EPAs with Japan. Incidentally, the Schedules of comprehensive

reservations for future non-conforming measures that Japan, Thailand, Malaysia and Indonesia adopted, should provide models that our negotiators may usefully examine carefully.

B. CONSTITUTIONAL LAW ASPECTS OF CHAPTER 2 ON TRADE IN GOODS OF JPEPA

19. In JPEPA Chapter 2 on Trade in Goods, the Philippines has assumed the obligation to reduce immediately to 0% many of the tariff rates applicable to goods imported from Japan. Art. 18, par. 1, of JPEPA states:

Article 18
Elimination of Custom Duties

1. Except as otherwise provided for in this agreement, each Party shall eliminate or reduce its customs duties on originating goods of the other Party designated for such purposes in its Schedule in Annex 1, in accordance with the terms and conditions set out in such Schedules.

In this connection, it is important to bear in mind certain constitutional provisions and principles.

20. The power to set and modify tariff rates – like the power to enact laws generally – is fundamentally legislative in nature. It is lodged in the Legislative Department of government (i.e., the two Houses of the Congress of the Philippines); by virtue of the principle of separation of powers, it is a power ordinarily denied to the two other Departments of Government. At the same time, the Constitution sets out express authorization to Congress (not just the Senate) to delegate the power to set and modify tariff rates and export and import quotas to the President, subject to limitations and restrictions. Art. VI, § 28(2) of the 1987 Constitution provides that:

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 dues or imposts within the framework of the national development program of the Government. [Emphases added]

It should be recalled that the above provision of our present Constitution was also found, in almost identical language, in both our

1935 Constitution (art. VI, § 22(2)) and in the 1973 Martial Law Constitution (art. VIII, § 17(2)).

21. The pertinent provision of our 1935 Constitution was implemented by §§ 401 and 402 of Republic Act No. 1937 (the Tariff and Customs Code of 1957). § 401 set out specific limitations on the extent to which pre-existing tariff rates could be modified by the President: (a) a floor below which no tariff rate could be reduced – not more than 50% of the normal duty rate fixed in R.A. No. 1937 (§ 104); (b) a ceiling on permissible increases of tariff rates – not more than 500% of the normal duty rate fixed – R.A. No. 1937 (§ 104). The statute also fixed an important time limitation: the power to fix or change tariff rates could not lawfully be exercised by the President while Congress was in session. § 402 of the 1957 statute also authorized the President to exercise (for a period of 5 years – i.e., until 1962) the same tariff setting and changing power through the medium of executive agreements, subject, however, to the same quantitative limitations.
22. In 1978, then President Marcos as Martial Law legislator and administrator, issued P.D. No. 1464 (the Tariff and Custom Code of 1978), which removed all the quantitative and time limitations on the President's tariff-setting power. He did this in disregard of art. VIII, § 17(2) of his own Martial Law Constitution.
23. In 1987, art. VI, § 28(2) of the present Constitution went into effect. Nevertheless, the post-martial laws Presidents have all acted as if the mandatory provisions of art. VI, § 28(2) of the Constitution do not exist, and as if the 1973 Constitution, including Amendment No. 6, and the unconstitutional portions of P.D. No. 1464 have not yet passed into history. Thus, many tariff rates in respect of imports from particular countries (including Japan, now under Chapter 2 of JPEPA) have been collapsed to 0% or near 0%.

[*Editors Note:* For detailed treatment of this issue, see Florentino Feliciano, *Deconstruction of Constitutional Limitations and the Tariff Regime of the Philippines: The Strange Persistence of a Martial Law Syndrome*, 84 PHIL. L.J. 311 (2009)]

Remedial Courses of Action

24. My respectful submission is that a serious constitutional problem exists with respect to art. 18, par. 1 of JPEPA, although JPEPA is a treaty and

not an executive agreement, since the Senate is only one of the two Houses of Congress. The problem is not of course unique to JPEPA. My impression is that this constitutional question has already been raised before the Supreme Court and is currently pending there.

25. It is also respectfully submitted that the constitutional issue here addressed can be permanently resolved only by a Republic Act that enacts the “limitations and restrictions” required by the Constitution. In the meantime, however, it should suffice to amend the Philippines Schedule to Annex 1 (referred to in art. 18 of JPEPA) and there add a clause substantially to the effect that such Schedule is without prejudice to future non-discriminatory legislation which the Philippines reserves the right to enact for important constitutional reasons.

Respectfully submitted,

Florentino P. Feliciano

II.

October 30, 2007
Honorable Miriam Defensor-Santiago
Chairman
Committee on Foreign Relations
Senate
Republic of the Philippines

Dear Senator Santiago:

We have the honor to transmit to your Honorable Committee:

(1) Suggested language that proposes to address the constitutional problems of the Japan-Philippines Economic Partnership Agreement (JPEPA) identified in my October 5, 2007 statement delivered by a colleague, Atty. Roberto C. San Juan, before the Honorable Committee on October 8, 2007; and

(2) A copy of the letter from Professor Maria Lourdes A. Sereno addressed to the editor of the Philippine Daily Inquirer responding to the October 13, 2007 column of Professor Solita Monsod, by explaining, among others, the context of my statement on the lack of

adequate reservations in the Philippines Schedule to Annex 7 (despite language in Annex 6 that refers to the operation of public utilities).

It is respectfully suggested that the amendments to the JPEPA be set out in a supplemental agreement and attached to the original JPEPA, signed by the Republic of the Philippines and Japan and approved and concurred in by the Senate at the same time that the original JPEPA is approved and concurred in.

Allow me to clarify that contrary to the impression that may have been created by certain statements attributed to the Department of Trade and Industry, I have not changed my views of the constitutional problems of the JPEPA and this letter is our small contribution to helping find a solution to the said problems for government while saving the JPEPA.

Thank you very much.

Sincerely,

Florentino P. Feliciano
(with) Ma. Lourdes A. Sereno

**A. SUGGESTED LANGUAGE THAT PROPOSES TO ADDRESS THE
CONSTITUTIONAL PROBLEMS OF THE JPEPA**

**Re – Philippines Schedule to Part 1 of Annex 7
(Reservations for Existing Non-conforming Measures)**

NB. – Insert in Article 94 “Reservations and Exceptions as new Paragraph 3 and renumber subsequent paragraphs:

**Article 94
Reservations and Exceptions**

x x x

3. The Philippines reserves the right, within one (1) year from the date of entry into force of this Agreement in accordance with the provisions of Article 164 hereof, to revise the Philippine Schedule to Part 1 of Annex 7 of this Agreement, by setting forth therein the complete listing of all Philippine constitutional and statutory provisions and implementing rules and regulations, as well as all issuances of provincial, city, municipal and autonomous regional governmental units and agencies of the Philippines, existing and maintained on or as of the date of entry into force of this Agreement, relating to investment and which are in whole or in part non-

conforming to the provisions of Articles 89 (National Treatment), 90 (Most-Favored-Nation-Treatment) and 93 (Prohibition of Performance Requirements) of this Agreement. The revised Philippines Schedule to Part 1 of Annex 7 of this Agreement shall be subject to the approval or concurrence by a two-thirds vote of the Senate of the Philippines, and thereupon shall retrospectively come into force as of the date of entry into force of this Agreement.

**Re – Philippines Schedule to Part 2 of Annex 7
(Reservations for Future Non-Conforming Measures)**

NB. Insert in Article 94 “Reservations and Exceptions” as new Paragraph 5 and renumber subsequent paragraphs.

Article 94

Reservations and Exceptions

x x x

3. x x x (Revised Philippines Schedule to Part 1 of Annex 7)

x x x

5 (a). The Philippines reserves the right, within one (1) year from the date of entry into force of this Agreement in accordance with the provisions of Article 164 hereof, to revise the Philippines Schedule to Part 2 of Annex 7 of this Agreement, by setting forth therein the complete and comprehensive reservations of the Philippines of its right to enact and maintain in the future measures, of any level of government – national, provincial, city, municipal or autonomous regional – relating to investment and which may, in whole or in part, be non-conforming to the provisions of Article 89 (National Treatment), 90 (Most-Favored-Nation Treatment) and 93 (Prohibition of Performance Requirements) of this Agreement. The Philippines shall notify Japan of the enactment of such future measures within six (6) months of the coming into force of such measure. The revised Philippine Schedule to Part 2 of Annex 7 of this Agreement shall be subject to the approval or concurrence by a two-thirds vote of the Senate of the Philippines, and shall retrospectively come into force as of the date of entry into force of this Agreement.

(b). For the avoidance of doubt, such comprehensive reservations shall include, without limitation, the right to enact or issue and maintain in the future any measure, action or decision pursuant to, or in implementation of the following constitutional provisions of the 1987 Constitution of the Philippines:

(i) Article II, Section 15 – the protection and promotion of the right to health of the people;

(ii) Article XII, Section 1, second paragraph – protection of Filipino enterprises against unfair foreign competition and trade practices;

(iii) Article XII, Section 2 – ownership of all lands of the public domain; utilization of or exploitation of all 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;

(iv) Article XII, Section 3 – lease and ownership of alienable public lands;

(v) Article XII, Sections 7 and 8 – ownership and transfer of private lands;

(vi) Article XII, Section 10, first paragraph – authorizing the Congress of the Philippines to reserve to Philippine citizens and corporations or associations with a prescribed minimum local equity content, certain areas of investments;

(vii) Article XII, Section 10, second paragraph – providing that in the grant of rights, privileges and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos;

(viii) Article XII, Section 10, third paragraph – regulation of foreign investments;

(ix) Article XII, Section 11 – operation of public utilities;

(x) Article XII, Section 13 – mandating that the State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods;

(xi) Article XII, Section 14 – practice of all professions, save in cases prescribed by law;

(xii) Article XIV, Section 4(2) – ownership, control and administration of educational institutions;

(xiii) Article XIV, Section 12 – state regulation of the transfer and promotion of technology;

(xiv) Article XIV, Section 11(1) – ownership and management of mass media; and

(xv) Article XIV, Section 11(2) – ownership of corporations and associations engaged in the advertising industry.

**Re – Philippines Reservation to Article 18, Paragraph 1
(Suspension and Adjustment of the Philippines Schedule to Annex 1
on Philippine Tariff Rates on Goods of Japanese Origin)**

N.B. Insert in Article 18 “Elimination of Customs Duties” as new Paragraph 2 and renumber subsequent paragraphs.

Article 18
Elimination of Customs Duties

x x x

2. (a) The Philippines reserves the right to suspend the applicability, in whole or in part, of its Schedule to Annex 1 of this Agreement, in case the Supreme Court of the Philippines renders a final decision, or the Congress of the Republic of the Philippines enacts legislation pursuant to and in implementation of Article VI, Section 28 (2) of the 1987 Constitution of the Philippines, which decision or legislation adversely affects the obligations of the Philippines under Article 18 of this Agreement and the Schedule of the Philippines in Annex 1 of this Agreement.

(b) The Philippines shall exercise the right reserved in Paragraph 2 (a) by formally notifying Japan and transmitting a certified true copy of the relevant final decision of the Supreme Court of the Philippines, or of the relevant statute enacted by the Congress of the Republic of the Philippines and the implementing rules and regulations if any, within six (6) months from the entry into judgment of the relevant Supreme Court decision, or from the entry into force of the relevant statute and implementing regulations, if any.

(c) In the formal notification of suspension of applicability, in whole or in part, of the Philippines Schedule in Annex 1 of this Agreement, the Philippines shall specify (i) the portion or portions of its Schedule in Annex 1 modification of which has become necessary by reason of the decision of the Philippines Supreme Court, or by reason of the statute and implementing regulations of any referred to above; and (ii) the consequential modifications of its Schedule in Annex 1 proposed by the Philippines. Thereupon, the Parties shall promptly enter into good faith, consultations with each other with a view to mutually adjusting their respective commitments so as to achieve a prompt, fair and balanced resolution of the matter.

(d) The resulting revisions of the Parties’ respective Schedules in Annex 1 of this Agreement shall take effect upon the completion of the Parties’ respective constitutional requirements.

**B. LETTER FROM PROF. SERENO ADDRESSED TO THE EDITOR OF THE
PHILIPPINE DAILY INQUIRER RESPONDING TO THE OCTOBER 13,
2007 COLUMN OF PROF. MONSOD**

LETTER TO THE EDITOR: Response to Professor Monsod on JPEPA (PDI),
10.13.07

Dear Professor Monsod:

Allow a former colleague of yours from the College of Law to explain why Justice Florentino Feliciano, former Chairman of the WTO Appellate Body, deserves the kind of respect he is being paid not only by Senator Santiago, but also by a recent Philippine visitor, WTO Director General Pascal Lamy, who informed the audience at an Asian Institute of Management forum that Florentino Feliciano is an extremely famous name in Geneva and the international law community. Among many accomplishments, he is largely credited for bringing the principles of public international law into international trade law. He is also a much-sought after judge in international investment disputes in the ICSID (International Centre for the Settlement of Investment Disputes) and NAFTA (North American Free Trade Agreement).

First, you are mistaken if your impression is that the JPEPA debates are the same as the WTO debates. The JPEPA is a zoo containing several animals foreign to WTO law – regulation of investment measures other than trade-related investment measures, undertakings on competition policy, improvement of business environment, and cooperation measures. Regulation of investment measures alone (Chapter 8) is an entire field of public international law itself – international investment law – and has jurisprudence and history that blossomed independently of WTO law.

Thus, if a case were to be brought on the JPEPA's investment chapter (Chapter 8), this will be interpreted by comparing its text not with the WTO text, for the latter has no comparable provision, but with bilateral and plurilateral investment treaties, such as Japan's and the Philippines' various bilateral investment treaties, and with NAFTA's investments portion. In fact, the Philippines has familiarity only with some, but not all, the prohibitions against performance requirements. JPEPA is the first treaty where the Philippines promises never to impose nationality hiring requirements or technology transfer requirements on any foreign investment. JPEPA contains obligations larger than the WTO's and intrudes more deeply into economic policy-making than the WTO does. WTO only

regulates trade, JPEPA regulates almost any kind of economic policy or administrative measure that affects trade with Japan and Japanese investments. Any discussion on the JPEPA before the Supreme Court will not be decided on the same kind of obligations as were scrutinized in the WTO debate.

Annex 6 which you point out, does not regulate measures that are not “measures affecting trade in services” (art. 71). “Measures affecting trade in services” are “purchase, payment, use, access to, supply of, commercial presence for supply” of service. Neither does it cover regulation of investments in the non-service aspects of an enterprise. However, services have aspects of the business that do not constitute supply of service. Japan, Malaysia, Thailand and Indonesia, listed conditions affecting service sectors not only in their equivalent of Annex 6 but also in their equivalent of Annex 7 (Investments) to ensure that nothing fell “within the cracks”, and to save themselves the trouble of having to define what is the service and non-service aspect of an enterprise. The UNCTAD had already warned developing countries of a serious misimpression – that trade in services rules can be easily segregated from the larger context of investment regulation (*Investment Provisions in ELAs, 2006*). Senators Mar Roxas and Johnny Enrile saw this. This cautionary view is justified by the fact that the definition of “investments” under art. 88 is so exhaustive that any and all kinds of property or contract rights, real or inchoate, passive or active, are covered, including shares of stocks held by Japanese individuals or Japanese entities. Art. 89 requires that those properties and rights, must be fully treated, as if they were Filipino.

What happens then in a case where a Japanese private citizen, in his individual capacity, wishes to buy additional shares that would increase the total foreign equity in a public utility beyond 40%? Is it the chapter on services or the chapter on investments that will govern? A textual interpretation of art. 88, from the point of international investment law can very well lead to the conclusion that in this case, the Japanese can, because the Japanese is not purporting to operate the public utility, but only own a small part of the investment vehicle that is a public utility. This can also be the result if a similar situation were to take place in education, advertising, etc. The advice of Feliciano – do what the Japanese and the other ASEAN countries did – reserve comprehensively; over-reserve than under-reserve.

This is the kind of line-by-line scrutiny that the JPEPA will be subjected to in case Japan were to sue us under Chapter 15’s provisions on State-to-State disputes. The dispute settlement tribunal will not determine the Philippines’

rights according to the negotiators' impression that a small device they inserted in art. 87, par. 4 was enough to ensure compliance with the Constitution. The tribunal will look at the text, and if the text requires us to grant national treatment to a Japanese national in the passive ownership of shares in a public utility, as art. 89 requires, even if it were contrary to the Constitution, there is a treaty breach if we refuse to allow the purchase of stock by the Japanese investor. The tribunal will look, not at GATT or WTO jurisprudence, but at ICSID and NAFTA jurisprudence for guidance. What Justice Feliciano therefore suggests, to prevent such a situation, is to fully cite pertinent constitutional provisions in Annex 7. If only the kind of care were given to Annex 7 that Annex 6 got (thanks to DDG Songco), we would not be in this terrible mess. Unfortunately, her fine work cannot extend to investment measures that are not "investments in services," that are not measures affecting "trade in services," or that do not concern access to the Philippine market by Japanese service suppliers.

I suggest we also listen to Justice Feliciano's advice on rectifying the most egregious constitutional failure of the JPEPA – the failure to make any reservation for future measures. The Philippines essentially abdicated its legislative power to enact preferential, protective or even developmental measures over Japanese investments. The enormity of this failure is dramatized by the contrasting comprehensive reservations by Malaysia, Thailand and Indonesia in their EPAs with Japan, and by Japan itself in its reservations in JPEPA. These countries assured themselves full flexibility to impose or adjust future preferential measures over large sectors of the economy, and to impose performance requirements, such as transfer of technology, hiring policies, etc. For nothing, we assured Japan that never shall we employ those kinds of policies, even if absolutely needed by Filipinos, against Japanese investors. This is contrary to specific constitutional provisions that require State to intervene when necessary.

No, Winnie, the emperor has clothes, and he was, as usual, wearing his finest and wisest judicial robes.

Ma. Lourdes "Meilou" Sereno
Former Professor, UP College of Law
Former Counsellor, WTO Appellate Body
October 13, 2007

III.

November 12, 2007

Hon. Miriam Defensor-Santiago
Chairman
Committee on Foreign Relations
Senate
Republic of the Philippines

Dear Senator Santiago:

This is to address the written statements of [some] governmental representatives []¹ submitted to Your Honorable Committee that took issue with my 5 October 2007 memorandum on the JPEPA.

As a preliminary matter, allow me to reiterate that I confined the analysis in my said memorandum only to questions of constitutionality. I did not include in my opinion other non-constitutional legal issues of the JPEPA which exist. Neither did I assume to cover economic problems of the JPEPA which may be far more pressing, serious and insistent than the problems described in said memorandum.

These former and present officials of Government disagree with all three main points in my 5 October 2007 memorandum and are of the following position:

- (a) that no reservations are necessary for future non-conforming measures because the JPEPA is in fact subservient to and must be read to require conformity with the Constitution, hence all constitutional reservations are considered reserved in the JPEPA;
- (b) that sufficient reservations were made for existing non-conforming measures because:

¹ Brackets supplied. Signed statements of these representatives form part of the records of the Senate Committee on Foreign Relations.

- (i) again, the JPEPA is subservient to the Constitution and for the foregoing reasons, no reservation is necessary with respect to the Constitutionally-mandated reservations;
 - (ii) JPEPA cannot be implemented otherwise than in accordance with Philippine law;
 - (iii) JPEPA has a built-in mechanism under its art. 4 that prevents a conflict from arising between the JPEPA's provisions and Philippine laws;
 - (iv) JPEPA is not self-executing and requires enabling legislation;
 - (v) that in any case, there is a one-year period in JPEPA for making additional reservations, and
 - (vi) that the specific Constitutional and statutory provisions in respect of which there is a claim of insufficiency or lack of reservation – identified by my 5 October statement and by the statements of other lawyers and academics – have actually been reserved, and that my criticism on this specific matter arose from a failure on my part to appreciate the Annex 6 Reservation on Services and a misreading of Annex 7 Part 1B.
- (c) that there cannot be any constitutional problem with the exercise of the President's tariff-setting powers as in fact the Supreme Court has recognized the constitutionality of the exercise of this power (including in my ponencia in *Garcia v. Executive Secretary*²).

For the foregoing reasons, Government urges the Senate to forego considering any additional language to amend, supplement or otherwise accompany the ratification of the JPEPA, inasmuch as the JPEPA in its present form, conforms to the Constitution.

The following discussion is intended to explain why this view of the Government is fraught with danger at the international law and constitutional law levels. At this point, it may be noted that Government has

² G.R. No. 101273, 211 SCRA 219, Jul. 3, 1992.

not disputed that the Philippines has made absolutely no reservation for future non-conforming measures, a fact that in itself I described as having given rise to the more serious constitutional law aspect of the JPEPA.

**On the Availability under International Law of the Defense of
Supremacy of the Constitution in Refusing to Comply with an
Obligation under the JPEPA**

The argument on the supremacy of the Constitution ignores the fact that the JPEPA creates legal obligations not only under domestic (Philippine and Japan) law, but also under international law. While the doctrine of Constitutional supremacy is relevant in a discussion of the JPEPA's effects in the Philippine internal legal order, it is of limited relevance in understanding the Philippines' international legal obligations under the JPEPA.

Under international law, a treaty is law between the Parties, and under art. 26 of the *Vienna Convention on the Law of Treaties* (which is widely considered as a codification of customary international law on the subject) "is binding upon the parties to it and must be performed by them in good faith."

The binding effect of a treaty is so basic a rule under international law that the following article of the same convention explicitly disallows a defense based on the requirements of the internal law of the non-complying Party, for non-compliance with a treaty:

Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46. [Underscoring added]

Developing this further, the International Law Commission's (ILC's) 2001 Articles of State Responsibility (which is likewise considered as a codification of customary international law), states the international law on the matter in art. 3, which reads:

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by

the characterization of the same act by internal law.³ [Underscoring supplied]

Further, a defense that the “organ of the State” who committed the State to an international obligation that is in contravention of that State’s internal law in so doing acted *ultra vires*, i.e., in excess of authority or even in contravention of explicit instruction, is likewise of no moment under art.7 of the ILC’s Articles on State Responsibility. In the case of the JPEPA, assuming *arguendo* that it may be in contravention of the Constitution, it is nonetheless binding on the State as a matter of international law. Neither is this defense available even if the Supreme Court were to “disown” the acts by declaring them unconstitutional. The said rule provides:

Article 7

Excess of Authority or Contravention of Instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.⁴ [Underscoring supplied]

In operative terms, this means that if a Japanese investor, or the Japanese Government, were to bring a suit under the terms of the JPEPA

³ An important explanation of the context of art. 3 is found in one of the commentaries of an eminent international law authority and a member of the United Nation’s International Law Commission since 1992; J. CRAWFORD, ILC ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 86 (2002):

“Commentary: (1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation even if it violates a provision of the State’s own law. Second, and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State’s internal law – even if, under that law, the State was actually bound to act in that way.”

⁴ J. CRAWFORD, ILC ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 106 (2002):

“Commentary

xxx

2. The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question. No other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.”

(under art. 107 or art. 152), the fact that the Government may have committed an *ultra vires* act under Philippine law, whether knowingly or unknowingly, by committing to an obligation contrary to the Philippine Constitution, will not be relevant.⁵ Neither is it material that the Supreme Court eventually declares the treaty unconstitutional for having been entered into in excess of authority. There are very limited justifications for parties' non-compliance with a treaty, and none of these justifications are relevant in the context of the present debate on the constitutionality of the JPEPA. The assumption that the JPEPA cannot be interpreted in an international forum to require the Philippine Government to comply with a provision that conflicts with the Philippine Constitution is simply wrong under international law.

Interpreting the Requirements of the JPEPA under International Law

The basic rules of interpretation under international law warn of the serious danger of accepting the misplaced arguments that:

- (1) the provisions of the Constitution are deemed written into the JPEPA,
- (2) statutory provisions are likewise deemed written into the JPEPA,
- (3) JPEPA's art. 4 is a mechanism by which contradiction between Philippine law and the terms of the JPEPA will be resolved and hence, prevented, and
- (4) all of the JPEPA's provisions are not self-executing and need enabling legislation.

The Vienna Convention on the Law of Treaties provides:

Article 31 General rule of interpretation

⁵ The exception of art. 27 of the Vienna Convention on the Law of Treaties (1969) referring to art. 46 is with regard to the competence of the authority signing a treaty on behalf of a Party. However, note that under art. 7 of the *International Law Commission's Article on State Responsibility*, which is of comparable influence as the *Vienna Convention*, this exception has weakened as a result of State practice.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended. [Emphasis supplied]

Ordinary Meaning of the Most Significant Obligation of JPEPA under Chapter 8

I adverted in my 5 October 2007 memorandum to the three most important obligations under Chapter 8 of the JPEPA, namely: (a) the obligation to accord National Treatment to Japanese investors and investments under art. 89; (b) the obligation to accord Most-Favored-Nation (MFN) Treatment to Japanese investors and investments under art 90; and the (c) obligation to refrain from imposing Performance Requirements on Japanese investments under art. 93. To clarify the binding character of these three obligations, it helps to repeat that part of the language of these provisions which convey this character:

Article 89. National Treatment: "Each Party shall accord to"

Article 90. Most-Favored-Nation Treatment: "Each Party shall accord to ..."

Article 93. Prohibition of Performance Requirements: “Neither Party shall impose or enforce”

There is an option to reserve from, i.e., make exceptions to, compliance with those three obligations and the only explicit mechanism in the JPEPA for such exceptions to be made are found in art. 94 which states that:

1. Articles 89, 90 and 93 shall not apply to: (a) any existing non-conforming measure that is maintained by a party at the central government level, as set out in its Schedule to Part I of Annex 7;

...

3. Articles 89, 90 and 93 shall not apply to any measure that a Party adopts or maintains [in the future] with respect to sectors, subsectors or activities, as set out in its Schedule to Part 2 of Annex 7, subject to the conditions set out therein. [Bracketed materials added]

The language of the JPEPA is clear and there appears to be no room for any other interpretation – for any Party’s reservation to the obligation of art.’s 89, 90 and 93 to be recognized, it must be found in that Party’s Reservations to Part 1 and Part 2 of Annex 7. JPEPA does not say that the reservations can be found in any annex, chapter, or document other than in Annex 7. Neither does JPEPA recognize implicit reservations. The only other exceptions that JPEPA allows for failing to comply with art.’s 89, 90 and 93 are, if the Party is experiencing exceptional circumstances – such as security or balance-of-payments emergency – or is undertaking a health or environment measure, that justifies departure from art.’s 89, 90 and 93. Constitutional goals such as promotion of Filipino labor and protection to Filipino farmers, or the constitutional reservation of private land and other economic sectors (including public utilities) to Filipinos are not recognized exceptions under the JPEPA unless expressly reserved in Annex 7.

Re: Argument that Sixth Paragraph of the Preamble and Article 4 of JPEPA Compel an Interpretation under International Law that JPEPA Obligations Must Conform to the Philippine Constitution and Laws

The Sixth Preambular paragraph provides:

Recognizing the importance of the implementation of measures by the Governments of the Parties in accordance with their respective laws and regulations;...

Art. 4 provides:

Article 4
Review of Laws and Regulations

Each Party shall examine the possibility of amending or repealing laws and regulations that pertain to or affect the implementation and operation of this Agreement, if the circumstances or objectives giving rise to their adoption no longer exist or if such circumstances or objectives can be addressed in a less trade-restrictive manner.

The ordinary meaning of the JPEPA Test does not support a conclusion that the Sixth Preamble and art. 4 of the JPEPA ensure that the JPEPA will not be interpreted by a tribunal applying international law rules on treaty interpretation, in a manner contrary to the Philippine Constitution or statutes. Indeed, an analysis of the text of the cited provisions reveals no such purpose. Art. 4 of the JPEPA in fact assumes that each Party shall have reserved in their respective List of Reservations of Existing and Future Non-Conforming Measures, those measures or types of measures that it deems to be of such importance to it as to warrant their maintenance or adoption even though those measures are inconsistent with JPEPA provisions in Chapter 8 on Investment. In a sense, art. 4 is the counter-point to the reservations mechanism of Chapter 8 by allowing each party to encourage the other, through the review mechanism, to discontinue the implementation or avoid the adoption of non-conforming measures that serve to impede the objectives of the JPEPA even if these have been explicitly reserved in Annex 7 “*if the circumstances or objectives giving rise to their adoption no longer exist or if such circumstances or objectives can be addressed in a less trade-restrictive manner.*”

The position now suggested by some governmental representatives makes nonsense, superfluous nonsense, of the JPEPA scheme of reservation and ignores that fact that *Japan itself made complete and comprehensive use of the JPEPA reservations mechanisms (which Japan, not the Philippines, invented). So did Malaysia and Indonesia in their respective Economic Partnership Agreements (EPAs) with Japan.*

Our governmental representatives also overlook the fact that art. 4 of the JPEPA is but one of several JPEPA devices that contemplate each Party being able to influence the other to amend or forego existing or future non-conforming measures.

Another is the entire chapter on Government Procurement, where the Parties specifically in art. 134, commit themselves to negotiate for the liberalization of each Party's Government Procurement Rules to the

suppliers of the other Party – in the face of presumed knowledge that the supply of goods and services to government is actually now restricted to Philippine nationals under the Philippine Flag Law (Commonwealth Act 138). Art. 134 of the JPEPA states:

Article 134
Further Negotiations

The Parties shall enter into negotiations at the earliest possible time, not later than five (5) years after the date of the entry into force of this Agreement, with a view to liberalizing their respective government procurement markets. In such negotiations, the Parties shall review all aspects of their measures regarding government procurement and shall consider the following factors:

(a) according national treatment and most-favored nation treatment to goods, services and suppliers of the other Party;...

There is nothing in the text of the JPEPA that suggests that Japan will forego what it may have gained in the JPEPA language (such as the reduction of regulatory restriction in the field of investments and trade in the Philippines) in order to help the Philippine Government protect its own Constitution. If the Government wants to ensure protection to the economic provision of the Constitution, it has only one way to do that – by crafting express language to that effect in the JPEPA, and only one place to state that – in the place designated by art. 94, i.e., in its Lists of Reservations of Non-Conforming Measures in Annex 7.

The repeated assurance by some Government representatives of their understanding and consistent position that the JPEPA is to be interpreted in accordance with the Constitution is not a sufficient legal tool under international law to overcome the JPEPA's express requirement to comply with art.'s 89, 90 and 93. In the absence of explicit reservations, it will require an egregious interpretation of the JPEPA to conclude that: (a) constitutional and statutory provisions are deemed written into the JPEPA in spite of the absence of language reserving such provisions; and (b) JPEPA cannot be interpreted otherwise than in accordance with Philippine law. A treaty, whatever else it is, is an international law instrument between two sovereign states. It is not to be interpreted in an international forum as if it were no more than an ordinary commercial contract between two private individuals acting within one and the same internal legal system of a sovereign state. If a Japanese investor came before a Philippine court seeking enforcement of a right accorded to him by JPEPA, but which claim is in collision with a provision of our Constitution, or of a Republic Act

enacted after entry into force of the JPEPA, the court will of course reject that claim and instead apply the Constitution or the Republic Act. But, and this is the critical point, such court decision will not be a valid defense to a charge of violation of an international obligation brought against the Philippines in an international dispute resolution forum. Should the JPEPA enter into force between the Philippines and Japan, its provisions conferring rights on the investors of Japan will constitute international law obligations of the Philippines.

The Argument Regarding the Supposed Non-Self-Executing Character of the JPEPA

Those who posit that the JPEPA completely conforms to the Philippine Constitution argue that even if some provisions of the JPEPA contradict the Constitution, these are not self-executing, and hence the possibility of operationally contradicting the Constitution is remote, if not impossible due to the requirement that first, there must be an enabling legislation for the JPEPA obligations to be executory in the Philippines.

This argument may be relevant with respect to some, but not all, of the obligations in the JPEPA. For example, the art. 18 obligation to reduce tariffs on the import of Japan-origin goods to the rates specified in the Philippine Schedule in Annex 1 requires the taking of certain internal steps in order that the benefits of art. 18 may be enjoyed by importers of Japan-origin goods to the Philippines.⁶ But such argument is completely misplaced and non-relevant so far as concerns the obligations imposed by art.'s 89, 90 and 93.

In the first place, art.'s 89, 90 and 93 of JPEPA are in fact, cast in "self-executing" terms in the ordinary sense of that term. Art.'s 89, 90 and 93 all use the specific, definite and mandatory verb form of "shall accord" and not the permissive and discretionary "may accord". Thus, per the express language of art.'s 89, 90 and 93, no implementing Philippine legislation is necessary to give domestic effect to the commitments there made by the Philippines. But even if one assumes, arguendo merely, that art.'s 89, 90 and 93 are not self-executing, that does not dissolve away the problem. It merely defers it, until the implementing legislation is enacted,

⁶ In the Philippines, a statute or a valid executive order must first be issued before the Department of Finance and then the Bureau of Customs issue the appropriate administrative orders for the tariff rate changes to take place according to the Philippine Schedule in Annex 1 f the JPEPA.

considering that the Philippines has not exercised the option to reserve the right to enact future non-conforming measures.

In the second place, there is no basis under existing international law practice to assure the Filipino public that art.'s 89, 90 and 93 will not have direct effect and immediate benefit to Japanese investors in the Philippines under international law unless the Philippine Congress were to enact enabling legislation for the same. Under current international practice, enabling legislation is not required in order that National Treatment and Most Favored Nation rights to foreign investors be deemed to exist if a bilateral investment treaty between the investors' State and the host State provide for the grant of such rights. These rights (National Treatment and Most-Favored Nation Treatment) are not unique to the JPEPA but are found in other Bilateral Investment Treaties (BITs), and these BITs in turn, have been deemed by various international investment arbitration tribunals to grant direct rights of National Treatment and MFN in favor of the foreign investor on the basis of the BIT alone (unless of course, express language is found to the contrary). It must be further noted that if the existing international investment law practice were to serve as guide for a determination of the Parties' rights under the JPEPA, beach of the said articles as well as of art.'s 91, 92, 95, 96, 97, 98, 104 and 105 of the same Chapter, can be the basis of an action under art. 152 of the Disputes Settlement Chapter,⁷ and, provided that consent of the host State is obtained, also of dispute settlement before an international conciliation or arbitration tribunal brought by an investor of one Party against the other Party who is the host state for the investment under art. 107, par. 2.⁸

7

"Article 152
Special Consultations for Dispute Settlement

1. For the purposes of settling disputes, either Party may make a request in writing for consultations to the other Party if the requesting Party considers that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired, as a result of failure of the requested Party to carry out its obligations, or as a result of the application by the requested Party of measures which conflict with its obligations, under this Agreement."

8

"Article 107
Further Negotiation

...

2. In the absence of the mechanism for the settlement of an investment dispute between a Party and an investor of the other Party, the resort to international conciliation or arbitration tribunal is subject to mutual consent of the parties to the dispute. This means that the disputing Party may, 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."

Finally, regardless of whether or not the JPEPA's provisions are self-executing, the Philippines is under obligation to comply with them in good faith, and the refusal to enact legislation to implement the JPEPA is itself an independent basis to claim breach of the JPEPA.

The Argument that there is a Period of One Year to List Existing Non-Conforming Measures

This argument overlooks the language of art. 94, par. 2, the only portion of the Investment Chapter that refers to a right to list reservations within one year from JPEPA's entry into force, and it reads:

Article 94 Reservations and Exceptions

...

2. Each Party shall set out in its Schedule to Part I of Annex 7, within one (1) year of the date of entry into force of this Agreement, any existing non-conforming measure maintained by a province or a prefecture referred to in subparagraph 1(b)(i) above and shall notify thereof the other Party by a diplomatic note.

The list whose submission is deferred to one year after the entry into force of the JPEPA is the list of existing non-conforming measures of Philippine provinces, not existing national non-conforming measures. Under the express terms of art. 94, par. 1 of the JPEPA, as earlier described, national government measures must be identified in the present list of the JPEPA in Part 1B of Annex 7, and not elsewhere nor at any other time.

On the Adequacy of the List of Existing Non-Conforming Measures, and on the Lack of Necessity for Such Listing (including for Future Measures) for Investments in Services in Annex 7

Some governmental representatives claim that the existing list under Annex Part 1B for Existing Non-Conforming Measures is adequate.

(1) In respect of the ownership of private lands, identified in the statement of Senator Wigberto Tañada as having been not adequately reserved for agricultural, residential or real estate development purposes, it is claimed that this had been adequately reserved in Annex 6 and in Annex 7.

(2) In respect of the prohibition under art. 40 of the Labor Code on the hiring of aliens unless there is no competent, willing and able Filipino for the job, it is asserted that this had been adequately reserved in Annex 6.

(3) In respect of investment in services, it is contended that the positive-list approach of Chapter 6 negates the need for a listing of future measures, and that all the constitutional provisions regarding services are adequately reserved in Annex 6, and that in any case, “services sectors” are explicitly exempt from the provisions of art.’s 89, 90 and 93 by virtue of art. 87, par. 4, with respect to both existing and future non-conforming measures.

(4) In respect of the other sectors identified by Senator Tañada, however, the governmental representatives appear completely silent on the matter. These are: (1) the manufacture, repair, stockpiling and/or distribution of nuclear weapons; (2) the manufacture of firecrackers and pyrotechnics; (3) manufacture of products requiring PNP clearance; (4) manufacture of products requiring DND clearance; and (5) manufacture of dangerous drugs. These items are not found in the list of existing non-conforming measures but in the list of future non-conforming measures.

Re: Adequacy of Reservation for Ownership of Private Lands

It must be noted that Annex 7 has rules of interpretation that will guide the determination of the legal obligations of the Party whose Reservations are put in question. Annex 7 of JPEPA provides the following relevant rules in pages 835-836:

Annex 7

Part 1

Reservations for Existing Measures

...

2. Each reservation sets out the following elements:

(a) “Sector” refers to the general sector in which a reservation is taken;

...

(d) “Type of Reservation” specifies the obligation referred to in paragraph 1 above for which reservation is taken;

...

(f) “Measures” identifies the existing laws, regulations or other measures for which the reservation is taken.

(g) “Description” sets out, with regard to the obligations referred to in paragraph 1 above, the non-conforming aspects of the existing measures for which the reservation is taken; and

...

3. In the interpretation of a reservation, all elements of the reservation shall be considered. A reservation shall be interpreted in the light of the relevant provisions of Chapter 8, against which the reservation is taken, and:

- (a) to the extent that the Phase-Out element provides for the phasing out of non-conforming aspects of measures, the Phase-Out element shall prevail over all other elements; and
- (b) except as provided for in subparagraph (a) above, the Measures element shall prevail over all other elements. [Emphases supplied]

In respect of ownership of private lands, this is how the reservations were set out on page 873, Part 1B of the Philippines List of Reservation for Existing Non-Conforming Measures:

3	
Sector:	Manufacturing
Sub-Sector:	Matters Related to Private Land Ownership
Industry Classification:	
Type of Reservation:	National Treatment (Article 89)
Level of Government:	Central Government
Measures:	The Constitution of the Republic of the Philippines, Article XII
Description:	Corporations, associations or partnerships with maximum 40 percent foreign equity can own private land.
Phase-Out:	None

It will be readily apparent that a reading of the above rules of interpretation will lead to the natural conclusion that the ownership of private lands has only been reserved to Philippine citizens and juridical entities with at least 60% Filipino equity only if the investment in land is an investment in manufacturing. It is not correct to assume that the term “manufacturing” as the sector for which reservation has been made can extend to exploitation, use and enjoyment of natural resources, to real estate development, residential use or to agriculture.

The Philippine Standard Industrial Classification lists “manufacturing” as only one among 17 economic sectors.⁹ It is an

⁹ The 17 major divisions of the economic sectors of the Philippines under the official Philippine Standard Industrial Classification System (2007) of the National Statistical Coordination Board under the National Economic Development Authority are the following: (1) Agriculture, Hunting and Forestry; (2)

extraordinary reading of the JPEPA to claim that “manufacturing” can cover all the other economic sectors.

Private land ownership was reserved for Filipinos also as a horizontal condition for market services in Annex 6. This apparently means that Japanese access to trade in services is conditioned on a limitation with respect to ownership of private lands – that the ownership of such lands cannot breach the minimum 60% equity in the ownership of such land. However, beyond “trade in services,” the problem of distinguishing an investment that is completely confined to “investment in services” as against an investment in an enterprise that may have mixed economic activities including services will rear itself as a significant problem in the interpretation of the JPEPA, a matter that will be discussed at greater length in a latter portion of this response.

In sum, other than for investments in manufacturing and other than for trade in services, private land ownership under the rules of the JPEPA may not be denied to a Japanese investor, such as for real estate development, agricultural uses and residential uses.

This problem arose from the failure to appreciate the fact that the Constitutional preservation of private land ownership to Filipinos is a prohibition that cuts across all economic sectors, and for any and all conceivable purposes. By delimiting the reservation on private land ownership to manufacturing and trade in services, our negotiators reserved less than what the Constitution requires. There appears also to have been a failure among our negotiators to appreciate the fact that the Philippine economy is not only made up of “manufacturing” and “services.”

Re: the Lack of Need to Reserve the Right to Make Reservations for Existing and Future Non-Conforming Measures for Certain Constitutional Provisions (Public Utilities, Mass Media, Education, Advertising and Practice of Profession) and for Services Generally

Some governmental representatives have argued that there is no need for a complete listing of existing and future non-conforming measures

Fishing; (3) Mining and Quarrying; (4) Manufacturing; (5) Electricity, Gas and Water Supply; (6) Construction; (7) Wholesale and Retail Trade; Repair of Motor Vehicles, Motorcycles and Personal and Household Goods; (8) Hotels and Restaurants; (9) Transport, Storage and Communications; (1) Financial Intermediation; (11) Real Estate, Renting and Business Activities; (12) Public Administration and Defense; Compulsory Social Security; (13) Education; (14) Health and Social Work; (15) Other Community, Social and Personal Service Activities; (16) Activities of Private Households as Employers and Undifferentiated Production Activities of Private Households; and (17) Extra-Territorial Organizations and Bodies.

in the Philippines' Schedule of Reservations to Part 1 of Annex 7, especially insofar as reservations for measures on the constitutional provisions on "services" is concerned. These they take to mean the constitutional provisions on public utilities, mass media, education, advertising and practice of professions.

With respect to the lack of need to reserve the right to maintain existing non-conforming measures in Part 1B of Annex 7 for which the Constitution maintains Filipino equity requirements in what they claim as the "services sectors", they point to: (a) the provisions of art. 87, par. 4 of Chapter 8, JPEPA that render the same unnecessary; and (b) the sufficiency of the reservations made by the Philippines in its Schedule to Annex 6.¹⁰

With respect to the lack of need to reserve the right to adopt and maintain future non-conforming measures, they point to: (a) the "positive list" approach of the Chapter on Trade in Services (Chapter 7) enunciated in art.'s 72 and 73 as rendering completely unnecessary the need to reserve the right to adopt and maintain future non-conforming measures for "services;"¹¹ and (b) the same art. 87, par. 4 of Chapter 8 that also renders reservations unnecessary.

¹⁰ They claim that in granting market access to specified service sectors listed in the JPEPA, government negotiators were careful to include all the constitutional limitations to market access that are applicable to the constitutionally-preserved service sectors - public utilities, mass media, education, advertising, practice of profession - including specifying the applicable equity caps or nationality requirements for the grant of professional licenses. They also claim that sufficiently specified as a general condition to access to services were the constitutional limitation on ownership of private lands, and on the limitation on participation of aliens in the board of directors and management positions to no more than the allowable constitutional limits. They also claim that they also included the applicable statutory limitations such as the hiring of aliens only when there are no Filipino nationals available for the position.

¹¹ Governmental representatives claim that in the first place, art.'s 72 and 73 of the Chapter on Trade in Services prevent the application of National Treatment and Most-Favored Nation Treatment obligations to services unless Japanese investors are given market access to the service sector through the "positive listing" of the sector in Annex 6 of the JPEPA. Art.'s 72 and 73 read:

"Article. 72
Market Access

1. With respect to market access through the modes of supply defined in subparagraph (t) of Article 71, each Party shall accord services and service suppliers of the other Party treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule of Specific Commitments in Part 1 of Annex 6.

...

Article 73
National Treatment

1. In the sectors inscribed in its Schedule of Specific Commitments in Part 1 of Annex 6, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the other Party, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.

..."

Art. 87 (4) of the JPEPA reads as follows:

4. Articles 89, 90 and 93 shall not apply to any measure that the Philippines adopts or maintains relating to investors of Japan and their investments in the service sectors with respect to the establishment, acquisition or expansion of investments.
[Underscoring supplied]

In respect of the claimed sufficiency of art. 87(4), for the prevention of conflict between art.'s 89, 90 and 93 on one hand, and Philippine constitutional provisions on the other, it is essential to note, firstly, that art. 87(4) refers only to "investments in service sectors." The Philippine economy is not, obviously, confined to "services sectors." As noted earlier, there are for statistical-gathering purposes, 17 major divisions of our economy according to the official Philippine Standard Industrial Classification System (2007) of the National Statistical Coordination Board under the NEDA. A distinct category called "services sectors" is not found there. Rather, the list indicates that in fact, all the major sectors of the economy have mixed use of activities that cannot be considered as "services." It is the Philippines' Schedule to Annex 6 of JPEPA that tries to elaborate on the "services sectors" for which market access is granted to Japan. There is no language in either Chapter 7 or Annex 6 that indicates that the Schedule in Annex 6 is intended to create any category of sectors for purposes other than the Chapter 7 obligations or to create legal distinctions with any effect beyond the operative rules of Chapter 7. In fact, references in the services sectors listed in Annex 6 are made only for the purpose of clarifying Chapter 7, i.e., "trade in services" commitments, and not to create any independent legal effect.¹²

Secondly, it is also essential to point out that the constitutional reservations of particular areas of economic activity to Philippine nationals and 60% locally-owned companies themselves are not cast in terms of "services" versus "non-services" sectors. In other words, constitutional reservations of some areas (e.g., "professional services") that might, with some justification be termed "service sectors" do not exhaust the entire field of constitutionally reserved economic activity. Thus, e.g., agriculture, mining,

They claim that, for example, since mass media is not positively listed in Annex 6, there is no room for access to mass media by Japanese investors. Hence, they claim, that there being no access in the first place, there is no National Treatment obligation required to be observed in the mass media sector of the Philippines for Japanese investors.

¹² Explanatory note 1 in Annex 6 (page 656) provides that the adoption of alphabet references to the WTO Sectoral Services Classification List in either Party's Schedule are "indicated to enhance the clarity in the description of specific commitments, but shall not be construed as being a part of the specific commitments."

fishing cannot be properly regarded as “services sectors.” Neither is the “services” versus “non-services” dichotomy compatible with the constitutional protection of public utilities in the context of the meaning of “public utilities” and “public services” under the Philippine Constitution and statutes.¹³ The impossibility of effectively defining and sustaining this “services” versus “non-services” divide is starkly illustrated by the fact that restrictions on entry into the shipping industry itself, which is usually claimed as part of the transportation services sector, is reserved under Annex Part 1B of the Philippine Schedule in Annex 7 as Reservation Number 18.¹⁴

Thirdly, within an area that might be widely regarded as a “service sector,” it is often difficult and perilous to try to separate out the purely “services” aspects from the “investment” or “non-services” aspects of that area. A brief discussion of efforts of international bodies and their difficulties and limitations is provided below to give an indication of the kind of problems our country can create for itself by needlessly making the “services” versus “non-services” dichotomy in our trade and investment agreements.¹⁵ An account of some of the international legal disputes that have already been generated on the “investments-versus-services”

¹³ Likewise, the Philippines has not attempted to define “services” *per se* but it has rules enumerating the economic activities sought to be regulated as “public services,” such as in the Public Service Act. And yet, if one were to go over the enumeration of “public services” within the Public Service Act, it will be quite obvious that it embraces within the term “public services,” economic activities that ordinarily cannot fall within even the WTO Services Sectoral Classification List – such as ownership of ice plants, power and electrical plants.

¹⁴ JPEPA, 891.

¹⁵ It might be helpful to consider the international context of the JPEPA rules on “trade in services” in Chapter 7 to which Annex 6 is appended. The status of efforts to define “services” in the relevant international agreements and bodies is still at a preliminary stage. There is no attempt in JPEPA to define the term “services,” as there has been no successful attempt in WTO to define “services” *per se*. The WTO Agreement has not defined services *per se* but only enumerated activities that constitute “trade in services” in art. 1, par. 2 of the General Agreement on Trade in Services (Annex 1B, Marrakesh Agreement). It has a Services Sectoral Classification List (GATT Document MTN.GNS/W/120, dated 10 July 1991) which acts as a tool to assist in the negotiation process. This WTO List itself is patterned after a sub-set of a larger UN list known as the Provisional Product Classification List (Statistical Papers Series M No. 77, Department of International Economic and Social Affairs, Statistical Office of the United Nations, New York, 1991) – a list whose principal purpose is to improve the gathering of economic data across countries and sectors for statistical harmony and accuracy. In like manner, the UN list does not attempt to define “services” but only enumerates the categories of services sectors. In this larger UN list, other broad categories of economic sectors are also identified – many of which in operation simultaneously undertake the production of man-made goods (manufacturing), the supply of service, and other economic activities that do not fall within either category, such as the growth of natural products. Even the Philippine Standard Industrial Classification List lists many sectors which undertake a mix of economic activities that are a combination of services, manufacturing, extraction, non-extraction energy activities, non-manufacturing production activities or all of the above. This only shows that man’s collective logic has not reached a point where clean categories with surgical precision can be made – of services, of manufacturing, of other economic activities – in a manner that can insulate a specific sector from the cumulative effects of the layers of rules in an economic agreement such as the JPEPA.

obligations is related by the 2006 UNCTAD Paper on Economic Integration Agreements.¹⁶

Fourthly, our submission is that there is no basis for saying that reservations of “service sectors” prevent conflict with constitutional mandates. There is also no need for the Philippines to be satisfied with such a half-hearted and perilous approach to preserving our constitutional reservations of certain areas of economic activity to local citizens and companies with specified local equity content. As noted several times, Chapter 8 of the JPEPA precisely offered us a “blank check,” as it were, in the form of the option to write our own complete reservations of existing and future non-conforming measures, without regard to formal categories like “service” and “non-service” sectors.

Fifthly, and perhaps most compellingly, Japan itself, who devised the concept of reservations in the Investments Chapter, did not consider adopting the “services” and “non-services” dichotomy now being offered by our representatives as explanation for their failures to make adequate reservations for non-conforming measures under Annex 7. Japan has reserved the right not to grant National Treatment and MFN rights, and the right to impose prohibited performance requirements on Filipino investors, both as reservations in Annex 7 for all economic sectors¹⁷ and as market access conditions in Annex 6 for its service sectors. It is extremely difficult to understand why the Philippines should be satisfied with less and the Philippines should not do what Malaysia¹⁸ and Indonesia¹⁹ have done, which

¹⁶ Examples of complexities arising from the interaction of services vis-à-vis investment obligations have arisen in NAFTA on cross-border supply of an investment by one Party, distinguishing between applicable and non-applicable provisions of the investment chapter when there is an attempt to exempt services from some but not all of the obligations in the investment chapter (such as in the Philippine language in JPEPA), and the combined effects of layers of obligations that amplify the intended consequences for the liberalizing party. *Investment Agreements in Economic Partnership Agreements*, UNITED NATIONS CENTRE FOR TRADE AND DEVELOPMENT, GENEVA, 130-31 (2006).

¹⁷ Pages 837-870 and 893-906. It must be noted that within sectors such as agriculture, fisheries, and even manufacturing, sub-sectors such as repair services for several manufacturing or industry sectors are reserved, indicating that economic sectors inherently are a mix of economic activities only part of which constitute “services” in the ordinary way that the term is used.

¹⁸ Please see pages 679-714 of the Japan-Malaysia Economic Partnership Agreement, especially Reservation Number 11 (at page 689) which reads:

“11

xxx

Malaysia reserves the right to adopt or maintain any measure relating to investments in services sectors, on condition that such measures do not constitute a violation of its obligations under Chapter 8 including National Treatment, Most-Favored-Nation Treatment and Market Access.”

¹⁹ See pages 798-906, Japan-Indonesia Economic Partnership Agreement.

is, make maximum use of the option to reserve the right to adopt and maintain non-conforming measures under Annex 7.²⁰

Finally, for the same inherent difficulties and the corresponding grave legal risks in attempting to protect Philippine constitutional provisions by making use of the “services” versus “non-services” dichotomy discussed above, it is likewise imprudent to believe that “future” measures pursuant to the Constitution are sufficiently reserved, even for the so-called “services sectors” by relying on the “positive list” approach of Chapter 7. As earlier described, the scope of regulation by JPEPA of Chapter 7 is limited to “measures affecting trade in services.” It is not unreasonable to believe that a measure that does not affect “trade in services” may be interpreted as barred under the JPEPA even if it is adopted pursuant to a constitutional mandate for the simple failure to reserve the right to adopt the relevant future measure.

Re: Failure to Reserve: (1) Article 40 of the Labor Code and (2) the 5 Sectors in the Foreign Negative Investment List Identified in the Tañada Paper

Governmental representatives appear quiet on the failure to reserve five areas covered by the Foreign Investment Negative List. These are: (1) the manufacture, repair, stockpiling and/or distribution of nuclear weapons; (2) the manufacture of firecrackers and pyrotechnics; (3) manufacture of products requiring PNP clearance; (4) manufacture of products requiring DND clearance; and (5) manufacture of dangerous drugs. Instead of being listed under the list of existing non-conforming measures, they were misplaced under the future measures list. Because of the clear language of the JPEPA’s rules of interpretation, it is not unreasonable for Japan to insist that Japanese investors have the right upon the entry into force of the JPEPA, to enter these reserved areas of investments beyond the limits allowed by law, even if contrary to Philippine law, because they were not explicitly reserved as existing non-conforming measures. The JPEPA is silent on the problem of misclassifying existing measures as future measures,

²⁰ The approach of the Japan-Thailand EPA (JTEPA) can be seen as a study in contrast to the approach adopted by our Government. Thailand virtually committed to grant national treatment only to manufacturing, by adopting a “positive list” approach in the investments chapter, meaning, unless a sector is specifically committed, there is no “National Treatment” obligation that exists for said sector. Its list consists of only two commitments: manufacture of automobile, and non-automobile manufacturing. Hence, treatment is due Japanese investors only for these sectors. It also limited the kind of performance requirement that it inhibits itself from imposing – to those of the kind contemplated in the TRIMS Agreement of the WTO. Its approach to “Most-Favored-Nation Treatment” is even a starker study in contrast. Neither Party virtually committed to provide MFN to the other automatically. MFN is to be granted as a result of a “request” by the other (JTEPA, art.’s 93 and 96).

and there is no assurance that an international tribunal will interpret these measures' classification in the list of future measures as having the legal equivalence of a reservation for existing measures.

There has also been a failure to reserve art. 40 of the Labor Code other than in all services sectors. The effect of the JPEPA is such as to allow a Japanese firm, upon entry into force of JPEPA, to resist the prohibition on the hiring by their enterprise of aliens unless the requirement that there is no competent, able and willing Filipino for the job is first administratively proven. The claim that the rule prohibiting the hiring of aliens has been sufficiently reserved is only partially true – it is reserved only in a situation where the hiring is sought to be made by a firm that squarely fits the description of an enterprise that enjoys market access to the services sector by virtue of Annex 6.²¹ In all other cases, art. 40 of the Labor Code, as a matter of ordinary application of art. 93, par.'s (f) and (g),²² cannot apply vis-à-vis a Japanese employer in the Philippines as to prevent it from hiring an alien even if there is a Filipino available, willing and competent for the job.

The Constitution Requires that a Long-Term Solution to the Repeated Exercise by the President of the Power to Set Tariffs be Identified and Implemented

It is simply not correct to claim that my *ponencia* in *Garcia v. Executive Secretary* inhibits a question from being raised regarding the constitutionality of the wholesale exercise of the power to set tariffs being made in this instance by the President through the JPEPA. The reason for the ruling in *Garcia v. Executive Secretary*²³ is clear:

Accordingly, we believe and so hold that Executive Orders Nos. 475 and 478 which may be conceded to be substantially moved by the

²¹ The prohibition of art. 40 of the Labor Code is found as a horizontal, i.e., global market access condition to all services sectors, page 720 of JPEPA and reiterated in other sections as well, but these are confined to the Trade in Services Annex.

²²

“Art. 93

Prohibition of Performance Requirements

1. Neither Party shall impose or enforce, as a condition for investment activities in its Area of an investor of the other Party, any of the following requirements:

...

(f) to appoint, as executives, managers or members of board of directors, individuals of any particular nationality;

...

(g) to hire a given level of its nationals;”

²³ See *supra* note 1.

desire to generate additional public revenues, are not, for that reason alone, either constitutionally flawed, or legally infirm under Section 401 of the Tariff and Customs Code. Petitioner has not successfully overcome the presumptions of constitutionality and legality to which those Executive Orders are entitled.

The Garcia decision does not foreclose questions on the absence of a power limit by which tariff reductions are being made by the President, or the complete collapse of the Philippine tariff regime, as will be accomplished by the JPEPA's reduction to "zero" tariff duties on 98% of Philippine tariff lines for Japan-origin goods, or the near-automatic assumption of such powers by the President when Congress is not in session. The reasons given in my 5 October 2007 statement are undiluted by the imprimatur given by the Supreme Court to the power of the President to raise taxes in the form of tariff duties through the imposition of the additional ad valorem import duty and the specific import duty involved in the Garcia case.

The Constitutionality of JPEPA

Certain proponents of JPEPA contend that the JPEPA cannot possibly suffer from any constitutional defect because the rule in the hierarchy of laws requires that the Constitution must always be held to be supreme. Accordingly, it is argued that the JPEPA will always be held to be subject to the Constitution and so ultimately, the JPEPA cannot be regarded as unconstitutional. Therefore, it is further argued, JPEPA should be ratified in the form it exists today and leave issues of constitutionality to our Philippine courts should such issues arise in the future.

This argument ordinarily warrants the briefest of notice – however it has been repeated in the media not only by officials who happen to be professionals in some field other than the law, but also by lawyers who might otherwise be expected to know better. A Philippine court which rejects a claim of a JPEPA treaty right upon the ground that to recognize that treaty right would be to violate some provision of our Constitution is, of course, simultaneously upholding the Constitution and denying enforcement of a JPEPA provision. That court is also rendering the Republic of the Philippines vulnerable to a serious charge of violating its international treaty obligation and committing an international delinquency for which it can be made responsible before an international tribunal. It is precisely to prevent this unnecessary and most unhappy dilemma with such portentous implications for our country that we recommend remediation measures in the relevant Senate Resolution.

Conclusion

For the reasons we have described above, we continue to believe that the Constitution will be best served if remedial language, a modest sample of which we had delivered to Your Honorable Committee on 30 October 2007, be considered and made an integral part of the JPEPA.

If you or any member of your Committee has any question in respect of the foregoing, please let us know.

Respectfully submitted,

Florentino P. Feliciano
Ma. Lourdes A. Sereno

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