

THE PHILIPPINE-JAPAN TREATY OF AMITY, TRADE AND NAVIGATION

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"We are a sacrificial race with a mysterious urge to suicide."

— *Claro M. Recto*

I

Rejection of the First Treaty

The Philippine-Japan Treaty of Amity, Commerce and Navigation (TACN), is probably one bilateral agreement which has generated much controversy and condemnation from various sectors of society. It is the only bilateral treaty in which the Philippines has afforded another country a "package deal", encompassing amity, commerce, trade and navigation. As a result of these objections, the TACN which was signed in December 9, 1960 in Tokyo went unratified by the Philippine Senate for a period of 13 years.

The important specific objections against the treaty consisted, first, of the most-favored-nation clause (MFNC) which Japan would extensively enjoy under the Treaty. The inequality arising out of an MFNC with Japan was pointed out by Salonga: "that between a rich industrially sophisticated country and a poor technologically under-developed country, the Most-Favored-Nation Clause works to the detriment of the later."¹

Another objection was the absence of an escape clause in the treaty. Such a clause would authorize either party to modify or terminate any provision of the Treaty if its continued operation would cause damage to the economy or any of the parties' local industries. In its stead was a consultative process which could endlessly go on as the danger or damage, which is more imminent on part of the Philippines, continues unabated.²

Still another important objection to the TACN, was the absence of a provision defining the scope of Philippine territorial waters. Attempts at including such a provision in the Treaty led to a deadlock in the negotiations. Later Laurel stated that "[t]o be sure, if

¹ Salonga, *Should the R.P.-Japan Treaty be Ratified?*, The Sunday Times, February 13, 1972, p. 25.

² See, Sta. Romana, *Dependency and the Philippine Japan Treaty of Amity, Commerce and Navigation: Focus on Trade and Investments* (PCAS, 1976) Thesis.

we at last desisted from our proposal, it was only after we realized that Japan would never enter into any treaty with us that would include a definition of Philippine maritime jurisdiction pending agreement on the matter at an international convention".³

The non-inclusion of such a provision not only negates the expenses and efforts the Philippines has exerted in international conferences for the adoption of its archipelagic concept of a territorial sea, but as some legislators pointed out, it also weakens our stand in these conferences. Japan's refusal to include such a provision also generated the fear among Filipinos, that the Treaty could be taken as a license for Japanese fishing boats to operate within our sovereign waters. This fear is not unfounded, for Japan's record shows that she "has never been one to respect a state's territorial waters beyond 3 miles. In 1955 alone, 156 Japanese fishing boats were captured on the high seas which are declared by some countries to be territorial seas . . . In 1956 32 Japanese fishing vessels were again seized".⁴

Saniel summarizes the reasons raised for rejecting the Treaty into two, which are:

- 1) The fear that the Treaty will become a license for Japan's intrusion into Philippine territorial waters; and
- 2) The fear that the Treaty will open the door for Japan's economic "invasion" of the Philippines.⁵

The above fears seemed to have valid and reasonable basis for they were never allayed by the assurances given by the proponents of the Treaty; neither was the latter's proposal of 'ratify first and remedy later', acceptable. As such the TACN never met the approval of the Philippine Senate. It was therefore laid to rest in the Senate archives in 1972.

Philippine-Japan Relations and "Reparations"

Our assertion of national policy vis-a-vis our relation with Japan came at a later hour in the day. Japanese business interests and investments had already lodged themselves within our economy. Their presence was facilitated by an earlier agreement between the Philippines and Japan. This agreement was the Reparations Program. Apparently for our sole benefit, Filipino policy-makers refused to recognize its true purpose and instead sacrificed national interest for

³ Saniel, *Philippine-Japanese Treaty of Amity, Commerce and Navigation: An Overview* 67 (1972).

⁴ Caparas, *Japan Pact Dangers Cited*, Manila Times, March 30, 1970, p. 1.

⁵ Saniel, *supra* at 64.

a measly \$550 million. Since the amount was to be given in the form of capital goods and services, "Japan's leading business circles" as one writer expressed, "were quick to see the connection between reparations and their business interest". Continuing he says:

They considered reparations as a kind of investment or economic co-operation to develop the recipient countries as markets for Japan's products. This view was clearly in a manner when they said that *reparations agreement of Japan with the Philippines would be seeds from which a great harvest can be expected in a few years*.⁶

The "reparations" program was therefore a scheme hatched and run by Japanese business interests. This is best exemplified by the Philippine case. As explained by Halliday and McCormack,

The Philippine programme exemplified the two key traits of the whole affair: utter business dominance, and the self-serving nature of the actual content of the governments. In the case of 'reparations' to the Philippines, the business leader handling the negotiations came to an agreement among themselves on the sum to be advanced to the Philippines without even informing their own Finance Minister...⁷

The head of the Japanese panel during the negotiations with the Philippines, Aiichiro Fujiyama, was not even a member of the Foreign office, but his unquestioned qualification seemed to be his Presidency of Japan's Chamber of Commerce and Industry. True to his nature as a businessman, he drove a hard bargain with Ambassador Felino Neri, and ultimately he was able to substantially reduce the actual war damage claim of the Philippines from \$8 billion to a mere \$550 million. The latter amount consisted of a mere \$300 million addition to her original offer of \$250 million. Attached to the original agreement was a \$250 million loan plan by Japanese private business firms to be extended to their counterparts in the Philippines. This latter plan "was hopefully viewed as the first step towards establishing a channel of Japan's direct participation in the Philippine economy".⁸

As a whole "the effects of Japanese 'reparations' and 'aid' to the Philippines show that these activities have been used to unload unwanted consumer goods onto the Philippines, to stifle local economic development, to take over Philippine concerns, bribe government officials, etc".⁹

⁶ Ohno, *The Settlement of Japan's Reparations Question with the Philippines, 1945-1956: Towards the \$550 Million Agreement*, SOLIDARITY, July-August 1976, p. 12, col. 2. (Emphasis added).

⁷ HALLIDAY & MCCORMACK, JAPANESE IMPERIALISM TODAY 22 (1973).

⁸ Ohno, *supra* at p. 11 col. 1.

⁹ HALLIDAY & MCCORMACK, *supra* at 23.

The Ratification of the Treaty

A retrospective view therefore of Philippine-Japanese relations should caution any policy maker in entering into any new agreement with Japan, especially one which has been unable to pass the careful scrutiny of some of our best legal minds.

In spite of this however, and without much ado, the Martial Law government ratified the TACN in its original rejected form in December, 1973.

The ratification of the Treaty could not be taken as the first step in opening our doors to Japanese investments. For as one Filipino businessman asserts:

Even in the absence of the Treaty, economic transactions between Japan and the Philippines have been substantial and have grown tremendously in the post-war period. They have covered the full range of economic transactions possible in relations between two countries with the sole exception perhaps of the outright establishment of wholly-owned Japanese subsidiaries in the Philippines.¹⁰

As of 1973, therefore, Japan was the third largest foreign investor in the Philippines.¹¹

The principal benefit Japan derived from the ratification of the TACN was the extension of a most-favored-nation treatment by the Philippines. Furthermore, the Treaty acted as a gigantic neon sign reassuring Japanese business interests that the martial law government highly welcomes Japanese investments and that it would use its powers to guarantee the Treaty's implementation.

Generally, however, as one study on the Treaty expressed: "The treaty seems to be only a contributory factor, not the crucial one in the recent expansion of Philippine-Japanese trade."¹²

It is not surprising, therefore, that a year after the ratification of the Treaty, Japan became the second largest investor in the Philippines.¹³

One of our nationalist writers was quick to note that:

With the ratification of the Philippine-Japanese Treaty of Amity, Commerce and Navigation in 1973, the invasion of the Philippines by Japanese capital became more intense even as the merging patterns of Japanese investments indicated that limited and highly detrimental

¹⁰ S.K. Roxas, *The Philippine-Japan Treaty of Amity, Commerce and Navigation: Ten Years Later*, 2 PHIL. YRBK. INT'L. L. 15, 15-16 (1969-1973).

¹¹ TSUDA, A PRELIMINARY STUDY OF JAPANESE-FILIPINO JOINT VENTURES 3 (1978).

¹² Sta. Romana, *op. cit. supra*, note 2 at vii.

¹³ *Ibid.*

objectives of Japan to concentrate only in pollution-causing, extractive, raw material producing and labor-intensive industries.¹⁴

The 1979 Philippine-Japan TACN

After the expiration of the Treaty's three year term (roughly in December, 1976) it has been extended on a year to year basis. This has been done according to Pres. Marcos:

***for want of a more permanent solution....that a more balanced and truly mutually beneficial agrément can be reached with Japan in the spirit of the 'heart-to-heart' understanding which Premier Fukuda has invoked.¹⁵

With the above presumably in mind a new Philippine-Japan TACN was signed by Pres. Marcos and Prime Minister Ohira on May 10, 1979 in Manila.* The new treaty according to the President was expected to remove the irritants and ambiguities of the old treaty.¹⁶

In a more textual comparison of both Treaties, one could see that they are essentially the same.

There have been additional provisions, but the main objections raised against the first treaty consisting of the existence of a most-favored-nation-clause, the absence of an escape clause, and the necessary inclusion of a definition of Philippine territorial waters, remain unresolved.

From the viewpoint of Japan, treaties such as the TACN and others of similar nature with Southeast Asian Countries, allowing direct foreign investments are but means to "solve some pressures in the surplus balance of trade of Japan with others, and to solve the problem of structural changes in Japan such as, the labor shortage, wage cost increase, high price of land and its stringent control of pollution".¹⁷

Japan's promise to help in the development of the economies of the less developed countries of Southeast Asia remains an illusion. Japan's actual aim is to strengthen its neo-colonial hold upon these countries, to secure a source of raw materials and markets for its goods.

¹⁴ CONSTANTINO, THE SECOND INVASION (JAPAN IN THE PHILIPPINES) 27 (1979).

¹⁵ New Directions in Philippine Foreign Policy, Speech, U.P. Law Alumni Dinner, Manila, September 29, 1978.

* By virtue of 1976 amendments to the Philippine Constitution the treaty-making power is vested in the President under martial law, as such the TACN was by his signature ratified on the part of the Philippines.

¹⁶ Times Journal, May 11, 1979, p. 1.

¹⁷ KHANTIGUL, RELATIONSHIP OF JAPAN AND SOUTHEAST ASIA IN TRADE AND INVESTMENT 4 (1977).

As one writer observes, that Japanese investments in Southeast Asia "are primarily to export pollution and to exploit cheap labor and domestic markets" is only one side of the coin, the other side consisting of host government policies which promote such industries are also to blame.¹⁸

II

COMPARATIVE ANALYSIS OF TRADE PROVISIONS IN THE OLD AND THE NEW TREATY WITH REFERENCE TO THE PROTOCOLS

Most-Favored-Nation-Clause

A most-favored-nation-clause (MFNC), which is a provision generally inserted in a commercial agreement between two states, obligates the contracting parties to extend all privileges or favors made by each in the past or which might be made in the future, to the articles, agents, or instruments of commerce of any other state in such a way that their mutual trade will never be on a less favorable basis than is enjoyed by that state whose commercial relation with each is on a most favorable basis.¹⁹

As opposed to the national treatment (which gives foreign nationals equal opportunities with its own citizens), the MFNC treatment gives foreign nationals equal footing as those granted to any other third country.²⁰

The purpose of a MFNC is to prevent discrimination in trade and commerce. It is one which is anticipatory in nature, because, it precludes any disadvantages which may arise from changing economic interests of the contracting parties.

While mutuality of advantage is the object of a MFNC, it works to a disadvantage if one of the contracting parties is a backward nation.²¹

Comparative Analysis

In comparing the provisions in the old and new Treaties, only the significant changes will be cited, if any, to determine whether the old criticisms remain valid despite these changes or if any substantial changes were conceded in our favor.

¹⁸ SANHUN & TANG, ed., JAPAN AS AN ECONOMIC POWER AND ITS IMPLICATION FOR SOUTHEAST ASIA xiv (1974).

¹⁹ SNYDER, THE MOST FAVORED NATION CLAUSE 10 (1948).

²⁰ *Id.* at 3.

²¹ *Id.* at 5.

Article 1 refers to MFNC treatment to be accorded to Japanese nationals on matters relating to their entry, sojourn, travel and residence in the Philippines.

There is *no change* in the *new* treaty; but Protocol No. 1 excludes permanent residence and Protocol No. 2 excludes the advantage given to a third country regarding visas and passports.

The treaty disallows permanent residence by Japanese individuals. However, Japanese firms can be firmly and permanently established here, manned by temporary residents coming in and out, as in the establishment of Japanese trading houses to the prejudice of Filipino importers and investors entering the field of foreign trade.²²

The unequal enjoyment of privileges applies to all matters including Article 1.

We also face the problem of the entry and re-entry of Japanese immigrants.²³

Article II refers to a MFNC treatment respecting "the levying of taxes, access to the courts of justice and to administrative agencies, the making and the performance of contracts, rights to property, participation in juridical entities, and generally to conduct all kinds of business and professional activities".

There is also the reservation to the "right to accord special tax advantages on the basis of reciprocity and by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue."

Under the *new* treaty, this has been broken down into Articles II and III, as follows:

Article II assures the protection and security for the person of the Japanese nationals "in no case less than that required by international law."

Article III virtually reproduces *in toto* Article II of the old treaty especially respecting matters on the levying of taxes and accordance of special tax advantages on the basis of reciprocity.

"Reciprocity" refers not to what each party may extend to another but rather the treatment which each extends to third countries.²⁴

²² Henares, *Possibilities of Working Out a Treaty with Japan*, Sunday Mirror, Aug. 5, 1966 p. 10.

²³ Yambao, *Phil-Jap Treaty—a catalyst to dependence* (U.P. Economics, 1976) Thesis.

²⁴ Ocampo, *Two Views on Phil-Japan Treaty*, PHILIPPINES FREE PRESS (July 25, 1970) p. 12.

Mere reciprocity between a highly developed country and an underdeveloped one is a disadvantage to the latter.²⁵ For example, if Japan grants country C the privilege to buy its cedar logs at a specified rate, it cannot grant the same privilege to the Philippines if no reciprocity on the matter exists.²⁶

Since Japan has a tighter control of its international commercial agreements, owing to its principal position in the world trade, it has less agreements with third countries which could be the subject for reciprocity or reciprocal agreements between the Philippines and herself.

The Philippines, on the other hand, has many commercial agreements intended to increase its foreign exchange reserves which could very well be the subject of reciprocal agreements with Japan if she should desire it.

Reciprocity, then as a limitation on the application of the MFNC, becomes unavailing. Besides, Japan has adopted many exclusionary policies, which the Philippines has not, because of its policy to attract foreign investments.²⁷

Article IV of the *new* treaty is a new provision which further assures the protection of the property of Japanese nationals and juridical entities, according them national treatment.

Protocol No. 8 of the new treaty refers to investment not subject to expropriation, nationalization, or deprivation of use except for public use and with just compensation.

Under the old treaty, Article III and IV unconditionally applies the MFNC treatment relative to matters of conduct of business and preferential activities of nationals and companies of either party and the right to impose restrictions and prohibitions on a non-discriminatory basis.²⁸

It allows the application of restrictions and prohibitions which are consistent only with each party's obligation to the Articles of Agreement of the International Monetary Fund (IMF) and those which have the equivalence of exchange restrictions.

Article V of the *new* treaty encompasses *in toto* paragraphs 1 and 2 of Article III of the old treaty.

Article VI reproduces *in toto* paragraphs 3 and 4 of Article III of the old treaty.

²⁵ *Ibid.*

²⁶ Laurel, *Political Motivation of the Phil-Japan Treaty*, 1961 *FOKIAN TIMES PHILIPPINE YEARBOOK* 67.

²⁷ Ocampo, *supra* at 12.

²⁸ Yambao, *supra* at 20.

And, Article VII also reproduces *in toto* Article IV of the old treaty.

Three new provisions, however, have been added to qualify the nature and purpose of import and export restrictions allowable under the treaty, as follows:

- 1) that notice shall be given far in advance (one month if possible) by the party imposing quantitative restrictions or prohibitions of an item of special interest to said party.

- 2) that the purpose of the restrictions or prohibitions would be to safeguard the external financial position and balance of payments as well as to promote the development of domestic manufacturing industries.

- 3) that the restrictions or prohibitions is in the interest of preventing deceptive or unfair practices (provided they do not arbitrarily discriminate against the commerce of either party) as enunciated in Protocol No. 8 of the old treaty.

The addition of the three new paragraphs aforementioned is perhaps a weak attempt on the part of the Philippine negotiators to correct a heavily loaded dice as a response to severe criticisms in the past against the provisions of Article III of the old treaty.

Looking, however, at the true economic and political conditions of the parties, Japan could easily prevent the imposition of such restrictions and prohibitions because of its superior position in trade and investment activities with third countries, whereas the present position of the Philippines is now one of almost total dependence on Japan.

Given, for example, the decision of the Philippines to cut down on timber exports to Japan, the latter would not be seriously affected because it could still fill its market requirements by increasing its importation from Indonesia; however, if in retaliation, Japan decides to cut down its copper ore requirement (as in the copper ore cutback in 1974) domestic copper suppliers could be seriously affected since the major market for our copper is Japan.

According to the proponents of the treaty, the Philippines could still protect domestic manufacturers from the unrestricted importation of Japanese products by the imposition of tariff duties. But considering the superiority of Japanese technology, her products have a lower cost per unit so that they cannot be classified as luxury items (for which higher tariff could be imposed) and could

very successfully enter the country and compete with local products.²⁹

If certain imports prove injurious to local manufacturing industries, under the old Protocol No. 9, the parties shall enter into consultations "to adopt adequate measures within its powers to prevent or remedy the injury". This is now expressed in the *new* treaty proper as Article VIII, which states that in order to prevent the harmful effects upon the commerce of either party of business practices which restrain competition, the parties must limit access to markets or foster monopolistic control by the combination, agreement or other arrangements between one or more enterprises.

Remedial action is, however, discretionary with Japan. An "escape clause" to this one-sided provision could have been inserted which would suspend the obligation under the agreement to the extent and for such a time as may be necessary to remedy any injury to the importing party, prior to consultation and possibly, renegotiation.³⁰

Besides, what needs to be protected are not only present locally manufactured products but also products which could be manufactured in the foreseeable future. By allowing almost unrestricted entry of Japanese goods which do not compete with locally manufactured goods, we would be retarding industrialization in the sense that it defeats Filipino initiative to develop new manufacturing methods.³¹

Aside from an ineffective Anti-dumping Law, under the provisions of the Flag Law, a Filipino bidder selling to his government was allowed to sell goods of local or foreign origin, therefore a Filipino importer of Japanese goods has the same competitive advantage as a Filipino manufacturer of local product.³²

Article V of the old treaty states that the criteria for trade between the parties is that the same should "contribute to the sound and balanced development of its national economy on a self-sustaining basis", and that the parties agree to further the interchange and the use of scientific and technical knowledge.

Neither shall hamper the introduction of capital and technology.

In the *new* treaty, the criterion of "trade on a fair and stable basis" is treated under a separate article IX.

²⁹ Vergara, *Phil-Japan Treaty: An Overview*, THIS WEEK Feb. 26, 1961, p. 28.

³⁰ Henares, *op. cit. supra*, note 22 at 11.

³¹ *Ibid.*

³² Vergara, *supra* at 29.

Article X of the *new* treaty, however, is a reproduction of the former Article V *in toto*.

It may be significant to note that in the beginning sentence of Article X, the treaty uses the terms "scientific and technical knowledge" with reference to its mere use of the term "interchange"; but the following sentence uses the term "capital" and "technology" with reference to its "unhampered introduction".³³

It was speculated by critics before, that the change in terms within the same paragraph could have been a mere inadvertence on the part of the drafters of the treaty. Today, as the treaty appears revised, it is clear that the intention of the parties is that there shall be unhampered introduction of capital into the contracting parties' territories without limitation save only that it should "contribute to the sound and balanced development" of the economy of each.

Proponents of the treaty justify the entry of Japanese capital and technology on the grounds that the Philippines has not and cannot attain full measure of prosperity and political freedom unless we welcome the entry of foreign capital and technology. Besides, other legislations like the Investment Incentives Act³⁴ specify the areas of investments which may be allowed to foreigners in order not to supplant domestic capital but rather to complement or supplement it.³⁵

It should be worth noting that it is not Japan's altruism which prompts her to seek the transfer of capital and technology, rather, it is a practical imperative considering that only fifteen per cent of Japan's mountainous land area is capable of supplying her enormous need for raw material with which to feed her manufacturing and processing firms.³⁶

The influx of Japanese investments after the ratification of the treaty more than justifies the conclusion that her total strategy involves the transfer of machinery and technology and capital investments sufficient to fully exploit Philippine natural resources and then to secure as payments for these in the form of imports of raw materials for the exclusive use of Japanese manufacturers and processors both here and in Japan.

Raw materials for industrial use and mineral fuels now account for as much as sixty-three per cent of Japan's total imports.

³³ Henares, *op. cit. supra*, note 22 at 12.

³⁴ Rep. Act No. 5186 (1967).

³⁵ LAUREL, PRIMER: TREATY WITH JAPAN (1970).

³⁶ *Japan Today*, Ministry of Foreign Affairs, Japan 48 (1978).

At present, Japan is one of the largest importers of raw materials in the world.³⁷

Besides, it is worth noting that with the population trend in Japanese rural areas which has continually diminished from thirty seven million in 1955 to only twenty-three million in 1974 and which represented only twenty-one per cent of the total population, Japan's ability to develop its agricultural and natural resources has diminished.

Japan is also poorly endowed with mineral resources and lacks most of the minerals necessary to sustain a modern industrial structure, having to import such basic materials as iron ore, copper, nickel, bauxite, etc.³⁸

Table I — Leading Exports of the Philippines to Japan

- | | |
|---------------------------|------------------------|
| 1. copper concentrates | 6. inedible molasses |
| 2. logs and lumber | 7. copra |
| 3. centrifugal sugar | 8. crude coconut oil |
| 4. bananas and plaintain | 9. iron concentrates |
| 5. rolled gold and silver | 10. shrimps and prawns |

Source: Philippine Foreign Trade Resume (1977)

Philippine-Japan Trading Today

"The entry of the Japanese trading firms in 1968 and the massive influx of Japanese goods a few years later could be pure coincidence, but government statistics indicate a highly organized selling pressure oriented to the country's essential import requirements, in the last ten years."³⁹

While Japanese purchases increase at an annual average of sixteen per cent (16%), the balance of trade between the two countries with regards to the Philippines has resulted to a negative balance due to the drop in Japanese purchases of copper concentrates, centrifugal sugar, logs and lumber. Owing to its limited mineral resources and deficiency in essential minerals exigent to its modern industrial economy, Japan is compelled to import basic metals such as iron, ore, copper, nickel, bauxite and others.

The balance of trade situation is cited in an editorial of the *Mainichi*, one of the three major dailies in Japan, as follows:

"The Philippines which has suffered huge deficits in trade with Japan (in 1977, it amounted to \$200 million and it soared to \$500

³⁷ *Id.* at 42.

³⁸ *Id.* at 54.

³⁹ *Japan has replaced U.S.*, Business Day, April 22, 1977, p. 9.

million in 1979), made persistent efforts in obtaining Japan's concessions regarding trade rectification..."⁴⁰

However, from the point of view of the government, this has very little to do with the inequitous TACN but rather attributes this to the appreciation of the value of the yen as against the dollar. The government is now hoping that with the lesser value of the cost of local goods, there would be more imports by Japan because with the revaluation of the yen, local goods would appear cheaper.

But how long could the Philippines remain blind to the realities of its present economic dependence on Japan as a result of the TACN?

Table II — Balance of Trade between the Philippines and Japan (1970 - 1978)

— FOB in Dollars —

	<i>Total</i>	<i>Balance of Trade</i>
1970 —	\$800,141,943	\$ 63,374,338 (+)
1971 —	775,776,272	4,139,918 (+)
1972 —	803,139,416	56,822,472 (+)
1973 —	1,193,642,720	156,003,998 (+)
1974 —	1,813,658,001	84,775,433 (+)
1975 —	1,813,287,906	101,294,876 (—)
1976 —	1,597,861,341	354,970,415 (—)
1977 —	1,701,868,073	248,731,833 (—)
1978 —	2,103,486,543	466,724,357 (—)

Table III — Relative Importance of Various Motives for Investments (700 companies)

<i>Motive</i>	<i>US</i>	<i>JAP</i>	<i>EUROPE</i>
1. to secure and develop local markets	40	56	43
2. to secure and develop a regional base	9	—	56
3. to develop a low-cost base for export	32	14	21
4. to secure and develop raw materials supplier	11	22	19
5. for complementation activities	2	—	1
6. other reasons	6	8	2
	100	100	100

Source: Yambao, Thesis (U.P. Economics) 1976

⁴⁰ *Trade Imbalance to be Checked*, Business Day, April 23, 1979, p. 7.

As a probable afterthought, in consideration of the criticisms that the MFNC would bar any advantage which the Philippines may derive on the basis of its arrangements with Southeast Asian nations, by Japan's pre-emption of the market as an industrial leader, Article XIII of the *new* treaty states:

That Articles V, VI and VII shall not apply to the following—

1) tariff preferences or other advantages granted by the Philippines to the ASEAN member nations under a trade expansion or economic cooperation scheme;

2) advantages accorded to adjacent countries in order to facilitate frontier traffic, accorded by the Philippines to countries adjacent to it like Indonesia;

3) advantages accorded either resulting from its associations in a customs union or free trade area.

The aforementioned exclusions merely affirm Japan's well-entrenched position as primary trader in the region. Also, these provisions make no substantial dent on the unconditional tenor of Articles V, VI, and VII.

Validity of Previous Criticisms

While foreign trade and investments supplement domestic investments by securing a stable market for Philippine exports and the exchange of surplus values and generation for foreign exchange reserves for the purchase of capital goods, the Philippines should not limit itself to one market as it did with the U.S. (pursuant to the Laurel-Langley Agreement) and suffer the consequent economic dependence on such country.⁴¹

Foreign exchange reserves should be utilized to purchase capital equipment and not finished products, bearing in mind always the finite nature of our resources.

The much hailed benefit of greater employment, higher standards of living and consequential benefits from the transfer of capital and technology to the Philippines eventually becomes moot by the depletion of our natural resources.

Development of an economic dependence on Japan without the concomitant initiative to encourage domestic industry renders our economy at the mercy of the Japanese and should they turn against us, we would surely suffer destabilizing effects in the economy.

⁴¹ Yambao, *op. cit. supra*, note 23 at 20.

The purportedly new and revitalized treaty with Japan which reportedly eliminated many of the inequitous provisions in the past remains the same and only the numbering of the provisions have changed. It is a mere reiteration of the old treaty. As such, the grounds of opposition hurled against it in the past, remain valid even today.

III

PROVISIONS RELATING TO THE EXPLOITATION, UTILIZATION, AND PROTECTION OF MARINE LIFE AND OTHER RELATED NATURAL RESOURCES

Provisions of the Treaty

The provisions of the Treaty covering the exploitation, utilization and or protection of Philippine aquatic life and resources generally fall into four categories.

The first relates to the right of either party to adopt or execute measures relating to the protection of, generally, all animal and plant life.⁴²

The second relates to cooperation between the parties to contain, control or minimize the discharge of oil or other pollutants, in order to protect marine and other related resources from actual or threatened damage.⁴³ In the event of discharge of oil or other pollutants caused by a vessel of either party, the party whose environment is damaged or threatened of damage, shall take all possible measures, within its capability and in accordance with its laws and regulations, and the other Party, upon request of the latter shall assist in containing, controlling or minimizing the effects of such damage.⁴⁴

The third covers the right of either party to adopt or execute measures for the conservation of fishing and other aquatic resources to maintain maximum sustainable yields and for the protection of endangered aquatic species.⁴⁵

Lastly, is the express denial—that the Treaty does not grant nationals and companies of either party any right or privilege to utilize and exploit the fishery and other aquatic resources under the fisheries jurisdiction of the other party, or to operate in connection therewith factory vessels within such jurisdiction.⁴⁶

⁴² Art. XIV, (d).

⁴³ Art. XII.

⁴⁴ Protocol, No. 14 (1979).

⁴⁵ Art. XIV, (g), (1979).

⁴⁶ Protocol, No. 11 par. 2 (1979).

With the exception of the first, all of the above provisions are new. These provisions are specific expressions of a state's legal right to adopt and implement measures necessary to protect its marine resources. The most significant change in this area from the Philippines' viewpoint, is perhaps, the stipulation denying the party, the privilege, on the basis of the Treaty solely, to fish within the fisheries jurisdiction of the other.

This seems to be in answer to one of the main objections raised against the ratification of the earlier TACN. But nothing has actually been solved. The ambiguity still stands. The treaty still does not contain a definition of Philippine territorial waters. Whether "fisheries jurisdiction" as contained in the treaty is the same as what we call our territorial waters under the 1973 constitution is left unanswered. It is therefore useless if not dangerous to proscribe Japan from using the TACN as a license to fish within our "fisheries jurisdiction" when it does not accept by treaty our concept of Philippine territorial waters. Since Japan actually has its own concept of a states' territorial waters, the TACN has therefore the effect of allowing her to fish in our sovereign waters which she deems to be part of the high seas.

The new TACN therefore, does not act as a safeguard against Japanese intrusion into our territorial waters for the purposes of fishing.

The TACN and Related Philippine Legislation

It should be noted however, that Japanese, or any, foreign investor for that matter, even prior to the ratification of the first TACN, could legitimately conduct fishing operations within our territorial waters. This could be done through the joint ventures scheme recognized under the Investments Incentives Law.⁴⁷

Under this law as explained by Campos,⁴⁸ foreigners may invest in three areas, which are:

1. All preferred pioneer enterprises, with BOI authority, as much as 100 percent of the capital of such enterprises, unless the area of industry or business concerned is nationalized, totally or partially and only if such area is not adequately exploited by Filipino capital.
2. In a preferred non-pioneer enterprise with BOI authority, up to 40 percent of the capital and even in excess of that up to 100 percent if Filipino capital cannot adequately exploit the same within a period of three years from its declaration as a preferred enterprise, subject also to nationalization laws; and

⁴⁷ Rep. Act No. 5186 (1967).

⁴⁸ Campos, *Multinational Corporations and the Philippines as Host Country: A Legal Assessment*, 50 PHIL. L.J. 149, 164-165 (1975).

3. In non-preferred enterprises, with BOI authority, if the investment is not more than 30 percent of the outstanding capital; and if it exceeds 30 percent, with BOI authority and only if the area of investment is not adequately exploited by Filipino capital, would contribute to the sound and balanced development of the national economy and would not conflict with the provisions of the Constitution and other laws.

The Philippine fishing industry has recently come within the direct operation of the Investment Incentives Law. Through a Presidential Decree, the industry has been declared as a "preferred area of investment".⁴⁹ This declaration is in line with its policy to "encourage and promote the exportation of fish and fishery aquatic products to enable the fishery industry to contribute positively to the development and growth of the national economy."⁵⁰ This is a departure from the policy of the earlier fishing law which declared that the goal was "to encourage, promote and conserve our fishing resources in order to insure a steady and sufficient supply of fish and other fishery products for our increasing population . . ."⁵¹

These laws taken together therefore, act as an encouragement and assurance that foreigners are given the right to participate in the Philippine fishing industry in accordance with the above stated rules.

Normally the fishing industry should not be considered a pioneer industry for the purpose of the Investment Incentives Law. Historically, Filipinos have been involved in this activity, so much so that 2.2 million of them depend mainly on this means of livelihood.

Foreign investments if ever they should be allowed in this industry, should be limited strictly to a 40 percent equity participation. But the declaration by the Fisheries Decree of 1975, without any qualification that it is a preferred area of investment, gives rise to the possibility that certain specific areas within the industry could be considered as pioneer and hence a 100 percent foreign equity investment is allowable.

The Fisheries Decree of 1975 also by itself, provided for another means, by which, foreigners are allowed to participate in our fishing industry. This is made possible through the charter contract, whereby:

Citizens of the Philippines and qualified corporations or associations engaged in commercial fishing may, subject to the approval of the Secretary, enter into charter contracts, lease or lease-purchase agreements of fishing boats or contracts for financial, technical or

⁴⁹ Pres. Decree No. 704 (1975).

⁵⁰ *Id.*, Sec. 2, par. 3.

⁵¹ Rep. Act No. 3512 (1967), sec. 1. Underscoring added.

other form of assistance with any foreign person, corporation or entity for the production, storage, marketing and processing of fish and fishery aquatic products...⁵²

Innocent and novel as the provision may seem, it may at certain instances result in a circumvention of the Constitution by exceeding the 40 percent limit of foreign equity participation in local industries. This could happen when the "qualified corporation or association engaged in commercial fishing" consists of an entity already with foreign equity participation in the amount of 40 percent or less and enters into a charter contract with another foreign entity. Depending upon the amount of the latter's investment, the total foreign investment could actually exceed the constitutional limit.

There are, however, two added requisites of the charter contract to which the foreign investor must abide. This requirements could be the reason for investors' preference of the joint venture scheme over that of the charter contract.

These requirements are:

1) That the foreign crew members of the fishing boat operated under the charter contract should not exceed 75 percent of the complement. The foreign crew should also instruct and train the rest of the complement which should consist of Filipinos.⁵³

2) That payments under the contract or agreement shall be made in kind, i.e., in export items of fish and or fishery aquatic products.⁵⁴

The second requisite, although of benefit to a country like Japan where fish is a necessary commodity, actually limits the form of profit the investor might wish to obtain.

Japan and the Philippine Fishing industry

According to an exhaustive paper⁵⁵ on Japanese interests in the Philippine fishing industry, before 1973, there were only 7 Japanese joint ventures involved in local fishing. After the ratification of the first TACN in 1973 and until 1976, Filipino-Japanese joint ventures in this area increased to 32. And as of March 1977 the total amount of Japanese equity in this industry was reported by the paper to be ₱8.4 mililon.

⁵² Pres. Decree No. 704 (1975), sec. 21.

⁵³ *Ibid.*

⁵⁴ *Id.*, sec. 21, par. 2.

⁵⁵ Third World Studies, University of the Philippines, *Japanese Interests in the Philippine Fishing Industry*, AMPO JAPAN-ASIA QUARTERLY REVIEW, Vol. 10, No. 1-2, (1978) p. 52-60.

The same study cautions us not to underestimate the control, such an amount could effect upon an industry which does not require large amounts of capital.

Besides direct investments, there are other areas in our fishing industry where Japanese interests, although indirectly involved, will ultimately result to their benefit. One such area is the construction of the Navotas Fisheries Mart in Malabon which will contain lodging and residential facilities for Japanese fishermen. The realization of the port is on the one hand made possible through a loan from the Japanese dominated Asian Development Bank and on the other by the Japanese Toyo Construction Company which will do the actual construction work.⁵⁶ The importance of this port to Philippine fishing and to its economy as a whole, is the fact that 45 percent of the total Philippine commercial fishery catch is unloaded here. The U.P. Third World study therefore warns us that "[c]ontrol of this port would mean control over a significant part of the Philippine fishing industry".⁵⁷

With the regulations set up by the port authorities, one of which provides that only fish brokers with a gross income of ₱200,000 can do business in the port, its control by big business is inevitable.⁵⁸

The immediate effect upon the Filipino people has been the demolition and relocation of around 6,000 *batilyos* or fish haulers and their families who live in that area and who do menial tasks within the port for their means of subsistence.⁵⁹

Another area of Japanese involvement in local fishing is through the Southeast Asia Fisheries Development Center (SEAFDEC), whose Aquaculture Department, which is mainly funded by Japan, is located in Iloilo. Under the guise of technical assistance and research, the study conducted by this institution is actually for the benefit of Japan's fishery needs. An example of this is the development of shrimps and prawns culture which are one of the primary aquatic imports of Japan but which is beyond the reach of our lower income groups.⁶⁰

This form of assistance is, as one Japanese writer explains:

- ***based on the premise of getting a return (e.g. purchase of the catch, access to foreign piscary, promotion of fishing net co., etc.)
- Overseas fishing cooperation is a business investment for Japan.
- Foreign-caught fish are purchased from countries growing increasingly dependent on expensive Japanese fishing gear and technology

⁵⁶ *Id.*, at 56 col. 2.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ See, Philippine Collegian, August 1, 1979, p. 1, col. 1.

⁶⁰ Third World Studies, *op. cit. supra*, note 55 at p. 58, col. 1.

aggressively pushed on them by Japanese capital. *Clearly, enhancement of local small fishing people or development of their productivity has never been the target of such a policy.*⁶¹

The Future of Japanese Interest in the Philippine Fishing Industry

The inevitable trend of countries in declaring a 200 nautical mile economic zone is one of the main reasons for Japan's future increase in its interests in the piscary industries of her Southeast Asian neighbors. The Philippines, through a Presidential Decree is the most recent nation to adopt a 200 mile exclusive economic zone.⁶²

The effect of the above international development on Japan can be seen by the fact that about 4.5 million tons which is equivalent to 45 percent⁶³ of its annual catch comes from beyond its sovereign waters and within the 200 nautical mile economic zones of other countries. Internally it affects Japan mainly in two ways. First, is the serious crisis its fishing industry will face, and second, is the problem of feeding a growing population which has a deep-rooted demand for fish, which according to the Japanese Agriculture-Forestry Ministry, would require 13.52 million tons of marine products in 1985.⁶⁴

Another factor, adding to the future increase of Japanese interests in the piscary resources of her neighbors, is the pollution and reclamation of coastal waters in Japan.

Pollution of Japan's fishing waters as a result of her petrochemical, steel and other industries, has had its toll not only upon Japanese marine life but also upon Japanese lives as well. An example is the outbreak of the so-called "Minamata disease" (it derives its name from the area where the disease first struck) which is communicated through the consumption of fish contaminated with organic mercury. The disease is said to consist of a painful nervous disorder causing not only blindness and paralysis, but has been responsible for 120 deaths in 1972.⁶⁵

The industrialization of Japan's coastal areas, through reclamation, is another event adding to her fisheries problem. Reclamation

⁶¹ JUNKO, *Overview of the Japanese Fishing Industry*, AMPO JAPAN-ASIA QUARTERLY REVIEW, Vol. 10, No. 4, p. 21, col. 1. (Emphasis Added).

⁶² Pres. Decree No. 1599 (1979), See, Coquia, *The Philippine View on Law of the Sea*, Bulletin Today, September 8-10, 1979.

⁶³ THE ORIENTAL ECONOMIST'S, JAPAN ECONOMIC YEARBOOK 1976-1977, p. 52, col. 2.

⁶⁴ *Id.* at col. 1.

⁶⁵ Osamu & Junko, *The Japanese Coastal Fishing People's Struggle: "We Won't Let the Sea Die"* AMPO JAPAN-ASIA QUARTERLY REVIEW, Vol. 10, No. 1-2, (1978), p. 51, col. 1.

has not only led to the destruction of traditional fishing grounds but also adds to pollution.⁶⁶

The ratification, therefore, of the TACN, coupled with our laws encouraging and protecting foreign investments, has provided a more favorable opportunity for Japanese fishing interests to invest in the Philippines. This is one opportunity, which as we have shown, they taken full advantage of.

The most-favored-nation treatment Japan enjoys under the TACN, coupled by her technological advancement has, therefore, left the Philippines at the losing end of the fishery trade. As one Filipino writer has explained:

The RP-Japan fishery trade is lopsided, with the Philippines incurring a huge deficit. Japan is the number one market for Philippine fish. On the other hand, Japan supplies 80 percent of the Philippine total fish import needs in the form of canned mackerel and sardines... The fishery trade between Japan and the Philippines follows the classic colonial pattern wherein the former imports raw fish from and exports processed fish to the latter.⁶⁷

With the occurrences at the Navotas Fisheries Port, perhaps, this Japanese forboding comes at a late time.

The features of Tokyo Bay we see today, *with the coast being filled in and the fishing people being chased out*, may be the features of the Philippines. Malaysia, Indonesia or South Korea tomorrow. Shall we let this happen? Fishing people all over the world especially in the advanced pollution nation of Japan, and in the Southeast Asia countries have never before had such an urgent need for solidarity.⁶⁸

⁶⁶ *Id.*, at p. 48, col. 2.

⁶⁷ CONSTANTINO, *op. cit. supra*, note 14 at 29.

⁶⁸ Osamu & Junko, *supra*, at 51, col. 2.