

RESOLVING CONSTITUTIONAL DILEMMAS IN TRADE POLICY-SETTING: THE PHILIPPINE EXPERIENCE

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THE INTER-ACTION BETWEEN THE WTO AND REGIONAL TRADE LIBERALIZATION

One would have to be a little mad to believe that the various points of interaction between the WTO regime, which represents multilateralism, and regional trade liberalization could be captured in half a day or even a days' gathering of lawyers where the primary agenda is to leave the participants with feelings of regional good-will and can-do'ism. An easy way out for those overwhelmed by the enormity of the task is to focus primarily on the positive, i.e., that ASEAN lawyers should sail with the high wind of expectations sweeping the region as talks of more and larger trade agreements are being conducted at fever pitch. However, allow this student of trade law to recall to this august body how arduous a task it was for the international community to reconcile the concept of regional integration with the concept of multilateralism –which many doubt was really any kind of success- and how the task continues to be as difficult today. More questions than answers were generated by the attempt to tolerate regionalism side-by-side with multilateralism, the future resolution of which is difficult to predict. But apart from the larger international legal dilemmas, this paper will attempt to raise even more local but fundamental issues by demonstrating that in one legal regime in the ASEAN at least,

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i.e., the Philippines, the ever-expanding and multiplying circles of trade agreements have only exacerbated constitutional problems that are just about ready to force a confrontation between the executive and legislative branches of government. Like many things in trade law, these issues have never been tested in the local legal arena, as the rush-up to the accession by the Philippines to the Marrakesh Agreement in 1994¹ prevented any meaningful discussion on the question of who decides on tariff rates and the rest of the components of trade policy.

IS THERE DEEP COMMITMENT IN THE ASEAN TO MULTILATERALISM?

One would only need to recall that all the ASEAN primary economic instruments post-WTO cling to the basic principle that the WTO multilateral platform is to be preferred as the primary platform for effecting trade liberalization, and that with respect to trade disputes, the primacy of using the WTO dispute settlement mechanism, once resorted to, even excludes other available mechanisms. This doctrine is supposed to be true for the APEC as well. Despite the strong language of support, however, for multilateralism, the breakdown in genuine progress on the Doha Agenda has been used as a justification to depart from the spirit of multilateralism in the WTO (which should have been the first venue for trade liberalization), with countries in the Asia-Pacific region entering into regional and bilateral trade agreements left and right. This has led many to question whether the WTO, as an institution, is relevant considering the unabated proliferation of regional and bilateral trade agreements.

THE LEGAL FORMULA FOR A WTO-CONSISTENT REGIONAL ARRANGEMENT

A bedrock principle that the WTO is founded on is the “Most-Favored-Nation” (MFN) clause. It is embodied in the first article of GATT 1994², the nucleic document for the gargantuan document that is the Marrakesh Treaty. The MFN clause itself is not

¹ Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement].

² General Agreement on Tariffs and Trade 1994, Annex 1A of the Marrakesh Agreement.

an original creation of the WTO nor even of its predecessor GATT, but from its character of governing primarily bilateral trade relations, the clause has occupied a central role in governing the multilateral relations first in the GATT, then in the WTO, and the continued centrality of the MFN obligation has served to attract more members to the WTO. Its legal language declares:

“Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

Simply put, any favorable treatment given to a product and all products of Country A, or of any other trading partner, whether a WTO Member or not, whether such treatment be in the form of customs duties, administrative charges, internal taxes, sale, transportation and distribution rules, shall be given to the like products of all WTO Members. This further means that any preferential treatment that exists in the bilateral relations or regional relations of WTO Members, whether it is created by treaty obligations or observed de facto, is to be extended to all fellow Members in the WTO. Theoretically, the preferential margins of preference given under the ASEAN Preferential Trade Agreement before, or under the now-prevailing ASEAN Common Effective Preferential Tariff Scheme, should apply, *ipso jure*, to the like products of all other WTO Members. Unless, of course, the preferential trade arrangement can be justified under other clauses of the WTO.

There are three ways by which a regional trade agreement could be WTO-consistent. One way is if it falls within the conditions for customs unions or free trade areas under Article XXIV of the GATT 1994. The second way is if the membership of the WTO grants a waiver of the MFN obligations of the members of the regional trade agreement where the latter derogates from the members' MFN obligation to all the other Members of the WTO. The third way is if it is invoked under the so-called "Enabling Clause" and the 1999 WTO Ministerial Decision.

Article XXIV of GATT 1994 speaks of the first way of justifying customs unions or free trade areas as consistent with the WTO:

"Article XXIV (GATT 1994):

*Territorial Application - Frontier Traffic - Customs Unions
and Free-trade Areas*

"...

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

(a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of

commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(*b*) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

(*c*) any interim agreement referred to in subparagraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

...

Under paragraph 8 (a) and (b) a regional agreement, whether it is in the form of a customs union or a free trade, to come within the exemption of Article XXIV must eliminate “the duties and other restrictions of commerce” ... on “substantially all the trade between the constituent territories in products originating in such territories.”

The second way for a regional trade arrangement to be WTO-consistent is for a waiver to be granted to the members of such an arrangement from the MFN and other obligations under the WTO under the provisions of Article XXV:5. It states:

“Article XXV*Joint Action by the Contracting Parties*

“... .

“5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. . . .”

The third way by which a preferential trade arrangement can be justified under the WTO is if it falls within the so-called Enabling Clause and the 1999 WTO Ministerial Decision. The Enabling Clause was a mechanism created in the Tokyo Round in 1979 where developed countries were permitted to provide preferential trade to developing countries and least-developed countries and permits preferential trading arrangements among developing countries. The 1999 Ministerial Decision on the other hand allows developing countries to provide preferential trade mechanisms for least-developed countries.

The ASEAN Common Effective Preferential Tariff Scheme is not the subject of a waiver under Article XXV:5, nor is there a declaration by any committee or body in the WTO that such satisfies the conditions of Article XXIV. It has only been formally notified to the Committee on Regional Trade Arrangements as a preferential arrangement under the Enabling Clause, and no WTO Member has requested its examination. The ASEAN-China Framework Agreement has similarly been notified to the WTO. Some bilateral trade agreements entered into by ASEAN members, principally by Singapore, have also been notified to the WTO.

Notification alone however, does not create the legal imprimatur of a validation that such regional or bilateral agreements are consistent with the WTO unless the WTO as a body makes a decision on the matter. The reality however, as most observers believe, is that the WTO will never be up to the task of examining all these regional trade

agreements due to the sheer number and complexity of the arrangements. The WTO itself admits³:

“It is estimated that more than half of world trade is now conducted under agreements of this kind. They are found in every continent. Among the best known are the European Union, the European Free Trade Association (EFTA), the North American Free Trade Agreement (NAFTA), the Southern Common Market (MERCOSUR), the Association of Southeast Asian Nations (ASEAN) and its ASEAN Free Trade Area (AFTA), and the Common Market of Eastern and Southern Africa (COMESA). From its inception, GATT — and now the WTO — has allowed member countries to conclude customs unions and free-trade areas, as an exception to the fundamental principle of non-discrimination set out in the most-favoured-nation clause of GATT’s Article 1.

...

“In February 1996, the WTO General Council set up a single committee to oversee all regional trade agreements, replacing separate working parties, each dealing with a separate agreement. The Regional Trade Agreements Committee also looks at the broader, systemic implications of the agreements for the multilateral trading system, the relationship between them, and encourages adequate reporting by countries that have signed these agreements.

“Up to May 2003, over 265 regional trade agreements had been notified to the WTO and before it to GATT. Of these, 139 agreements notified under GATT Article 24, 19 agreements under the Enabling Clause and 26 under GATS Article 5 are still into force today. The committee has currently under examination more than 125 agreements.

³ http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief12_e.htm, October 22, 2006.

- “The Regional Trade Agreements Committee has developed procedures to examine the agreements, including compiling information. These procedures are for assessing whether each agreement is consistent with WTO provisions. However, since there is no consensus among WTO members on how to interpret the criteria for assessing this consistency, the committee now has a lengthening backlog of uncompleted reports.
- “As the number of regional agreements increases, so does the need to analyze whether the WTO’s rules on these agreements need to be clarified further. WTO members differ on whether regional agreements help or hinder the multilateral trading system — whether they function as “building blocks” or “stumbling blocks”. One view is that the regional agreements strengthen the multilateral system because they can move faster, and because they can help integrate developing countries into the world economy. Other countries believe that the WTO’s rules should be revised — and not just reinterpreted — so that the two systems can work together better, particularly since the number of agreements has increased, and their membership has increasingly overlapped.

“Issues raised by the regionalism debate are complex.

“Some are primarily **legal**. For example, GATT Article 24 requires that a regional trade agreement should cover “**substantially all the trade**” in goods between its members. Similarly, GATS Article 5 calls for a “**substantial sectoral coverage**” in services. But there is no agreement among members on what this means, and in practice many agreements leave out large and sensitive areas such as agriculture and financial services. This poses difficulties for assessing whether the agreements are consistent with WTO rules.

“Other issues are more **institutional** in nature. They highlight possible discrepancies between the regional agreements’ rules and those of the WTO. The focus in negotiations has shifted over time from tariff reductions to rules and regulations, both at the regional and at the multilateral level — for instance, rules on anti-dumping, subsidies, or product standards. Some recent regional agreements include provisions not covered by the WTO at all, such as investment or competition policies.

“Finally and most importantly, there is the **economic dimension**. Today, this goes far beyond the effects of tariff preferences on members and non-members of regional agreements. Rather, this is now a question of the regional agreements’ impact on the shape and development of world trade itself — given their large and increasing number and their overlapping membership. Over the next few years, this will be one of the most important challenges facing trade policymakers in all continents.”

KEEPING TRACK OF REGIONAL DEVELOPMENTS: WHAT HAPPENS TO THE TARIFF LINES?

ASEAN is one of the regions most active in attracting both bilateral and regional trade agreements. To date, different degrees of economic partnering have been discussed with the North Asian countries of China, Japan and Korea, the South Asian economic powerhouse of India, the Pacific neighbor Australia, the United States and certain Latin American countries.

The overlapping condition of many of these bilateral and regional agreements can only mean that each ASEAN country, unless it has a dramatic tariff rationalization system in place or unless it is implementing a near-zero tariff regime, would have as many as 5 or 6 different tariff regimes applicable on an MFN basis, on an ASEAN/AFTA CEPT basis, on an ASEAN-China basis, and on an ASEAN country to bilateral partner basis. Instead of trade liberalization making tariff administration simpler,

the result has been a more entangled web of complicated tariff columns with the possibly attendant corruption that complicated systems encourage.

While countries like Singapore are barreling at full throttle towards a free trade regime, countries with large agricultural populations and an underdeveloped industrial infrastructure will face increasing domestic pressure to halt the advances towards liberalization. One only has to remember the negotiations on economic partnership agreements between Japan on one hand, and Thailand and separately the Philippines, on the other, to understand the political costs of trade negotiations. True enough, in countries with large agricultural populations, the benefits of freer trade have not sufficiently dispersed, leading to increasing political tension that is the result of liberalization that has not been finely-calibrated for the local sectors that are at greatest risk of dislocation from the influx of imported goods or services.

Harmonizing National Policy with Multilateral and Regional Trade Liberalization

As the regional association of lawyers, ALA members must not forget that international trade policy is a function first and foremost of national policy. In every setting where an economy sets its own directions, this can only be possible because of the existence of national sovereignty. A sovereign has agreed to self-limit its choices and manner of implementation of national policies to the same extent that it has entered into legally-enforceable agreements that affect its national policy. Unless this basic truth is reiterated and internalized, every ASEAN member risks being swept away by the waves of generalized half-truths about the virtues of globalization without understanding the need to provide safety nets for the poorer sectors of society who will find difficulty adjusting to the break-neck speed at which trade liberalization can take place.

The first realization from the understanding of sovereignty in an increasingly internationalized setting is that greater effort must be expended on defining what is the national interest. It appears that within the ASEAN, the ability to define what is the national interest varies in degrees. The more culturally distinct from the West the leadership of a country is, the greater the likelihood that it will define national interest

with increasing clarity and distinctiveness vis-à-vis the trade and investment models being promoted by the World Bank.

The second realization is that the leaders will have to look at the organic framework of their country for answers in case of conflicts with the impositions of the Western-led international trade system or a developed-country-driven bilateral trade arrangement. For example, the conflicts between the Philippine constitutional system, and the requirements of international pressure for downward adjustments of existing tariffs have pitted economic leaders against the leaders of industry, labor and agriculture. In a country where the Western trade and investment model has, for decades, been taught as the “ideal” in economics classes, the difficulty of proposing an alternative path to development increases tremendously.

Third, the disparity in the levels of economic development and the strategic trade interests of the different ASEAN countries will require a very delicate balancing act among the members, as those who are pushing for a more aggressive agenda will have to give more consideration to those whose domestic economic and/or political situation would require a more nuanced approach to liberalization.

THE CONSTITUTIONAL PROBLEMS OF THE PHILIPPINES IN TRADE POLICY-SETTING

In the Philippines, several cases have been brought before the courts in the past several years involving the implementation or non-implementation of trade measures.

In the first set of cases, three different cases were brought involving the Safeguards Act.⁴ The first was brought by an importer who, getting wind of the report that a manufacturer was about to invoke the protection of safeguard measures against

⁴ **safeguard measures** = Action taken to protect a specific industry from an unexpected build-up of imports — generally governed by Article 19 of GATT. The Agriculture Agreement and Textiles and Clothing Agreement have different specific types of safeguards: “**special safeguards**” in agriculture, and “**transitional safeguards**” in textiles and clothing in http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief25_e.htm, accessed October 22, 2006.

competing imports, brought an injunction suit to prevent the filing of an application for protection by the manufacturers, assailing in the process the constitutionality of the law for being a wrongful delegation of Presidential powers. The second was brought by a manufacturer who questioned the improper interpretation by the Tariff Commission of the provisions of the law. The third was brought to an appellate court by the competitor-importer of the second plaintiff to prevent the manufacturer from assailing the findings of the Tariff Commission. In the three cases, different rulings came out from different courts. When the cases were finally brought to the Supreme Court, the rulings of the Court gave the impression that the constitutional provisions requiring the provision of safety nets to local manufacturers, producers and laborers were not sufficient to override court deference for the bias of the economic managers for the generalized principles favorable to free trade, even as against the clear expression of a protectionist policy by the Constitution.

In the second set of cases, anti-dumping suits were brought against the importers of a certain group of industrial chemicals. While the suit prospered in the Tariff Commission, the findings did not gain enough support from the trade diplomats, leading to its eventual withdrawal and non-implementation in the face of a complaint in the WTO filed by the exporting country.

In the third set of cases, suits have been filed to compel the disclosure of the contents of a final negotiated trade and investment treaty, as well as the disclosure of the deliberations inside government committees setting tariffs. As of this date, the first has been rendered moot by the eventual release of the executed text of the treaty, while there has been no decision on the second.

The above cases required the courts to examine the intentions of the framers of the Philippine Constitution, considering that it has, for a constitution, a quite extended treatment on what are constitutionally-appropriate international trade arrangements,⁵ and

⁵ The “promot(ion of) the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive –Sec. 12, Art. XII and the “pursu(it of) a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity – Sec. 13, Art. XII.

general parameters for national development.⁶ However, even though there was advertence to these constitutional provisions in the discussion of the cases, the courts did not go far enough, did not go to the extent of answering the question of how these provisions in the Constitution could be addressed in the face of the increasing limitations brought about by the Philippines accession or execution of multilateral, regional and bilateral trade arrangements. The judicial solutions found so far in cases where trade law and policy issues became involved was to resort to a literal reading of the law, or to assume that the issues brought by the protagonists could be limited to the particular intended importation at bar. It is respectfully submitted that in either approach, the Supreme Court was wrong. Facing the fundamental problem of reconciling the constitutional directive to protect the vulnerable sectors of society from the ill effects of globalization was immediately required. It is no comfort that such issues in globalization that the larger world is becoming increasingly more worried about have not been given the time nor attention they deserve in the local arena.

REGIONAL TRADE AND INVESTMENT LIBERALIZATION

The President signed the first trade *cum* investment treaty of the Philippines with any country in September this year, with Japan. Non-governmental organizations and congressmen brought a suit to compel the Philippine Government to disclose the text of the final draft, which was mentioned rendered by the subsequent publication of the text. Unlike previous preferential trade agreements executed by the Philippines, the Japan-Philippines Economic Partnership Agreement partakes of the nature of a trade and investment agreement in the mold of a NAFTA. At least in the Philippine view, it was

⁶ “Article XII, Section 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the under-privileged.

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

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

ambitious in coverage, straddling significant areas of trade policy and investment regulation. Any reviewer of the same would have required frequent application of the tests of constitutionality, especially in the area of investment liberalization commitments. The government's rationale for its execution was that it is a door to open the nursing and caregiver profession in Japan. On the other hand, its opponents have raised the issue of lopsidedness of concessions against the Philippines, and the ambiguous effect of the zero tariff concession on toxic wastes on its importation policy.

While the Department of Foreign Affairs has not yet transmitted the treaty for ratification by the Senate, the camps opposing and supporting the treaty are already gearing up for a debate on the costs and benefits of the treaty, as well as its compatibility with the Constitution and national legislation. An issue that will be at the core of the tariff reduction commitments will be the question of who has the right to set tariffs -- whether it is the President or Congress -- and whether the determination of tariff rates and the larger concerns of trade policy requires the exercise of prerogative in the form of full congressional action, and not merely the ratification of a treaty by the President.

It will be no surprise if similar debates - perhaps less focused on the questions of jurisdiction to set trade policy-- on the consistency of trade and investment agreements with the national interest have been taking place not only in the Philippines but in other ASEAN countries as well. In which case, it is time that the ASEAN members learn from each other's difficulties, for indeed continuing liberalization will engender many changes that are difficult to predict, and keeping ASEAN societies together while they undergo those changes will remain to be a tough job for the ASEAN leadership.