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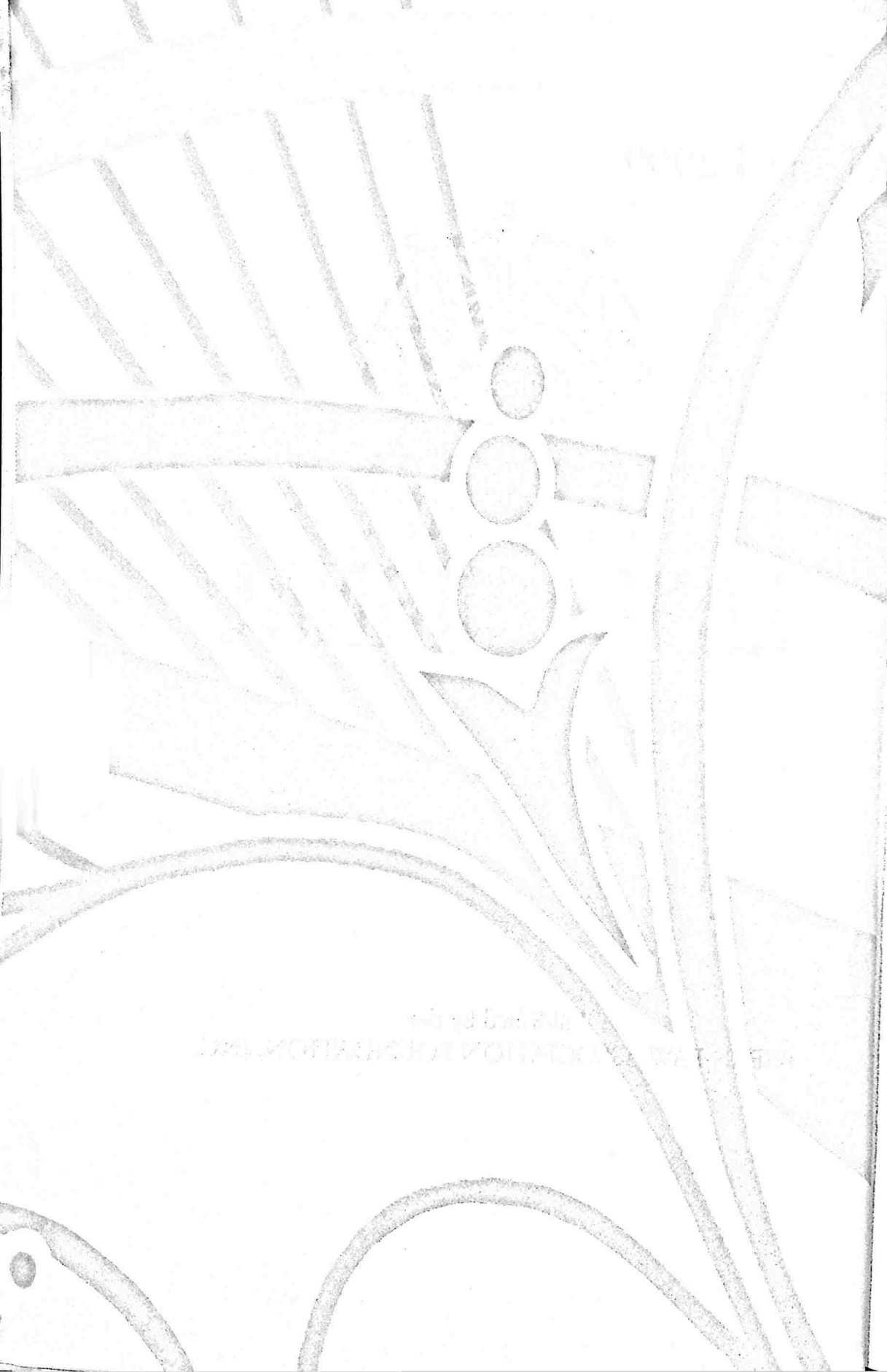

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EDITORS' NOTE

The ASEAN LAW ASSOCIATION (ALA) celebrated its 25th anniversary special commemmorative session in Manila on 24 November 2005. A program honoring its pioneers carved out its organizational framework and brought the entire ASEAN legal community together. It focused on a common purpose to share the legal information amongst ASEAN countries with the publication of scholarly papers and an authoritative book on ASEAN Legal Systems, as well as close relations, cooperation, and mutual understanding through the ALA website.

This fourth volume showcases the different topics by legal experts in the different fields of law discussed in the continuing legal education series sponsored by ALA and contributors on subjects of interest to ASEAN lawyers. It also reflects teh state of flux of legal developments in the ASEAN region in legal education, regional trade liberalization, parallel international arbitration procedures, cross-border statues to curb money laundering, and terrorist activities.

The contents of the articles found in this journal are current at the time of their submission.

MYRNA S. FELICIANO

VICTORIA V. LOANZON

Contents

Taking ALA to New Heights

By T P B Menon*

On the 25th day of July 1985 I submitted a paper entitled "Future Direction of ALA" to the Governing Council. On the 29th day of February 1992 I submitted a further paper entitled "Programme of Action" to the Governing Council.[1] Many of the proposals made in those two papers had come to pass. This year we celebrate our 25th anniversary of the founding of ALA and it is an opportune time to rethink our priorities in the changed circumstances. As none of the other members of the Governing Council have had time to put down their thoughts on paper I though I should do so for discussion at the next Governing Council Meeting in Bali in mid 2007.

In this short paper I intend to touch upon the following matters:

(a) the establishment of an ALA "Think Tank" to study and report to the Governing Council on what steps should be taken:
(i) to enhance Judicial Co-operation between the Asean countries and
(ii) to speed up harmonization of trade laws in the Asean region.
(b) the establishment of Linkages by ALA to the meeting of Asean Ministers of Law/Justice so that ALA can share with the political leadership of the Asean countries the views and ideas of ALA in the development of the laws in the Asean region.
(c) the creation of an "Asean Lecture" to be delivered by an eminent jurist in the Asean region or beyond (to coincide with each General Assembly and Conference) to enhance the status of ALA in the international community and to attract more participants to the Conference.
(d) to set up a Commission (made up of one eminent practicing lawyer from each Asean State) to study Alternate Dispute Resolution (ADR) as a viable tool to resolve particularly trade and commercial disputes in the region and to set up a working Module of Rules (and Forms) for use in the region.

Let me now elaborate on each of the above.

A. Think Tank

Although there had been much discussion on Judicial Co-operation and Harmonisation of our laws over the years these incantations will remain as a pious hope unless concrete steps are taken in this direction. We cannot rely on our Standing

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* *Founder and former President of the Asean Law Association, 1984-1986; Graduated from the University of Malaya, Singapore, 1961.*

[1] *The copies of the earlier papers can be obtained from the Hon. Secretary, ALA (Singapore Chapter) on request.*

Committees as they have proved ineffective for three main reasons:

1. They only meet at irregular intervals – usually coinciding with the Governing Council Meetings or the Assembly.
2. They are not often made up of experts in the field but generally of members of the Governing Council or other participants attending the Governing Council Meetings.
3. They have not been given any specific directions by the Governing Council and thus they drift from one Governing Council Meeting to another achieving little.

The Think Tank I have in mind will be made up of experts who will be free to meet at anytime or communicate with each other by fax or e-mail at the press of a button. I have deliberately chosen Judicial Co-operation as one of the topics as there are several distinguished Judges and Chief Justices who are already on the Governing Council and other Chief Justices and Judges of the region had shown interest in this particular aspect of the work of ALA.

In the same vein trade is of particular interest to the Asean countries and efforts to set up an Asean Free Trade Zone or an Asean Open Market had been on the forefront of the discussions of the Asean Trade Ministers. This is perhaps an area where co-operation and harmonization can be achieved without doing any violence to the existing arrangements that exist between the Asean states. We in ALA should capitalize on this and put forward concrete proposals submitted by the Think Tank in their Report to Ministers of Law/Justice in the region.

To ensure that the Think Tank carries out its task effectively the Governing Council should:

(a) identify the experts in the field as members
(b) appoint a chairperson
(c) spell out its terms of reference and
(d) lay down the time lines for it to furnish its report

The report of the Think Tank (on being approved by the Governing Council) can be used as a convenient conduit to create linkages to the Asean Ministers of Law/Justice.

B. Linkages to Asean Ministers of Law/Justice

In April this year, Chief Justice Chan Sek Keong of Singapore at a diner hosted by ALA had occasion to touch upon this topic. The learned Chief Justice who was formerly Attorney General of Singapore was acutely aware of the lack of any linkages between ALA and the Ministers or Attorneys General/Solicitors General of the region. This same

point was adverted to by Prof. Jayakumar, the Deputy Prime Minister and Minister of Law of Singapore in his speech at the ALA golf tournament held in September this year. These are clarion calls for ALA to act and I propose that we establish such linkages by the President of ALA.

(a) inviting the Asean Ministers of Law/Justice to the General Assembly and Conference and the Asean Lecture as special guests
(b) inviting the Secretary-General of Asean to our General Assembly and Conference and the Asean Lecture
(c) furnishing the reports of the Think Tank and the Commission on ADR (see below) to the Asean Secretary-General during the Opening Ceremony of the next General Assembly with an appropriate short speech by the President of ALA to highlight this event.
(d) alternatively, presenting reports of any studies conducted by or under the auspices of ALA to the Asean Law Ministers Meeting.

Needless to say inviting the Asean Ministers of Law/Justice will involve the host country in additional costs. The Governing Council will have to consider how this proposal can be implemented without the host country being saddled with unnecessary costs.

C. The Asean Lecture

The Asean Lecture should be the crowning jewel at each General Assembly and Conference.[2] These lectures should be delivered by persons who by the very nature of their learning and scholarship or the high office (whether judicial or otherwise) they hold would demand a captive audience. This Lecture will enable each Asean country to showcase, so to speak, its most illustrious sons in legal scholarship. If for any reason we are unable to find any suitable candidate for any particular session of the General Assembly then we can look beyond the Asean region for a suitable candidate.
I remember that at the 1979 Conference in Jakarta we had occasion to hear an oration by one Prof. Mokhtar Kantaatmadja. It was some years later that it dawned on me that it was his vision (as the then Minister of Justice of Indonesia) of an Asean body of lawyers that led to the formation of ALA. The Asean region is not devoid of legal scholars and visionaries. The important fact is that we must learn how to harness and economically and expeditiously deal with by way of mediation, negotiation or arbitration by experts instead of litigation in the Courts.

[2] *The Asean Lecture should be in addition to the keynote address usually delivered by a dignitary of the host country at the opening session of the General Assembly and Conference.*

To ensure that ADR is properly resorted to and fairly conducted, the Governing Council may want to bring the members of the newly appointed Standing Committee on ADR under the auspices of the Commission so as to avoid unnecessary duplication of work and expense.[3]

Here again, to ensure that the Commission carries out its task effectively, the Governing Council should:

(1) identify the experts in the field as members
(2) appoint a chairperson
(3) spell out its terms of reference – particularly to consider how to exploit the linkages within ALA to promote arbitration in Asean jurisdictions of international disputes as well as intra-regional disputes
(4) lay down time lines for the Commission to furnish its report.

The report of the Commission (on being approved by the Governing Council) can be used to further enhance the linkages between ALA and the Asean Ministers of Law/ Justice mentioned above.

In my 1992 paper, I suggested the formation of a Publicity Committee consisting of the President of ALA and three other office bearers to give publicity to all the activities of the ALA (in the press and TV) so that lawyers of the Asean region and beyond will know of the existence and activities of ALA. This suggestion will become all the more relevant if ALA were to undertake the above proposals. Much has been achieved by the ALA having its own website but this in itself is not enough. ALA must be proactive and search for its audience instead of leaving it to our audience (be they lawyers or others) to search for ALA at the website. Perhaps the terms of reference of the current information Standing Committee could be expanded so that the Chairman of that Standing Committee can regularly keep the press and TV informed of the activities of ALA through the President or Secretary General of ALA.[4]

These are some of my thoughts. I am certain other members of the Governing Council will have other ideas. I have put my thoughts down on paper in the hope that it will generate discussion at our next Governing Council Meeting to be held in the convivial surroundings of Bali in mid 2007.

Dated this 20th day of March 2007.

[3] *I am indebted to Mr. Avelino C. Cruz of the Philippines for this suggestion. He touched upon this topic in his final comments to the Governing Council in Bangkok in November 2006.*

[4] *I am indebted to Mr. C.R. Rajah and Mr. Charles Lim for their valuable suggestions on several aspects of this paper.*

The Writ of Habeas Data*

By Chief Justice Reynato S. Puno**

The writ of habeas data can be availed of as an independent remedy to enforce one's right to privacy, more specifically the right to informational privacy. The remedies against the violation of such right can include the updating, rectification, suppression or destruction of the database or information or files in possession or control of respondents.

The writ of habeas data is also a remedy to protect the right to life, liberty or security of a person from violation or threatened violation by an unlawful act or omission of a public official or employee or of a private individual or entity. It complements the remedies of the writ of amparo and writ of habeas corpus as they may be availed of concurrently.

In the drafting of this Rule, the Committee on the Revision of Rules has considered several studies that have shown remarkable uses of the habeas data writ – uses that were not really intended by its developers. Thus, they have found that it has become "an excellent Human Rights tool mostly in the countries that are recovering from military dictatorships."[1]

This writ entitles the families of disappeared persons to know the totality of circumstances surrounding the fates of their relatives and imposes an obligation of investigation on the part of governments. This writ is particularly crucial in cases of political disappearances, which frequently imply secret executions of detainees without any trial, followed by the concealment of the bodies for the purpose of erasing all material traces of the crime and securing impunity for the perpetrators.

The question is -- since we are no longer in transition to democracy, do we need this writ of habeas data? I will not hazard the answer to the question but let the legal scholars speak:[2]

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* *Delivered on the occasion of the launching of the Rule on the Writ of Habeas Data, February 1, 2008, Training Center, G/F Centennial Bldg., Supreme Court.*

** *Chief Justice of the Supreme Court of the Philippines, he holds a Bachelor of Laws degree from the University of the Philippines, a Master of Comparative Laws from the Southern Methodist University in Texas, a Master of Laws degree from the University of California, Berkeley, and finished all academic requirements of the degree of Doctor of Juridical Science from the University of Illinois. After almost 10 years of private practice as a lawyer, Chief Justice Puno entered government service by joining the Office of the Solicitor General. He served as Deputy Minister of the Department of Justice; joined the judiciary initially as a trial judge, Associate Justice of the Court of Appeals and as Justice of the Supreme Court. Recently cited as UP's Centennial Most Distinguished Alumnus, he has been honored for his accomplishment as public servant.*

[1] *Guadamuz, Habeas Data, n.43.*

[2] *18 J. Marshall, J. Computer and Info. L. 1, p. 11.*

Even with the adoption of legal and other protections, violations remain a concern. In many countries, laws have not kept up with the technology, leaving significant gaps in privacy protections. In other countries, law enforcement and intelligence agencies were given significant exemptions to privacy laws. Finally, without adequate oversight and enforcement, the mere existence of a law may not provide individuals with adequate protection.

There are widespread violations of laws relating to the surveillance of communications even in the most democratic of countries. The U.S. State Department's annual review of human rights violations found that over 90 countries illegally monitor the communications of political opponents, human rights workers, journalists and labor organizers. In 1996, a French government commission estimated that there were over 100,000 illegal wiretaps conducted by private parties, many of these on behalf of government agencies. There were protests in Ireland after it was revealed that the UK was monitoring all UK/Ireland communications from a base in Northern England. In Japan, police were recently fined 2.5 million yen for illegally wiretapping members of the Communist Party. The Echelon system is used by the U.S., UK, Australia, Canada and New Zealand to monitor communications worldwide.

Police services, even in countries with strong privacy laws, still maintain extensive files on citizens for political purposes not accused or even suspected of any crime. There are currently investigations in Sweden and Norway, two countries with the longest history of privacy protection for intelligence and police files. In Switzerland, a scandal over secret police spying led to the enactment of their data protection act. In many former Eastern Bloc countries, there are still controversies over the disposition of the files of the secret police.

Companies regularly flaunt the data protection laws, collecting and disseminating personal information. In the U.S., even with the long-standing existence of a law on consumer credit information, companies still make extensive use of such information for marketing purposes and banks sell customer information to marketers. In other countries, inadequate security has resulted in the accidental disclosure of thousands of customers' records.

Let me now inform you how the world is extending protection to privacy. Again, I quote from legal literature on the different models of protection:[3]

[3] *Op cit., pp. 10-11.*

1. Comprehensive laws

In many countries around the world, there is a data protection law that governs the collection, use and dissemination of personal information by both the public and private sectors. This is the preferred model for most countries adopting data protection law. It is also the model favored by Europe to ensure compliance with its new data protection regime. In most of these countries, there is also an official or agency that oversees enforcement of the act. This official, known variously as a Commissioner, Ombudsman or Registrar, monitors compliance with the law and conducts investigations into alleged breaches. In some case the official can find against an offender. The official is also responsible for educating the public and acts as international liaison in data protection and data transfer. However, the powers of the commissions vary greatly and many report a serious lack of resources to adequately enforce the laws. A variation of these laws, which is described as a co-regulatory model, is currently being adopted in Canada and Australia. Under this approach, industry develops enforceable standards for the protection of privacy that are enforced by the industry and overseen by a privacy agency.

2. Sectoral Laws

Some countries such as the U.S. have avoided general data protection rules in favor of a specific sectoral laws governing, for example, video rental records or financial privacy. In such cases, enforcement is achieved through a range of mechanisms. A major drawback with this approach is that it requires that new legislation be introduced with each new technology so protections frequently lag behind. There is also the problem of the lack of an oversight agency. The lack of legal protections for medical and genetic information in the U.S. is a striking example of the limitations of these laws. In many countries, sectoral laws are used to complement comprehensive legislation by providing more detailed protections for certain categories of information, such as telecommunications, police files or consumer credit records.

3. Self Regulation

Data protection can also be achieved – at least in theory – through various forms of self-regulation, in which companies and industry bodies establish codes of practice. However, these efforts were disappointing, with little evidence that the aims of the codes are regularly fulfilled. Adequacy and enforcement are the major problem with these approaches. Industry codes in many countries tend to provide only weak protections and lack enforcement. This is currently the policy promoted by the governments of U.S., Japan and Singapore.

4. Technologies of Privacy

Privacy protection has moved into the hands of individual users with the recent development of commercially available technology-based systems. Users of the Internet and of some physical applications can employ a range of programs and systems that will ensure varying degrees of privacy and security of communications.

These include encryption, anonymous remailers, proxy servers, digital cash and smart cards. Questions remain about security and trustworthiness of these systems. Recently, the European Commission evaluated some of the technologies and stated that the technological tools would not replace a legal framework, but could be used to compliment existing laws.

I wish to conclude by saying that the Supreme Court is not blind to the happenings of the present. Always there is the need to balance the powers of the government and the right of the individual so that we can all enjoy that ever elusive "just and humane society" where over one's own mind and body, the individual remains sovereign. Thus, in recognition of the sovereignty of every Filipino people, the Supreme Court again exercises its expanded rulemaking power to open up the courts to petitions that would otherwise be left unheard—so that claims for violations of the right to informational privacy shall be heard and addressed.

Thank you and good day.

Legal Education Reform in Indonesia +

*By Hikmahanto Juwana**

Foreword

Legal education in Indonesia has been in a state of reform since the time of Dutch colonization. Originally, legal education was a middle school education at the Senior High School level with the establishment of the Rechtsschool in 1908. In 1924, legal education was transferred to the higher education sector or a level equivalent to university. This transfer was formalized with the establishment of the Rechtshogeschool.

This article will endeavor to explain and analyze legal education reform in Indonesia. Initially, this explanation will focus on an evaluation of legal education reform which will include an evaluation of educational objectives and the organization of legal education. Next, based on the results of this evaluation the article will suggest a number of ways to improve or perfect the legal education process in the future.

The article contains two basic arguments. Firstly, based on the evaluation of legal education objectives in Indonesia, it can be clearly seen that in reality these objectives are not autonomous. The objectives of legal education are very dependent on the intentions of the government at the time or the specific prevailing conditions in Indonesia. Yet, if one was to look at the graduates from any faculty of law, then it also becomes quite evident that a number of these legal education objectives do not have any significant influence.

The second argument is that the evaluation of the organization of legal education indicates several weaknesses that do have a significant influence on graduates of law faculties in Indonesia.

Legal education in this article has been reduced to mean legal education at the undergraduate level or a first degree of law. Nevertheless, in several sections the article will discuss two types of legal education; namely, academic or university legal education and professional legal education.

+ *This article contains the personal views of the author and is not to be interpreted as the views of the institution where the author is employed, specifically the Faculty of Law of the University of Indonesia. The author wishes to acknowledge the assistance provided by Yetty Komalasari Dewi and Hadi Rahmat, two young lecturers of the Faculty of Law at the University of Indonesia.*

* *Dean and Professor of the Faculty of Law at the University of Indonesia. Professor Hikmahanto obtained his LL.B from the University of Indonesia, his LL.M from Keio University, Japan, and his Ph.D from the University of Nottingham, England.*

This article is based on the research and the empirical experience of the author. The author has had the benefit of completing the undergraduate legal education in Indonesia, and become a lecturer and currently the Dean of the Faculty of Law at the University of Indonesia (FHUI). Additionally, the article draws on the experiences of the author as a practicing lawyer and as a bureaucrat in Government agency.

Evaluation of Legal Education Reform

The following is an evaluation of legal education reform in Indonesia. This evaluation of legal education will focus on two aspects, legal education objectives and the organization of legal education.

Legal education objectives need to be evaluated because legal education reform in Indonesia is neither separate from the intentions of the government of any one perioc nor the specific prevailing conditions in Indonesia. Since legal education became a part of the higher education system in Indonesia, there has been more or less four periods of government that have had some influence on the law and legal education: the Colonial government, the government of Soekarno, the government of Soeharto, and the post-Soeharto governments. Each of these governments will be analyzed as to what the objectives of a legal education were during the respective periods of government.

Meanwhile, an evaluation of the organization of legal education must be undertaken primarily because organization represents the medium that ties together the objectives noted previously with the graduates produced by law faculties. The desired legal education objectives must be interpreted accurately into the organization of a legal education in order that law faculties produce the graduates expected of them.

a. Evaluation of Legal Education Objectives and their Impact

Legal education objectives in Indonesia have experienced a number of changes over time. These changes to the legal education objectives have tended to occur as there has been a fundamental change of government. For example, Indonesia moved from being a colony to an independent state; then, an Indonesia in revolution to an Indonesia in the throes of development, and an Indonesia governed authoritatively to an Indonesia becoming increasingly democratic.

It is apparent that legal education objectives can neither be separated from what is occurring in Indonesia nor the intentions of the government. Soetandyo suggested that legal education objectives 'are not a process that is autonomous,' but:

"a process that claims in a functional manner to follow political developments, particularly the politics that are closely connected with policy and the efforts of government to efficiently use the law to achieve objectives that are not forever in the legal domain and/or the justice domain." [1]

Simply, this means that legal education objectives are not a neutral product but are colored by the intentions of the government. Consequently, these objectives are unlikely to prevail for indefinite periods of time.

The Colonial Dutch government introduced legal education in Indonesia to fill an administrative need, namely, to fill up legal bureaucratic positions from the ranks of indigenous citizens. It was hoped that graduates of this newly introduced legal education would become judges of the landraad or legal officers in the offices of the Dutch Colonial government. [2]

Legal education objectives in this period were to create legal bureaucrats or rechtsambtenaren. The curriculum for legal education at that time was designed with a primary objective of ensuring that once students graduated they had a thorough knowledge of certain legal principles—especially those dealing with legislation.[3] In fact there was an observation that successful graduates of this curriculum were very legalistic in that their knowledge of the law and did not touch upon the empirical realities experienced by those in the field. [4]

At the time Indonesia gained independence, legal education objectives changed. The legal education objectives were influenced greatly by the perceptions of the national leadership towards the law and a desire to create a uniquely Indonesian state. Soetandyo describes these perceptions as follows:

"President Soekarno proclaimed a need to create a legal revolution to overthrow all aspects of colonial law that up to that point according to formal principles must still be viewed as the prevailing law. President Soekarno openly criticized legal experts and the hold of formal law as conservative powers that will serve to obstruct the wheels of revolution. The experts who have always been bound together legalistically to the this formal law—with the pretext of legal certainty—are always inclined to hold on to old systems and orders, which in reality were exceedingly colonial." [5]

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1 Soetandyo Wignjosoebroto, "Development of the National Law and Legal Education in Indonesia in the Post-Colonial Era" may be accessed at <http://www.huma.or.id/document1/01_analisa%20hukum/Perkembangan%20Hukum%20Nasional%20&%20Pendidikan%20Hukum%20Di%20Indonesia%20Pada%20Era%20Pascakolonial_Soetandyo.pdf>

2 Ibid., 4.

3 Ibid., 4.

4 Ibid., 4.

5 Ibid., 3.

It is not surprising then that the legal education objectives changed and moved towards producing graduates that have not only the courage to throw off the shackles of Dutch colonial law but also possessed the necessary skills to continue the revolution from colony to independence.

Legal education objectives changed again when the Soekarno government was replaced by that of the Soeharto government. In this period legal education was designed primarily to ensure that graduates were able to support the process of development in Indonesia.

Law students were expected to know just enough of the theory and the prevailing laws and regulations. Students were also expected to be sensitive to the operation of the law in the community. Mochtar Kusuma-Atmadja who at that time was the Chairperson of the Legal Sciences Consortium (KIH) was stringent in his promotion of the importance of sociology in legal education and law studies.[6] Therefore, a direct consequence of this is that law in Indonesia – both in theory and practice – is always related to the very latest problems of socio-economic development.[7]

Of significance during this period, particularly in 1993 in response to the needs of graduate employers, who considered that the graduates that were coming out of law faculties were not fit for practice, the law curriculum was amended (hereinafter referred to as "1993 curriculum").[8] These amendments were designed to ensure that graduates knew not only just enough of the theory but also possessed legal skills. In this instance it is clear that both academic and professional legal education came together as one in a curriculum.

In the period of the post-Soeharto governments, which is also identified with the early stages of the democratization process in Indonesia, an intention that legal education produce progressive graduates has come to the fore. This idea was put forward by, among others, Satjipto Rahardjo from Diponegoro University.

According to Rahardjo progressive legal education represents an opponent to the educational status quo. This idea of progressive legal education came about as a reaction to the unresponsiveness of the law to the fundamental changes that were occurring in Indonesia during this period. The law was continuing to amble along its rather dogmatic path and was essentially considered to be insensitive to the process of transition being experienced in Indonesia. In any event, the National Law Commission (KHN) rated legal education as being inclined to be monolithic.[9]

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6 Ibid., 10.

7 Ibid., 10.

8 The curriculum is provided under the Minister of Education and Culture Decree (Decree No. 17/D/O/1993).

9 National Law Commission, "Towards a New National Legal Development Paradigm," February 2005 may be accessed at <www.komisihukum.go.id/article_opini.php?mode=detil&id=113>

The attributes of progressive education include being (1) creative, (2) responsive, (3) protagonist in nature, (4) freedom in character, and (5) oriented towards Indonesia and its needs.[10] It is envisaged that if progressive legal education were to be fully implemented with the above noted elements, then law faculties would be able to create graduates that will always place in their conscience, justice above laws. Currently, progressive legal education remains at the discourse level and much remains to be desired.

In consideration of the legal education objectives noted above, the question becomes — how far and significant are the stated objectives impacting upon the graduates produced by law faculties?

Despite the differences in the shifting objectives of legal education, there seems to be no striking distinctions in the graduates produced by law faculties during the different periods. Graduates of the 1930s, 1950s, 1970s, 1980s and even the 1990s can be reasonably stated to be the same. Recent graduates are still inclined to be legalistic and are no different from the graduates of the Dutch colonial period which tend to neglect the post-independence stated legal education objectives.

There are several reasons why a number of these noted legal education objectives are not seen to be significant to the graduates produced by law faculties:

First, the core legal education curriculum that was in effect during the colonial government period is still in effect today. If there is any difference, then the difference is located in the application of the credit semester system and the emphasis on the applied nuances of subjects.

Furthermore, the substance of subjects in the core curriculum and the teaching methods have not fundamentally changed since the period of colonial government. The substance of subjects and the teaching methods have already become self-perpetuating because of long-serving lecturers. These lecturers are resistant to whatever changes which are often fundamental to the stated legal education objectives.

Second, this problem of perpetuation is further exacerbated through the system of recruitment of lecturers. New lecturers are recruited to become assistants first. The recruitment process commences as soon as the prospective lecturer, normally a student, finishes his study. The principal lecturer undertakes the recruitment based on the obedience of the prospective lecturer to the principal lecturer, as well as his faithfulness to the substance of the subject and the teaching method employed. New lecturers must accompany the principal lecturer for a period of several years before they are trusted to teach classes on their own and thus they have been sufficiently indoctrinated into the ways of the principal lecturer, hence perpetuating a change-resistant legal education system.

10 Satjipto Rahardjo, "Where is Legal Education?," Kompas (8 April 2004).

Third, this situation is compounded because the textbooks remain unchanged. Furthermore, whatever is presented in the subject by the principal lecturer then becomes the teaching materials, inclusive of any dictated notes and books and adopted by succeeding lecturers. Students are neither given the freedom nor the opportunity to seek different perspectives. Students have been molded to answer the exam questions with the answers expected of them and not to compare, contrast, or analyze based on different perspectives proffered by other experts on the relevant question.

Fourth, the majority of graduate employers tend to prefer the type of graduate that knows particular laws and regulations as opposed to one that has a broad understanding of the law. It can reasonably be said that the law in Indonesia has been reduced to regulations. Therefore, whatever the specified objective is in legal education, law faculties will continue to produce graduates that satisfy the tastes of employers. Throughout the history of Indonesian law faculties, it is worth noting that there has not yet been one law faculty courageous enough to produce a graduate that is different from those of other law faculties, even for the purpose of fulfilling legal education objective as determined by the political leaders.

Fifth, society's perceptions have resulted in the uniform, in nature and type of graduates produced by law faculties. The society stereotypes law graduates as very legalistic, good in memorizing, and above all faithful to legal doctrines. The consequence is that the organizers of legal education, lecturers, and even students consider that there are no other choices but to conform to the perceived society's stereotype.

In brief, it can be concluded that several of the legal education objectives as observed have no impact on the graduates produced by law faculties. Law faculties already do and will continue to produce graduates that resemble those produced by law faculty first introduced by the colonial government.

This conclusion can also be reasonably stated to indicate that legal education objectives really represent something that is neutral. It is also appropriate to conclude that legal education objectives in the Indonesian context is not in consonance with the preferences of political leaders or country-specific conditions because ultimately the graduates of Indonesian law faculties are generally the same.

b. Evaluation of the Organization of Legal Education

Implicitly, it is recognized that legal education in Indonesia is directed towards producing graduates that possess of legal knowledge of principles and knowledge of the laws of Indonesia. The question that arises now is whether the institution of legal education in Indonesia has translated this into the implicit legal education

objectives? Sadly, it has not yet reached that stage. One of the primary indicators is the many complaints from graduate employers. Moreover, law graduates in Indonesia are deemed to be unable to compete with those law graduates from other countries at the regional level.

If this is the case, what are the weaknesses in the organization of legal education to date?

The following will try to explain and analyze the weaknesses in the organization of legal education in Indonesia:

1. There are No Distinct Differences between Academic (University) and Professional Legal Education

Legal education in Indonesia has for a long time not distinguished between academic and professional legal education. Distinction between the two types of education is important. This importance derives from the fact that students studying law in its academic form are not certain whether they can immediately apply what they have learned in practice.

Since legal education was first introduced in Indonesia both academic and professional legal education have been fused.[11] The only exception to this was for those individuals who intend to become notaries.[12] The curriculum has been drafted in such a way that graduates are expected to have a thorough theoretical legal knowledge while at the same time have the skills that are demanded by the professional world.

In the 1993 curriculum despite acknowledging these two types of education, they still fused them into one. Moreover, the fusion of academic and professional legal education in the 1993 curriculum is gleaned in almost all levels of higher education in Indonesia as the institutions sought to implement the applied approach.[13]

Although this was the case, the subjects applied in the 1993 curriculum were insufficient to ensure that graduates were ready for employment with respect to specific professions they were likely to join.

11 *Hikmahanto Juwana, "Rethinking the Legal Education System in Indonesia," Jentera, Special Edition, 2003: 95.*

12 *In Indonesia, as in many Continental European Systems, notaries are one part of the legal profession that is required to participate in further education to obtain specialized legal skills.*

13 *Mardjono Reksodiputro, "Legal Laboratory as a Vehicle for Legal Skills Education through the Applied Approach" and "Legal Writing." Law and Development, No. 6 / XXIV, 487.*

The fusion of academic and professional legal education is not a realistic objective. The allocation of time for students to obtain the theoretical and practical knowledge is too short. Generally, law faculties will graduate students after they have followed a 4-year program and in some law faculties, it is possible to graduate in 3.5 years. Clearly, this time frame is too ambitious to encompass the two types of education and complete both successfully.

If one were to make a basic comparison with other commensurate professions, [14] to become a doctor requires four years of university education and two years of professional education. [15] To become an accountant requires four years of university education and one year of professional education. To become a psychologist requires four years of university education and two years of professional education. [16] To become a pharmacist requires four years of university education and one year of professional education.

It is not surprising that there has been a great deal of criticism leveled at law faculty graduates who, unlike their counterparts noted above, are able to immediately commence practice as advocates upon graduation without first having to complete any professional legal education. In this regard the KHN recommended, "... need to develop law faculties in the future that resemble the education patterns of medicine, in order [that graduates are] immediately employable." [17]

Currently, even though professional legal education exists, catering to public prosecutors or judges, this education tends to just repeat the university legal education already obtained. This repetition occurs for two basic reasons: first, in professional legal education the materials are taught mostly by academics that do not have a background in practice or only minimal practice experience; and second, practitioners who teach the professional program are inclined to teach materials that are theoretical in nature. Thus, the permeating theoretical nature of the materials lead the lecturers, both the academics and the practitioners, to believe the materials must be presented in this manner.

2. Weaknesses of the Credit Semester System

In 1982, the credit semester system was introduced in the organization of legal education. One of the consequences of this was that there were a number of year-lon subjects that had to be broken down and studied across several semesters. This mean that the titles of the subjects were changed to accommodate the fact that they were now held across more than one semester.

14 *Data obtained from faculties within the University of Indonesia.*

15 *This is according to the new curriculum of the Faculty of Medicine, University of Indonesia. According to the former curriculum, academic education consists of 5 years of study and professional education of 1 year.*

16 *In the Faculty of Psychology, the professional stage is equivalent to a Masters and therefore requires 2 years of study.*

17 *Ibid., National Law Commission, "Towards a New National Legal Development Paradigm."*

In several law faculties, the total number of subjects offered has expanded and in some cases, exponentially. In the FHUI, for example, there are more than 130 subjects offered in any one year. This increase in course offerings is intended to satisfy the interests of certain parties that consider certain subjects more important to teach.

There are several weaknesses with the application of the credit semester system. First, students do not understand the continuity between one subject and another or understand that one subject may in fact be a pre-requisite for another subject they intend to take in the future. As a result students do not get the strong foundation needed to understand the law. The other weakness is that some subjects are overlapping in content due to lack of coordination between lecturers. Students are learning the same thing under a different subject name.

Furthermore, students do not adequately consider the subjects they choose. Most often subjects are chosen based on the ease of passing the course rather than their post-graduation needs, particularly with reference to employment.

3. Lack of Attention in Supporting Infrastructure

This weakness in the organization of legal education occurs because as a policy, law faculties do not pay sufficient attention in the supporting infrastructure, particularly with a view to facilitating the implementation of the curriculum. The main areas of supporting infrastructure that do not elicit enough attention include, among others, the professionalism of lecturers, teaching methods, library resources, journal resources, lecture rooms, and the very large class sizes forced upon lecturers.

The professionalism of lecturers becomes a weakness since the majority of lecturers often reduce their academic duties to purely lecturing. The majority neither research nor do they write for any legal journal, including their university's own legal journal (if one exists). In the event research or writing is undertaken, it is done in such a manner that it is the bare minimum required to meet the standards for promotion.

The professionalism of lecturers also relates to their attendance at lectures, the research completed, and any written work that may result. Senior lecturers, professors, and those with doctorate degrees are often pulled away from campus to work opportunities off-campus. In Indonesia, it is considered natural, and more prestigious, for senior lecturers to work off- campus. They tend to work in government agencies, the private sector, or are inadequate to become campus bureaucrats.

The reasons for this are prompted by demand from outside and financial benefits. Financially, a lecturer's salary is inadequate to meet their needs, especially in higher education institutions run by the State. Ultimately, employment as a lecturer becomes a part-time venture and provides an academic status.

Subsequent to the lack of professionalism of lecturers is that graduates often complain about the difference between what they learned at the university and the reality in the field of legal practice. Additionally, graduates also complain about the minimal amount of knowledge that they acquire through their academic preparation.

Another weakness is the teaching methods employed. Most lessons are still presented as a one-way communication. It is not uncommon for lecturers to dictate lecture notes to their students. The fault does not lie with the lecturer only because Indonesian students do not culturally possess the ability to question or challenge what is presented to them. They will just listen and make the minimum amount of notes by the lecturer to pass the course.

The teaching methods employed are also related to the subject materials. Teaching materials are sometimes limited to one or two textbooks and what the lecturer knows. Modules are sometimes not prepared and any reference books provided are the bare minimum. Furthermore, subject materials are not updated with current trends or movements in the law. Much of the substance of the subjects remains unchanged from year-to-year irrespective of the many changes that have occurred in the laws and regulations as well as any other relevant legal concepts. Moreover, lecturers fail to put in the necessary effort to make the subject material relevant to current trends in the subject field.

In teaching students, lecturers do not demand or challenge their students to answer questions. Students give priority to answering questions in a manner that the lecturer expects them to answer the question to gain them a good grade. From year-to-year model questions and the types of questions stay the same and passed down to junior students.

Students are neither given any incentives nor additional credits if they ably reveal the perspective of another expert. Incentives are also not provided if students' exhibit improvisation in answering questions included in the case materials covered in lectures. Among students there is an impression that they will graduate if they learn the dictated notes or the examination problems of that lecturer.

Supporting services that do not garner enough attention include, among others, the availability of law library resources and subscription to law journals.

Libraries have yet to become a critical component of legal education in Indonesia. Where there are law faculties within universities, it has always been deemed sufficient to have buildings and lecturers. They have disregarded the library as an important part of the law faculties. Actually, without a functioning and well-equipped law library, a law faculty in fact means very little. Without a law library, the role of the law faculty can be reduced to merely handing out law degrees. It must be acknowledged that it is law libraries, not lecturers that provide the broad insights for students.

Law library collections of Indonesian law in Indonesian are very limited and this problem of limited resources is even more acute in terms of English law books. Furthermore, only a few of the law faculties in Indonesia have the desire or the funds to subscribe to electronic legal resources such as Westlaw and Lexis Nexis.

Even where law libraries exist, the tragedy is that the majority of lecturers and students do not actively use library resources. This is because the lecturers do not give assignments or legal problems in their classes so that students have to visit the library for research or other purposes. Students can graduate from law faculties having spent a minimum amount of time in the library, perhaps even no time at all.

The problem of inadequacy of law libraries and their usage is further exacerbated because many students and lecturers do not possess a library culture. Borrowed books sometimes are not returned. Books have pages torn out as the borrower does not want to photocopy it. There is a culture of self-interest in that one borrower does not consider the needs of other borrowers. Moreover, the spaces provided in law libraries usually reserved for study and research are often used for discussions and conversations that are not related to the law.

Another aspect of critical support infrastructure is the existence of a law school journal. Many law faculties throughout Indonesia do not yet have a law journal. In those where a law journal is in existence, it is general in nature. The articles that appear in these journals sometimes are merely to satisfy the conditions for obtaining a promotion for the author. Furthermore, both the author and the editor do not differentiate the types of articles accepted for the journal. Popular articles or seminar papers are accepted as is without any modification into an acceptable law journal format because there are no standards.

Many law journals are not managed professionally although there is an accreditation system in place. The receipt of articles is more based on personal relationships and friendships rather than the quality of the writing. There are also articles that are accepted not because of the quality of the article but rather the status or the name of the author. Articles from professors are more readily received and published despite the fact that upon serious peer review the standard of the legal research may not be at an accepted professional level.

Furthermore, articles in journals are seldom used as references by either students or lecturers. Students and lecturers alike seldom follow current issues or debates in journals. They read journals only if they must or there is a need to do so.

A consequence of the lack of attention paid to the existence of libraries and legal journals is the minimum legal knowledge that graduates acquire. Graduates also do not get the opportunities to gain legal knowledge. They are not as sharp as their colleagues who have previously graduated from overseas law schools.

Other supporting infrastructure which is lacking attention is the issue of subjects being conducted with huge number of students. The class size may come as high as 300 students. In such instances, the lecturers may not be able to give special attention to the students. Class size also has to do with the availability of rooms. This has become a problem since most of the time classroom allocation managed by the University and not faculty. The lack of building and classroom infrastructure has to a certain extent affected the quality of graduates expected under the curriculum.

4. The Strong Interventions by the Curriculum Drafters

The law education curriculum in Indonesia is dominated by the identity of the drafters. In the past there was an institution within the confines of the Department of National Education that had specific responsibility over the development of a number of sciences, including law. This institution was initially known as the Legal Sciences Consortium (KIH) which was later changed to become the Commission for the Discipline of Legal Sciences (KDIH).

In the beginning KIH had members from eight law faculties represented by their Deans, among them, the University of Indonesia, Gadjah Madja University, Padjadjaran University, Airlangga University, University of North Sumatera. It is unclear as to what was the criteria for membership of the KIH or the KDIH, except by seniority and consensus. Additionally, the Head of the KIH or the KDIH was not a current Dean but rather a law lecturer appointed by the Department of National Education. The KIH and the KDIH were assisted by a number of experts from several higher education institutions from throughout Indonesia.

In January 2003, the KDIH was dissolved by the Department of National Education. Since that time the drafting and improvement of the curriculum or any other matters related to the organization of legal education is no longer vested in the agency.

In theory, every law faculty now has the freedom to amend or improve the curriculum as one sees fit. Nevertheless, and in spite of this apparent freedom, the Deans of the state-run law faculties have taken the initiative to meet periodically in a forum known as the Deans of the Indonesian Public Law Faculties Cooperation Board. To date, the current membership is 34, which includes a military law school.

During the KIH or the KDIH period, the drafting of the curriculum was carried out by the Head, Deans, and experts. Thus, a frequent occurrence was that individuals involved in the drafting or improvement of the curriculum whether consciously or otherwise, were able to exert their influence with specific interventions that allowed for their own respective perceptions to determine the subjects that were considered important in the curriculum. This led to the impression that the important determining factor was not the subject but rather the subjectivity of the proponent in the KIH/KDIH.

Considering that the leadership and some experts who held positions in the KIH/KDIH had obtained further post-graduate education in the social sciences, the fact that the legal education curriculum exhibited these social science influences is hardly surprising.[18] In addition, those individuals who drafted and determined the legal education curriculum had already placed social science subjects into the compulsory subjects list in the legal education curriculum, which ensured that the study of law moved away from the strict study of law and maintained an element of how these laws were to apply in society.

The influence of the social sciences also came to the fore because senior law faculties at that time were initially combined with the social sciences faculty.

It is difficult to deny that the social sciences have colored the organization of legal education and the legal curriculum. The effect is that law faculty graduates appear to have lost direction when it comes to the practice of law. Thus, graduates have considerable difficulty and some are unable to distinguish between positive law and the values that exist in the community.

The above is not intended to suggest that the influence of social sciences on legal education is not important. On the contrary, social sciences are very beneficial and helpful to law faculty graduates. Law faculty graduates with basic social sciences knowledge possess an increased sensitivity to the operation of the law in a country like Indonesia.

The negative consequences which are sometimes excessive, is that the social sciences resulted into the distortions that arise with the traditional study of law. Law is studied in its social sciences context. In legal education in Indonesia, research and the writing of a thesis are based on a method known as social research. This is inspite of the fact that many of the legal issues would be better covered and handled using a doctrinal research approach. This results in the students experiencing a great deal of confusion when they have to do research and write their thesis.

Other problems include that there is not enough attention paid to the depth of the gaps between one law faculty and another in the organization and implementation of the curriculum. The mandated curriculum is followed by the senior law faculties but not followed by the junior law faculties. This lack of attention to the glaring gaps between law faculties is a direct result of the drafters of the curriculum coming from the senior law faculties and their inability to incorporate the demands and needs of the junior law faculties into the national curriculum.

18 *The experts appointed to the KIH/KDIH were those who had a legal education yet had their further education in the social sciences, such as sociology and anthropology.*

Law Education in the Future

From the above evaluation of legal education, it becomes evident that there are several weaknesses and problems. When these weaknesses and problems are accepted as prevailing among the majority of law faculties in Indonesia, though should be given to an appropriate solution to overcome the identified weaknesses and problems.

The following are some basic thoughts on how an ideal legal education in Indonesia might be accomplished.

1. The 'Neutralizing' of Legal Education Objectives

Into the future it is time for legal education objectives to be neutral of any outside interests. Legal education objectives must be freed from the desires of both, the political elite and policy makers as well as any special situations or circumstances that afflict Indonesia or will do so in the future.

In periods past, labels given to governments in Indonesia as colonial government, Old Order, and New Order have placed a heavy burden on legal education objectives.

Neutral legal education objectives will produce law faculty graduates similar to those of times past. Faculties, then, will no longer be burdened with certain interests that ultimately have negligible impact on the graduates of law schools.

From the perspective of a graduate, the knowledge acquired suggests the degree of how beneficial legal education has been. Therefore, the duty of a law faculty is, clearly, to provide knowledge to its graduates in order that they can utilize their knowledge of the law as widely as possible and as demanded by the employment they choose.

Neutral legal education objectives will allow graduates to choose an employment option without having to feel bound to outcomes considered desirable. Above all, the reality of law graduates is that they will frequently change employment and need to be prepared for this with a broad grounding in the fundamentals. Graduates will, without doubt, suffer if legal education were to be directed to only one specified outcome.

In this era of globalization, the challenge for legal education organizers is to produce graduates that are comparable with graduates from law faculties across the globe. For a number of law faculties they have already consciously begun to prepare their graduates for employment not only in their own countries but also in foreign countries. In this regard, and stating the obvious, legal education objectives in Indonesia must be comparable to those legal education objectives maintained overseas.

If one considers the 1993 curriculum the reality is that the legal education objectives are in fact already neutral. It was stated by Mochtar that the objectives of the

curriculum was to provide an academic or theoretical foundation along with an effort to promote skills aspects and a practical command of positive law.[19]

Neutralizing legal education objectives is increasingly important if the orientation is to be towards their future employers. Employers are extremely varied. Currently, employers in the legal field include the government or public sector and the private sector. In the government sector, law graduates become civil servants working in the Department of Foreign Affairs, the Department of Finance, and other departments. While, the private sector is enormously varied providing a wide range of opportunities. Law graduates accept work both locally and internationally. Local employment is in law firms and corporations tend to be the primary employers. In contrast, international opportunities can see graduates employed in law firms or international organizations, such as the Asian Development Bank.

What is common among these graduate employers is that they require law faculty graduates to have acquired legal knowledge as well as knowledge of the laws of Indonesia that is free from the burdens of special interests.

In the light of the above reasons, then it becomes apparent that legal education objectives in Indonesia, irrespective of whether they want to or not, must be made as neutral as possible. In short, the objectives of legal education are to provide basic legal knowledge and knowledge of the laws of Indonesia, aside from producing a typical law graduate.

The needs of a graduate of a law faculty have to be prioritized in the educational objectives in Indonesia so that graduates acquire the required skills that is expected by the community and the profession. As a result of this, besides providing legal knowledge and knowledge of the laws of Indonesia, legal education objectives must also produce graduates that possess other specialized skills. These skills, among others, include an ability to see an event or fact from more than one perspective, capably of arguing in oral or written forms, skilled in interpreting words, and being meticulous in their work.

When the legal education objectives have already been made as neutral as possible, then these objectives must be incorporated into the curriculum. A curriculum that reflects neutral legal education objectives is a curriculum that has two distinct subject categories. First, subjects from all branches of the law; namely, civil law; criminal law; constitutional law; administrative law; and, international law. Second, subjects that encompass the laws of Indonesia, especially those subjects that influence the law in Indonesia. Presently, the law in Indonesia is particularly influenced by European (Western) law, Islamic law, and Traditional Community or Adat law.

19 *Mochtar Kusuma-Atmadja, Legal Education in Indonesia: An Explanation of the 1993 Curriculum 497 (Law and Development No. 6 / XXIV December 1994).*

The acquisition of this knowledge of the various branches of law is expected to provide universal knowledge, that is, knowledge that it is not limited to Indonesia in law. This is critical in an era of globalization where Indonesian law graduates must possess a universal understanding and knowledge of the law as well as its legal jargon.

Meanwhile, the acquisition of positive law in Indonesia will provide the requisite legal knowledge of the law as it applies in Indonesia. This is what is expected by employers of law graduates. Besides law graduates having an understanding of the law, they also require that they have knowledge of Indonesian law because the study of law is related to where the law is learned.

Additionally, the curriculum may accommodate a number of subjects and teaching methods that will develop students to posses the model features of a law faculty graduate.

2. Distinct Separation between Academic (University) and Professional Legal Education

Although professional legal education currently exists,[20] the separation between university and professional legal education needs to be a continuing concern.[21] It is worth noting that this separation is expected to be reflected in both the curriculum and the subject materials.

There are two requirements that must be fulfilled in order that there are distinguishable differences between university and professional legal education.

The first requirement is related to the law faculty. Law faculties need to change the 1993 curriculum, because this curriculum was designed to produce graduates that were capable of gaining a command of both the theoretical and practical aspects of law simultaneously. The amended curriculum in the future need not be burdened with the elements of professional legal education.

The curriculum must concentrate on providing legal knowledge and a knowledge of the laws of Indonesia. In the event there is a certain specific set of professional knowledge provided, that knowledge must be considered to be early exposure to the profession. Yet, it must be realized that the knowledge provided will not be sufficient for graduates to enter any specific profession.

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20 At this time from the four traditional legal professions, professional legal education for the notaries has been in existence the longest. Meanwhile, legal education for judges and prosecutors has also been in existence for some time. Legal education for advocates has only come into existence in 2005 as a consequence of the Law on Advocates which makes it an obligation to undertake professional legal education.

21 This is a recommendation of KHN which states, "There is a need to separate professional education from the Master of Laws program (S2). Professional education is provided separate from an [undergraduate program] S1, but is not the equivalent of an S2." See: National Law Commission, "Towards a New Paradigm of National Legal Development."

The second is related to employers of law graduates and professional organizations. These employers must properly be oriented to undented requirement this separation of university and professional legal education. They do not expect that the law graduate is ready for immediate professional service.

Employers should understand that university legal education is not to prepare graduates who are ready for immediate professional employment in any specific area. University legal education is at the level of providing theoretical knowledge to graduates and this knowledge should not be characterized as a graduate being ready for immediate practice. On the contrary, those that graduate with a university legal education do not suddenly become ready for immediate practice in any profession that they may choose to enter.

This separation certainly does not mean professional legal education can be undertaken without the pre-requisite of participants having received a university legal education. University legal education must become a pre-requisite for those who intend to enter into traditional legal professions; namely, judges, prosecutors, advocates, and notaries.

Although there is a separation between university and professional legal education and inspite of this separation, the two types of education are organized in stages. The conditions for a university legal education is important because the four legal professions noted the demand that participants possess legal knowledge, both theoretical aspects as well as the current laws of Indonesia.

Current professional legal education needs to be continually perfected. There is still considerable room for improving the professional legal education. Once professional legal education is established, then university legal education will no longer be burdened with the provision of elements of professional legal education. A number of the professional elements will be transferred to the professional legal education.

3. Competency Based Curriculum (CBC)

Recently, throughout Indonesia the competency based curriculum (CBC) is being introduced. The CBC is effective across basic, middle, and higher education levels. This policy certainly needs a response from those responsible for legal education. The question becomes, what must be done in response to the policy putting into effect the CBC?

At this time the discourse is divested towards ways of incorporating the CBC into the legal education curriculum. One of the ways is to identify beforehand the professions that law faculty graduates may enter. Once those professions have been identified,

only then could the competencies be determined. The weakness of this method is that the professions that law faculty graduates may potentially enter are so varied that it makes it difficult to determine appropriate standard competencies.

The incorporation of the CBC into the legal education curriculum does not have to be identified with the legal profession. For law faculties that provide a university legal education, then the CBC must be interpreted as an effort to produce graduates that possess competencies that can be perceived by the society and the traditional legal profession as appropriate for future employment.

There are three main features that the society and the profession perceive and expect of law faculty graduates.

The first feature is that a graduate can see an event or fact from different perspectives. This should lead to developing arguments as a result of one person seeing one fact from a different perspective.

The second feature is the strength to find a basis for the argument being pursued. Here it is important that graduates have the skills to undertake investigations of available legal materials and resources. Investigations in this context can be research but not research as it is known in the social sciences. Research here corresponds with legal research books written and published in America or England.

The third feature is the ability to present argument in a persuasive manner in either written form or oral forum.

These three features must be reflected in the legal education curriculum. The CBC need not be reflected in the legal education curriculum through the introduction of new subjects, but it may be introduced with subjects that already exist. Nonetheless new subjects may be introduced, such as in legal writing or legal research.

The features of competency may also be reflected in both the teaching methods and the process of learning. This in turn will provide an answer to the weaknesses noted in the organization of legal education.

First, lecturers must abandon the one way communication method. Lecturers must be capable of encouraging students so that they want to know more about the topics that are the subject of discussion. The lecturer must also be capable of teaching the students to see facts from a number of different perspectives. Here, small classes are needed, whereas large classes are only for general lecture.

Second, evaluation of the achievement of students in classes can no longer be based on the provision of the answers expected by lecturers. Evaluation must be based on the number of books read and used by the student in answering the question.

Additionally, students are to be evaluated on their ability to analyze what has already been revealed descriptively. The expectation from this exercise is that students will naturally come to undertake research and then present that research as well as analyze the research results.

Third, subjects that provide introductory knowledge of practical skills and moot court presentations must be utilized as fora for students to argue different perspectives. For example, the subject on Criminal Procedure law is to be used to allow students to practice seeing the issues from the perspective of judges, prosecutors or advocates. Another example is that for moot court presentations in for a such as in International Legal Process, relevant findings of the International Court of Justice as well as principles of international law could be utilized. Students could also be asked to produce a United Nations Security Council Resolution from the perspective of developing and developed countries.

If these three points are incorporated then the CBC can be introduced without tearing up the existing curriculum and starting from scratch.

4. Post-Graduate Education

Legal education in the post-graduate program needs to be reviewed. The post-graduate program, specifically the Masters program, is perceived primarily as a university level education. One of the consequences of this is that the curriculum is formulated based on academic interests. However, in a modern world it is not necessary for the Masters program to be characterized as an academic or university program.

The Masters program has three main objectives. First, there is a university Masters program; second, there is a masters program that aims toward a more sophisticated knowledge of the students; and finally, there is a Masters program for professionals.

A university Masters program is an education that is organized to prepare individuals who are intending to become lecturers or researchers. Moreover, this Masters education is to prepare students for the next level, a Doctorate.

The Masters program that has the basic objective of deepening and updating the knowledge of the students would mean that the students will have acquired a more detailed knowledge within a defined specialization upon graduation.

Meanwhile, the Masters program for professionals is intended to provide an academic title to those that have been educated for a specific profession. Professional education may or may not result in the award of an academic title. Yet, if legal education is intended to bestow an academic title then that education must be organized by a university. In America, where universities manage run law faculties as professional

faculties, graduates are awarded the title Juridical Doctor (JD). In Indonesia, at this time, those who have already completed the notaries education program, as one of the conditions to enter the notary profession, are awarded a Masters of Notaries degree.[22]

Meanwhile, the Doctorate program is a form of legal education best characterized as academic. This is because the written dissertation constitutes one of the requirements that reflect the detailed research of the students.

Conclusion

Reform of legal education in Indonesia will continue unabated. In the future there must be several 'perfections' of the process. A perfection of the curriculum for undergraduate programs must be completed with the objective of providing a strong academic legal knowledge to students.

In the execution of changes to legal education in the future, it must be noted that whatever the solution offered, the solution must be applied in a manner so that students, lecturers, and any other stakeholders will not feel the change. Our experience in Indonesia, abrupt changes have always been counter productive.

There must also be awareness that whatever legal education reforms are carried out, it will need time, energy, money, and patience. These four components cannot be ignored as each is intricately related to the others. Nevertheless, it must be acknowledged that financial support is the most important key of these four components.

22 *The Masters of Notaries is a requirement for an appointment as public notaries under Law No. 30 of 2004 on Notaries.*

Reinventing Philippine Legal Education

By Andres D. Bautista*

It is quite evident that the Philippines is the most westernized nation in Asia. Filipinos go by Spanish sounding names, speak English the American way and predominantly profess the Christian religion. By way of a brief historical lesson, the nearly 400 years of western colonial rule started with the Spanish conquest of the islands which began on March 16, 1521—the date Magellan first landed on our shores though the Spanish regime was officially established only in 1565— over 40 years after that first landing. The Spanish Occupation (1565–1898) was followed by a period under American sovereign control (1898–1935) ushered in by the defeat of the Spaniards in the Spanish American War of 1898, after which the Commonwealth of the Philippines was established (1935–1946). The Republic of the Philippines officially came into existence in 1946.

A FUSION OF LEGAL SYSTEMS

Because of the country's colonial history, the Philippine legal system is one in which three of the world's legal traditions (Roman law, Anglican or common law, and Mohammedan law) have converged and found common ground; and where two traditions (civil and common) have been blended into a peculiar legal system unique to the Philippines. Justice George Malcolm described this as a system, in which the two great streams of law—the civil, the legacy of Rome to Spain, and the common, the inheritance of the United States from Great Britain, amplified by American written law, have met and blended. On the substantive law of Spain... the (American) regime has grafted a simplified code procedure, the Torrens system, a negotiable instruments law, American public and private corporation law, and other commercial statutes."[2]

As to which system, Roman or Anglican, exerts greater influence, Justice Jose Laurel has said that "...legally and socially, the civil law system has so become interwoven with the life and proprietary interests of (Filipinos) that to introduce an entirely new legal system would be destructive of an institution... to which (the Filipino people) have been accustomed to for a period of more than 300 years."[3] And indeed, the Philippine Supreme Court has also said (through Justice Carson) that "neither English

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1 *MELQUIADES GAMBOA, AN INTRODUCTION TO PHILIPPINE LAW 59, 7th ed., c. 1969 (Central Lawbook Publishing, Quezon City, Philippines).*

2 *Ibid.*

3 *Jose Laurel, What Lessons May Be Derived by the Philippines from the Legal History of Louisiana, 11 PHIL. L.J. 63 (1915-1916).*

nor American common law is in force in these Islands; nor are the doctrines derived therefrom binding upon our courts, save only insofar as they are founded on sound principles applicable to local conditions, and are not in conflict with existing law..."[4]

But Justice Laurel also was quick to point our that "...we cannot now evade the tendency to amalgamate into one body the laws of the conquerors and the laws of the conquered..." Echoing this view, the Supreme Court admitted that "...nevertheless, many of the rules, principles, and doctrines of common law have... been imported into this jurisdiction, as a result of the enactment of new laws and the organization and establishment of new institutions by the Congress of the United States or under its authority; for it will be found that many of these laws can only be construed and applied through the aid of common law from which they are derived, and that, to breathe the breath of life into many of the institutions, recourse must be had to the rules, principles, and doctrines of common law under whose aegis the prototypes of these institutions had their birth."[5] It is also true, then, that Philippine jurisprudence is "based upon English common law in its present-day form of Anglo-American common law to an almost exclusive extent."[6]

The current state of Philippine law is succinctly summarized as follows:[7]

First, the greater bulk of Philippine private substantive law is Romanesque.

Second, there has been an increasing infiltration of common law principles into Philippine jurisprudence due to several causes, to wit: (a) the automatic substitution of Spanish political law by American political law, upon the transfer of sovereignty; (b) the continued drawing from American patterns by the Philippine Legislature in the enactment of new statutes; (c) the growing reliance by the bar and bench on American decisions in the application and interpretation, not only of American-derived statutes but also of the old statutes of Spanish origin; and (d) the imitation of the system of American legal education by the law schools of the Philippines.

Third, despite the rapid increase of the common law element, the Romanesque portion of Philippine law still predominates and will continue to predominate.

Fourth, although many common law provisions and principles are being literally grafted on the law tree of the Philippines, the case law method of adjudication, which is a condition sine qua non of the common law system, is not adopted. The doctrine of stare decisis does not obtain here in the same sense that it obtains in common law countries. Precedent is only evidence of the law and not the law itself. Consequently, the Philippine legal system is not likely to be a common law system in the strict sense. The most important American legal concepts and institutions which have been incorporated into the Philippine legal system are:

4 *U.S. v Cuna, 12 Phil. 242 (1908), cited in GAMBOA, op. cit., supra., note 1 at 75.*

5 *Alzua v Johnson, 21 Phil. 308 (1912), cited in Gamboa, An Introduction to Philippine Law, 75.*

6 *In re Shoop, 41 Phil 213 (1920)*

7 *Cited in Gamboa, op. cit, note 1 at 77.*

A. In the realm of government, the doctrine of separation of powers and the power of judicial review according to which the judiciary, a co-ordinate department of the government, serves as the ultimate interpreter of the Constitution.

B. In the branch of adjective law, a scientific and simplified system of civil and criminal procedure.

C. In the field of commercial law, a series of modern laws on trade and commerce, such as the Corporation Law, Insolvency Law, Negotiable Instruments Law, Securities Act, Insurance Law, General Banking Law, etc.

D. With respect to the Civil Code: the rules of equity concerning trusts, natural obligations, estoppel, quieting of title and reformation of instrument; additional rules governing easement, damages, liability of common carriers, the statute of frauds, sale and partnership; a procedure for arbitration, etc.

AMERICAN INFLUENCE

There is a pervasive American influence in the Philippine educational system. Indeed, within the first decade of America's occupation of the Philippines, a secularized, free, and compulsory public school system was immediately established.[8] Closely hewing to the characteristics of the American public school system, English was used as the medium of instruction and, indeed, the great majority of teachers (600 in all, called 'Thomasites,' having arrived in the Philippines on board the ship USS Thomas) were brought to the islands from America.

In 1902, to complement the existing highly-centralized public school system, the Philippine Commission further established a high school system supported by provincial governments; special educational institutions; schools of arts and trades; agricultural schools; and commerce and marine institutes.[9] In 1908, the Philippine Legislature approved Act No. 1870 which created the University of the Philippines.[10]

Insofar as the beginnings of American type law schools are concerned, the College of Law of the University of the Philippines was founded on January 12, 1911, but its origins can be traced earlier to law courses already offered in 1910 by the American organization Young Men's Christian Association (YMCA), largely through the efforts of George A. Malcolm (who later became the first permanent dean of the UP College Law, before being elevated to the Philippine Supreme Court in 1917). The UP College of Law opened in June 1911, with a total of 125 students, comprising freshmen and some

8 *"Historical Perspective of the Philippine Educational System," from http://www.deped.gov.ph/about_deped/history.asp*
9 *Ibid.*
10 *Ibid.*

sophomores from the YMCA. The faculty was at first predominantly American, but who were soon supplanted by Filipino teachers. One of the first Filipino faculty members, Jorge C. Bocobo, succeeded Dean Malcolm and became the first Filipino dean of the College. He held the position until 1934.[11]

The College offered a three-year course for full-time students and a four-year course for students who were employed and studying part-time. Starting in school year 1917-1918, given the bar performance of part-time students however, a four-year course was prescribed for all students.[12]

The first Philippine bar exams were administered in 1901, with 13 examinees.[13] There are now more than 100 law schools operating in the Philippines producing approximately 6000 law graduates a year. In 2005 a total of 5,610 examines took the bar, out of which only 27.2% (1,526) passed. The lowest bar exam passing rate was recorded in 1999, when only 16.59% (660 out of 3,978) of examinees passed. The highest passing rate was recorded in 1981 with a 43% passing rate.

Most law schools in the Philippines offer a Bachelor of Laws (LLB) degree, with the exception of the Ateneo Law School, U.P., the University of Batangas College of Law, and the MBA-JD dual degree program offered by the Far Eastern University Institute of Law in partnership with the De La Salle University Graduate School of Business, which offers a Juris Doctor (J.D.) along with a Master of Business Administration degree.

THE MBA-JD DEGREE

Recognizing that the spheres of law and business are constantly overlapping, the Far Eastern University Institute of Law (FEU-IL) and the De La Salle University Graduate School of Business (DLSU-GSB) have collaborated to create a dual degree program in business management and law. The Program's business component provides a management education that prepares students for results-oriented decision-making; its law component provides students with legal knowledge and analytical tools necessary in understanding how law affects business and management decisions.

Indeed in a world that has become both increasingly competitive and interrelated, the need to learn and develop multi-disciplinary skills has become more apparent. Market expectations on the roles of the lawyer and the manager have expanded to take into account the changes brought about by technological advances and innovations. When asked to render a legal opinion or give professional advise, lawyers and managers are expected to provide tailored solutions to problems that simultaneously consider the

11 *Condensed from http://law.upd.edu.ph/.*

12 *Ibid.*

13 *Condensed from INQ7.net http://news.inq7.net/breaking/index.php?index=1&story_id=71094 and Manila Standard Online http://www.manilastandardtoday.com/ContentLoader?page=politics06_mar30_2006#top.*

"bigger picture." The program, in effect, is designed to enable graduates to approach problems from both commercial and legal perspectives by equipping them with practical knowledge and skills in the two interrelated areas.

Atty. Ricardo Romulo, perceptively remarked that, "modern society reposes on a lawyer a role and responsibility that requires him to possess a far ranging knowledge of subjects other than law. Be as adviser, negotiator, advocate, judge, administrator or manager, a lawyer must be prepared to assume direction of all phases of the areas of personal conflict inherent in a complex society and economy."

For his part, former Trade and later Finance Secretary Cesar Purisima observed that "the worlds of law and management have melded in our global economy, and the interplay of law, finance and business economics in modern day transactions requires the skills of both a business manager and a lawyer to analyze, package and negotiate a deal."

Indeed, former Supreme Court Justice Flerida Ruth Romero had predicted what Atty. Romulo dubs as "the age of enlightenment of legal education in the Philippines." As head of the UP Law Center, Justice Romero has consistently battled for an interdisciplinary approach to the teaching and study of law, stating that "courses in economics, psychology, sociology, public administration, planning etc., would considerably broaden the outlook of law students and liberate then from the occasionally restrictive confines of the doctrinal approach."

It was with this mindset that, the DLSU-FEU partnership, the first of its kind in the Philippines, was created. Dual degree programs—that is, law in combination with another degree in business, the social sciences, or the humanities—are already being offered by many American and English law schools, but it is a novel thing among Philippine universities.

The kind of innovative thinking that went into the formation of the MBA-JD program is also evident in the choice of faculty members and the teaching methods used in the program. Towards this end, we continually emphasize to the students the program's commitment to the principles of relevance and participatory decision making. Relevance is displayed through the offering of courses that are taught by practitioners with exposure to international best practices and who know the practical "nuts and bolts" of the subject. Furthermore, faculty members are encouraged to use alternative teaching techniques apart from or in conjunction with the case method, which has been the basic tool of traditional legal education in American law schools since the early 1900's. In this way, students not only learn the theory but also equip themselves with the skills needed to cope with real life situations. Participatory decision making is shown in the way we treat our students- not as subordinates but as partners not only in choosing elective subjects and faculty but in working towards the objective of providing relevant education.

BEYOND THE SOCRATIC METHOD

More recently, a lot of discussion has taken place about the continuing suitability of the strict application of the Socratic method to the study of law. This method of teaching where a law professor is supposed to draw the answer out of law students through a series of questions remains the hallmark of Philippine legal education. Revived and adapted to the law school setting in the 18th century by Harvard Law School dean Christopher Columbus Langdell, it continues to razzle and dazzle the Filipino law student. Most criticism of the Socratic method commonly center around its main weaknesses or disadvantages, these being—

That it is an inefficient methodology. The Socratic method is an inherently slow methodology which inevitably tends to minimize course coverage.[14] The Socratic method—a dialectic method of inquiry first described by Plato in the Socratic Dialogues, which typically involves two speakers at any one time with one leading the discussion and other agreeing to or rejecting certain assumptions [15] —adopted in its purest form as a teaching method, simply takes too long. The concepts that may be elicited in the conduct of an hour and a half-long series of Socratic dialogues between professor and students could probably be covered in a 20-minute lecture, after which more important points could still be taken up in a moderated discussion. Even in a straight lecture where a student is not required to recite, students will get little value out of attending class if they have not prepared just as thoroughly.[16]

That it allows for very little feedback from professor to student, making grades seem arbitrary. Law professors and students alike have noted that the lack of feedback allowed by the Socratic method can limit their appreciation of what they are doing well and what they are doing wrong.[17] This is especially true in large classes, where interaction between students and professor is limited.

That it makes no room for practical and participatory learning. According to its advocates, one of the main advantages of the Socratic method is that it encourages students to prepare for class because only "intensive and consistent daily preparation (will allow) students to participate effectively in (the) process."[18] But the experiences of universities that have adopted alternative methods also show that the most effective way to ensure that students come to class prepared is to make classroom learning more of a participatory experience. Participatory methods (such as research and writing projects, presentations, debates, role-play and others) and activities that require working out practical legal problems make students in larger part responsible for their own learning.

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14 Andrew Beckerman-Rodau, "A plug for the 'traditional approach' to teaching law," from http://www.law.suffolk.edu/arodau.

15 Definition taken from http://www.wikipedia.com

16 See "The varying methods of teaching" Thomas M. Cooley Law School, http://www.cooley.edu/introlaw/Lesson%203/lesson%203-1.htm

17 Anthony Ricky, contribution posted on http://thenonbillablehour.typepad.com/nonbillable_hour/2004/11/five_by_five_an.html.

18 University of Arkansas, "Law school teaching methods," from http://www.uark.edu/admin/urelinfo

DIALOGUE V. CASE STUDY

These critiques are particularly relevant to a program that seeks to combine the two disciplines of business and law.

Many law professors still maintain that the Socratic method is "incredibly well-suited to teaching law" [19] According to some, the Socratic method, applied skillfully, helps students "discern relevant from irrelevant facts... and distinguish between seemingly similar facts and issues." [20] Socratic discourse requires students to "articulate, develop, and defend positions that may at first be imperfectly defined intuitions," [21] thus effectively developing reasoning and problem-solving skills.

The "cornerstone" of business school teaching, on the other hand, is the case study method. Usually, in a business school classroom, (1) one case study is discussed per class session; (2) class participation makes up a large percentage of the course grade; and (3) the final exam consists of another case study. [22] Sara Kelley of the Georgetown University Law Center makes the following points in her discussion on law schools adopting business school teaching methods:

> *"In MBA classes a case study is usually between five and twenty pages long. It lays out a fact pattern and requires students to plan a responsive course of action. (The) advantages of the case study method over law school's case method include its requirement of group effort, its encouragement of meaningful class participation, and its focus on problem solving. According to Professor Don Welch of Vanderbilt Law School, "legal education helps students prepare students to exercise professional judgment through the case method. But it may be that the kind of case method used in business schools... does this more effectively."* [23]

Some forward-thinking American law schools are already using case studies and simulations as part of classroom teaching technique. Stanford University's website, for instance, provides the following information for potential students:

Research has shown that existing law school teaching methods and curricula do not adequately teach students the full complement of "lawyering" skills they need to competently practice law. The traditional appellate case method assumes that a problem has reached a point where litigation is the only alternative, and presents

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19 *Michelle Adams, "New Ideas for Law School Teachers: Teaching Intentionally," from http://www.concurringopinions.com/archives/2006/06/post_7.html*

20 *From http://www.answers.com/topic/case-teaching*

21 *Elizabeth Garrett, "The Socratic Method" in http://www.law.uchicago.edu/socrates/method.html, originally printed in The Green Bag, c.1998.*

22 *Sara Kelley, "Developments in Legal Education: Law Schools Adopting Business School Teaching Methods," from http://www.aallnet.org/sis/allsis/newsletter/25_1/DevLegalEd.htm*

23 *Ibid.*

students with a scenario in which all relevant issues have been identified, the question of law narrowly focused, and the questions of fact resolved. Skills-oriented courses and clinical programs have made significant contributions to a law school's ability to teach lawyering skills. Their reach, however, has been limited by a combination of factors, including their high cost and the relatively few law students who actually take advantage of these programs. [24]

Stanford, among others, espouses the incorporation of case studies and simulations into law school curricula in order to bolster skills in critical areas, such as: [25]

- Problem solving
- Legal research
- Factual investigation
- Persuasive oral communications
- Counseling
- Negotiation
- Recognizing and resolving ethical dilemmas
- Organization and management of legal work

A growing number of law schools and professors in the United States are finding that a mix of reading (cases), listening (lectures), and participation (class interaction/simulation) can be greatly beneficial for students, particularly for 'today's generation of students' who, according to law professor Laura Heymann, are

> *"...a more diverse group in terms of race, gender, religion, ethnicity, sexual orientation, financial status, political views, family situations, work experience, and life experience... who have been raised on a diet of popular culture and instant communication, resulting in shorter attention spans and higher demands on faculty to use technology in the classroom. They are fluent Internet users but do not always have a similarly-developed ability to be intelligent consumers of information... Finally, some students today see themselves as consumers of an educational service, which manifests itself in the way they treat the classroom experience..."* [26]

24 *"What are case materials?" Stanford Law School in http://www.law.stanford.edu/publications/casestudies/faq/*

25 *Ibid.*

26 *Laura Heymann, "Teaching Today's Students" from http://www.concurringopinions.com/archives/2006/04/teaching_todays_1.html*

THE WAY FORWARD

Following their lead, the DLSU-FEU MBA-JD dual program seeks to explore how the two systems of learning—business and law—can be combined so that each discipline enriches the other.

Challenged to find a balance between business and law, practical and book learning, the DLSU-FEU MBA-JD program is one in which (1) students are treated as real professionals who are responsible for their own learning; (2) law faculty are encouraged to adopt a mixture of teaching methods, especially those that conduce to learning and discussion even outside the classroom; (3) the use of technology is promoted to enhance the classroom experience, facilitate greater course coverage, and aid in interactive learning; and (4) a decided emphasis is placed on exercises and discussions about practical legal processes and problems.

Now only in its fourth year, the DLSU-FEU MBA-JD program is still fine-tuning its curricular offering, taking into consideration feedback received from both students and faculty. Although the disparity between business and law school learning methods may never be completely bridged, the MBA-JD program proves the point that a certain dynamism between the two approaches may realistically be achieved. Indeed, by focusing on the strengths of each discipline and ensuring an internal cohesion between legal and business principles, a student literally and figuratively gets the best of both worlds and should turn out to be a more complete business lawyer.

Legal Education in the 21st Century -- Thailand

By Prasit Kovilaikool

"The business of law school is not sufficiently described when you merely say that it is to teach law or to make lawyers. It is to teach lawyers in a grand manner and to make great lawyers."

Justice Oliver Wendell Holmes Jr.

Introduction on legal Education in Thailand

Legal education began about one hundred years in Thailand, even in the absence of a formal law school. In the early Rattanakosin period, the civil officers learned law on the job training from the senior officers. The inception of law school is derived from greater interest in the law due to such prime-movers as Prince Ratburi Direkrit. It was he who advocated that legal education was a prerequisite for those serving the court. The first law school was then established in 1897 (B.E.2440). Subsequently, during the reign of King Rama VI, Prince Charoonsak Kridakorn requested the King's permission to change the law school to a Royal law school at the Ministry of Justice under the auspices of the Thai Council on Legal Education, on August 7, 1924 (B.E.2467).

During the reign of King Rama VII, there were substantial changes in the country's administration. There was a suggestion to transfer legal education to Chulalangkorn University, which led to a royal decree to this effect in 1933 (B.E. 2476). Law was then taught at Chulalongkorn University for a while until it was again transferred from the Faculty of Political Science and then to Thammasat University in 1934 (B.E.2477). In effect, law was taught at Chulalongkorn University for only one year prior to the transfer to Thammasat University. However, the law revived again the law course at th Chulalongkorn University in 1958 (B.E.2501) leading to the establishment of a Faculty of Law in 1972 (B.E.2515)

Evidently, legal education in Thailand is approximately 100 years. It is worth examinin to what extent it has progressed over the years when compared with other disciplines such as medicine, engineering, economics, political science and public administration. Some may claim that legal education has progressed slowly, compounded by conservative attitudes. Other comments may include the obsolescence of law and detachment of law from leaders of the community and the socio-economic

development of the country, especially as there are fewer lawyers in executive and decision-making positions than those from other disciplines such as economics, public administration and business administration.

Moreover, the general public is skeptical of lawyers. The traditional sentiment of the public towards lawyers is that they are fickle-minded and even untrustworthy, especially some lawyers are dishonest and indulge in unethical practices. It thus depends upon lawyers to change the negative image which the public has of the legal profession.

On the question of syllabus, the curriculum should not just concentrate upon pure law. It has to cater to ethical conduct, morality, professional responsibility and social responsibility. Concern for justice, sensitivity to injustice, and protection of the rights and interests of the poor are also all crucial elements of a lawyer's education.

Legal Education in the 21st century

Legal education has begun in the Western world almost a thousand years ago in Bologna University, Italy, Oxford University, United Kingdom, Paris University in France, etc. The business of law school is not sufficiently described when one merely says that it is to teach law or to make lawyers. It is to teach lawyers in a grand manner and to make great lawyers. Justice Oliver Wendell Holmes, Jr. propounded that: "Law school today must be engaged not only with the law, but as also with ideas from disciplines outside law. Someone says that the challenge for the legal professional is not to stay abreast of development in their fields, but also to appreciate in ramification of economic, political, trade, business, scientific and technological development in this dynamic region."

Legal profession is imbued with ethical standards and law has great relations with morals. A lawyer must have good ethical conduct and good morals. Morals and ethics are the most important characteristic of a good lawyer. So a good lawyer must be honest with his client. He must likewise be honest with his opponent. He must be honest with the court and, above all, he must be honest with himself. For after all, Lord Denning said that morality is the foundation of justice.

A great law school must have great law teachers to teach their students to be good lawyers in a grand manner. Society needs a good lawyer more than a clever lawyer.

The following observations were made:

1. No matter how good and complete the law of land is, law is meaningless if those who use it in the legal profession lack virtues and ethics. It will not attain its objectives or fulfill its intentions.

At times lawyers may cause inconvenience and damage to honest folks, or they may threaten and infringe on the rights and freedoms of persons. They may also cause hardship for well-intentioned citizens.

In reality, the law goes hand in hand with justice, and justice must uphold rectitude, legality and rationality. In this light, the law will be a blessing.

There will be beneficial results if those who use the law and the law itself as exemplary. Law teachers must, therefore, teach their students to perform well and maximize their ability. They should bear in mind and underscore in teaching their students, the need to be good persons and to abide by virtue, ethics and morality. Their hearts and minds should be committed to justice in responding to the duties of lawyers. This will create benefits and peace for the country.

2. A key function of lawyers is to protect and promote justice for all especially the disadvantaged and impoverished.

Lawyers must abide by the Rule of Law. They must use peaceful means to uphold justice and counter dictatorships and vested interests. They should not look for personal rewards or other forms of self-gratification. They should foster equality, equity, and human rights and freedom in order to enhance the honor and integrity of humanity.

Lawyers should embody ethical principles and a commitment to justice rather than mere adherence to the law. Ethical, professional conduct, honesty, and the duty to serve the people should be at the heart of the profession. Lawyers must build up a just society.

Those lawyers who abide by professional ethics and personal morality represent the true image of the profession-what the profession should project and practice in a dedicated manner. In responding to the call for peace, tranquility and development, the law should promote justice. Drafters of the law and legal practitioners are instrumental in promoting this aspiration. If they abuse the process and contravene the law, it is not difficult to see that unethical behavior will arise and inhumanity will ensue. The latter is often the consequence of misdeeds on the part of those lawyers who serve dictators and vested interests by distorting their knowledge.

Such lawyers act as manipulative tools of crooked elements and are a threat to the population. They should be considered as traitors to the legal profession and to the people.

It is important therefore to condemn those lawyers who abuse their role and who fail to uphold the Rule of Law. As power corrupts and as the search for unjust rewards and undue recognition corrodes, it is best to reject those lawyers who pollute their

function. Integrity and the commitment to democracy and human rights find living proof from the inner strength of lawyers who abide by the rule of law.

It is thus necessary for professional law teachers to change the misconception that may emanate from the above. It is incumbent upon them to set a good example, to personify ethics and to gain respect from students. Teachers should earn the admiration of their students through good deeds and commitment of upgrading the standard of education. If such academic elevation does come to pass, teachers would then be authorities in their fields, which may also lead to further influence in other domains. They would then be listened to by the judiciary and members of parliament when questions of law reform arise. In other countries, such as the United States, a prominent lawyer is well-known and manifests himself in judicial decisions and legislation.

The above should, therefore, be an inspiration for law teachers. If they can genuinely commit themselves to attaining excellence in their profession, they will prove to be a paradigm for society. Their merit, once earned, will be a catalytic lesson for posterity.

3. A lawyer's fundamental duty is to serve mankind to safeguard lives, property, freedom and liberty, to protect the innocent against deception, the weak against oppression or intimidation and the peaceful against violence of disorder and to respect the legal rights of all people to liberty, equality, justice and human dignity.

Lawyers should be leaders of society. They should respect the law of their nation strictly and consistently so as to set a good example for other people to follow. Beyond respect for the law, lawyers should exemplify morality, integrity, virtue and ethics, as well as conduct themselves honestly in their profession. They should bear a sense of responsibility toward the public in upholding the pride and honor of the legal profession so as to earn public respect and trust. Moreover, lawyers should be audacious in their approach in the sense of being willing to express themselves and offer criticism with reason and impartiality. In particular, they should be polite, flexible and modest.

They should respect other people's opinions and be genuinely aware of their own rights and duties and should never accept bribes. They should not act to the detriment of others nor should they exploit others for their own benefit. They should thus make sacrifices for the benefit of others in keeping with the maxim that "the greatest happiness of the people is the highest good and prevails over all else".

Another important role for lawyers is the protection of the public interest to adhere to the greatest extent possible to the principle of "the supremacy of the public interest". This is due to the fact that lawyers are like the "technicians" of society who have to establish social rules and regulations to eliminate or alleviate conflicts between the

interests of the population. They should promote justice for all and build an equitable society based upon peace and order.

In upholding justice, provisions of law are naturally important. However, they are less important than how the law is interpreted because normally law is man-made and is shaped by the intentions of the drafters in accordance with socio-economic conditions. Yet, society evolves and changes with the passing of time. To apply the law to correct the ills of society or to develop society thus depends upon the conscience and responsibility of those who enforce the law. As His Majesty The King graciously advised the 33rd Class of Barristers:

> *"Some lawyers adhere to the law literally to uphold justice, but this may prove to be too narrow an approach. It may fall short of rendering justice. Therefore, those who protect justice and equity should be very circumspect. They should reach a clear understanding that the law should not cause injustices. It should merely be a means of protection and enhancing justice. Application of the law should thus aim to uphold justice; it should not merely uphold provisions of law per se. Upholding justice in this country is not solely based upon the restricted confines of the law; it should also encompass morality, ethics, rationality, and the truth."*

If lawyers behave in an exemplary manner, this will ensure the survival of society. It will enhance happiness of all, well as provide a brighter future for the country's development.

4. Lawyers must be aware that they are members of a very noble profession, and must therefore have a deep sense of professional ethics and social responsibility. The most important personal duty is to respect and to act consistently in accordance with the law. A proper and conscientious discharge of this duty, which they owe to the profession and to society, will not only serve as a good example to the general public, but also help to foster the sanctity of and respect for the law. Lawyers serve the law and are therefore under it; at no time must they abuse their training and professional position. Indeed, their professional position makes this duty particularly imperative. Without its regular and conscientious performance, the rule of law in a democratic society would collapse; and without its consistent performance, there would be no equality before the law and no equal protection under the laws.

Over and beyond this personal duty, lawyers must uncompromisingly support and promote the high public aims of the profession; namely, social justice and the rule of law. Only through justice and the rule of law can the least advantaged in society live in dignity, for justice is a universal ideal as it is natural; and the freedom it defends together with the rights it protects are the common ends of humanity. These fundamental rights are not exclusive to the rich, the politically powerful or to any other social group. The achievement of these ends is the lifetime public commitment of all

lawyers. Nothing less than the stability of the state is at stake—for "[j] Justice is the foundation of a commonwealth; without its preservation, no government can survive."

These aspirations are indeed lofty; but without them, no lawyer is worthy of being a member of this noble profession. The fulfillment of these aspirations requires patience, perseverance and courage: patience and perseverance in continuously maintaining right principles and equity in executing their duties; and courage in expressing their own opinions and in making their own decisions.

Lawyers must have a high moral character, but that is not sufficient for they must also have "Dhamma." They must strive to overcome their own whims, prejudices and personal interests: they must, in short, overcome themselves. Only when this has been done can they begin to promote social justice and equity. To this end, they must have self-respect, self-discipline, self-confidence in their own decisions as lawyers.

It is clear, consequently, that merely to be "clever" is not enough. Unethical lawyers bring the profession into disrepute and undermine the very foundations of the state and society. The practice of this noble profession makes it vital that it be guided by the highest principles. Knowledge must, at all times, be guided by awareness; and law must, forever, be guided by morality and "Dhamma."

5. Good lawyers have the duty to be responsible in many ways to society according to the principles of the legal profession. However, one important responsibility that is worth mentioning here is that good lawyers must always observe and perform in accordance with the laws of the country in order that they may set good models for the public in general. Laws should be efficacious so that the public may be equally protected under them true to the democratic system consistent with the "Legal State" or the "Rule of Law." This is to ensure that the public shall be assured of the maximum benefits of justice and opportunity. Jurists must fight for, encourage and support this principle wholeheartedly so that social justice may prevail under the laws of the state and that the underprivileged in education, economic and social aspects and others may live in the society with grace and warmth as contained in the saying Justitia Fundamentum Rei Publica (Justice is the foundation of the republic; without its preservation no government can survive). This is because human rights, freedom and justice are coveted by every human being and they are not exclusive only to the rich, the politically-endowed or the privileged. There can be no denial that justice should be made universal and come naturally. Jurists, therefore, are entrusted with the duty to unwaveringly solve and overcome the problems to reach these goals.

In this connection, jurists must be imbued with strong ideals: a high sense of honesty in their profession a keen sense of their duties, and an unwavering spirit in carrying out their responsibilities. They must also uphold righteous principles in performing their duties. They must dare to express themselves to make their decisions implementable. In order to accomplish the foregoing, they have to be righteous ethical jurists. In other

words, they have to practice "Dhamma" (moral; good in conduct or character; ethics) because they will have to fight against, and win for themselves before they can fight against others.

Fighting against one another is obviously arduous because they will be choosing between their vested interest for their own happiness and the need to sacrifice for others. Law students, who are fully supported financially by their parents, will find it difficult to prove such dedication. The time will come when the opportunity will arise and they can wield the power.

6. Good lawyers must always be the leaders of society and strictly and consistently observe the laws of the state in order to set good examples for others to follow. Besides, jurists have to be moralistic, true to their own words, virtuous and honest to their own profession, and responsible to the public. All these goals will enhance the honor and dignity of jurists and people will respect and have full faith in jurists. In addition, jurists have to be unwavering in their profession, daring express themselves and to offer commentary on what is righteous and lawful. Jurists have to be polite, modest, humble and respect other people's opinions. They should truly realize their own rights and responsibilities without savoring wealth and happiness for others as indicated in the saying: "There is no other form of happiness that is more blissful and important than the happiness obtained by the public." Another major responsibility of jurists is to safeguard to the maximum extent the public interest consistent with the saying: "The supremacy of public interest" Jurists are just like social engineers entrusted with the hats of laying down rules for the society to eradicate of lessen conflicts of interest among the people bearing in mind the principle of righteousness, and of building a just society so that members of that society may live in harmony, peace and good order.

Incidentally, in safeguarding justice for the sake of the people, although the provisions of laws themselves are important, of even greater importance are those enforcing and interpreting the laws. This is because laws are enacted by human beings in accordance with their innermost intentions so that such laws will be suitable and in line with the social and economic structures then prevailing.

Social and economic structures keep changing. Therefore, making use of laws to solve problems connected with society or social development depends to a very large measure on the scruples and the responsibilities of those making use of them.

There is a need for good law teachers to teach law students to build up a just and harmonized society in 21st century in the ASEAN region.

Teaching is first priority

The greatest satisfaction comes in working with students on a one-on-one basis or in small groups, where one can see the results of hard work.

Generally, it can be seen that the development of legal education comprises the following components:

1. law teachers;
2. students;
3. the curriculum;
4. a well-stocked library and accessories;
5. places of learning and their environment.

Law teachers constitute one of the most important components in the development of legal education in the country. Law teachers must be qualified, scrupulous, and steadfast in discharging their honorable duty despite tremendous hardships. Law teachers must train, instill and impart their knowledge and experience to their students and set good examples. In this way, the students may follow suit and turn out to be law graduates with quality and scruples so that these graduates may follow suit and turn out to be law graduates with quality and scruples and may competently administer justice which is the essential ingredient in bringing about peace and happiness to the society in general. The foregoing is the ultimate expectation and dream of all lawyers who only hope that it will not only be an empty dream.

In addition to their role and responsibility, law teachers must remain steadfast and emotionally stable. They must make sacrifices by devoting themselves in order that their students may succeed. In this context, law teachers must devote their entire intellectual capacity and strength in order that their students may succeed. By nature, law teachers earn pathetically less than other members of the legal profession. Therefore, it is not surprising that several law teachers head for other employment in the legal profession. Law teachers earn just enough to live a decent life. They will never be rich, but they can enjoy considerable liberty and academic freedom. They are supposed to behave themselves within ethical boundaries of Great Law Teachers. Besides their selfless devotion, law teachers must carry out their duties with perseverance and scruples, guiding their students toward becoming experienced, scrupulous, ethical and well-behaved good citizens so that they can contribute to the well-being of society.

The above may well portray the ideal picture of law teachers. In return, they will only receive praise and self-esteem once they learn that their former students have succeeded in their careers. But in order to become an accomplished law professor,

one must earn the respect, trust and confidence of his students which takes time. To prove dedication, performance and other positive traits related to a professor's moral obligation, the qualities can be summed up as follows:

1. Law teachers must be steadfast, unshaken, law-abiding, highly qualified and emotionally stable.

2. They must be kind and compassionate towards their students. They must hav good intentions and always seek the best for their students because their students' success is also theirs.

3. They must persevere, be patient and capable of containing their anger while dealing with their students.

4. They must be idealistic, have high principles and be truthful so that they can set good examples for their students.

5. They must possess academic leadership i.e. they must demonstrate their authority in the subjects they teach.

6. They must be independent and neutral to maintain their status as academicians but must also show their own opinions and principles.

7. They must be open-minded, ready to listen to the opinion of their students, and far-sighted, ready to take in new technologies.

8. They must adhere to the principle of taking the middle path and avoid extremes. They must also be ready to compromise to achieve the success and expectations of their students. They must learn how to forgive and forge

9. They must search and take initiative towards the quest for new frontiers of knowledge and technologies so that they can impart the same to their students to enable them to keep abreast of socio-economic changes especia in the era of globalization. To truly be well-rounded, they must also take initiative and be good in their academic development.

10. They must be kind-hearted, humble and readily accessible to their students. They must also be content with being solitary. They must not be too ambitious because their income is only enough for them to carry on a basic living. In this connection, they must be frugal and not expect to become wealthy as they are supposed to live within the ideal confines of good teachers.

11. They must maintain their integrity in their capacity as teachers. They must treasure their dignity and self-respect – taking pride in being teachers.

12. They must always look at things on the bright side, be optimistic for their students so that they can render moral support to them. Students will in turn hold their teachers in high esteem.

13. In addition to being highly qualified, law teachers must have high virtues, ethics, and morals. To be dubbed as a living monument is indeed most appropriate. If law instructors are incapable of setting good examples for their students, the success of legal education appears dim.

In view of the foregoing, it can be seen that law schools and law teachers have a great responsibility. They are not simply there to teach law. Law teachers are supposed to be selflessly devoted to their students. This will result in turning out law graduates imbued with a keen sense of scruples, who have the potential of becoming great lawyers in future. Just as Justice Oliver Wendel Homes Jr. once said, "The business of a law school is not sufficiently described when you merely say that it is to teach law or to make lawyers. It is to teach lawyers a grand manner and to make great lawyers." As teachers, we need good and perfect law graduates to be great lawyers in the future.

Conclusion

From the above description, it is quite clear that the mission, roles, duties, and responsibilities shouldered by honorable lawyers are absolutely abundant. For instance, these include the responsibilities of lawyers towards society and the public in the process of the protection of people's lives and freedom towards society and the public in the process of the protection of people's lives and freedom, the promotion and support of justice for society so that there would be what we call a Just Society. At times it is to be expected that there will be an encounter against those with political or financial clout, which threatens lives, well-being, or reputation. Most importantly, a good lawyer must possess excellent leadership which suggests that the lawyer must have bravery or professional courage. All opinions, both for and against, must be fearlessly expressed without any apprehensiveness from corrupted power. And all of this must be done for the right reasons and lawfully based on purely public interests, not one's own interests.

This process of producing good lawyers is not a simple matter. Such responsibility falls on law schools and teachers, who must be fully cognizant of the significance of their duty and should make an unflinching effort to create an awareness, along with an understanding that this later forms an idealism together with a determination to join forces in leading one's lives according to the established objectives, instilling and encouraging conscience among law school students.

On the other hand, given the social environment of the 21st Century under globalization of a borderless world, especially in the case of capitalism society, it is the money that rules. Materialism is predominant. Morals, virtues and ethics of lawyers are of utmost importance. As a matter of fact, virtue and ethics are even more important than the knowledge of laws. Lawyers who are virtuous and ethical will benefit the society and protect the people's rights and freedom, promoting justice for society. Clever lawyers, however, might use their knowledge in the wrong way because of their lack of virtue and ethical standards, which will further lead to damage and injustice in society.

Law schools and law teachers represent an institution. An individual lawyer correct such faults by instilling or coaching lawyers so that they take interest in and respect their legal profession by applying the principle of ethics as their main guidance while using their legal knowledge for their society at the same time.

It is important to note that in fact, virtues and ethics, have existed before all the laws. They are more important than laws themselves and they are above laws. A good lawyer must therefore have high virtue and ethical standards. In this 21st Century under globalization, it is imperative that law schools and law teachers must focus their efforts in the task already mentioned. The reason for this is that those who have both virtues and ethics, no matter where they are in this world, will always be those who perform their duties justly, efficiently and virtuously, leading to peace and happiness for a peaceful and civil society, and peaceful co-existence.

Legal Ethics in Asean Legal Education System – Brunei Darussalam Experience

By Mr. Ahmad Jefri Abdul Rahman

PREAMBLE

A man went to see a lawyer and asked what was his least expensive fee was.

One hundred dollars for three questions" said the lawyer.

"Isn't that an awful lot of money for three questions?" asked the man.

"Yes" said the lawyer. "What is your final question?"

The term "Legal Ethics" used in this paper, refers to the rules of ethics, codes of etiquette or conduct, usages and customs which apply to the members of the legal profession in carrying out their professional and moral duties to fellow members of the profession, their clients and to the Courts. The fact that the issue of Legal Ethics is being discussed in this forum, may be taken by some as evidence of a decline in the professional and moral standards of the legal profession today. The need to discuss this topic should not arise at all. The subject of Legal Ethics should indeed be ingrained into all members of the legal profession early on in their study of the law and should be second nature to them by the time they embark on their legal practice. But is this really the case?

Those who subscribe to the view that professional standards are in decline often regard the degradation of the profession by lawyers into a mere business as a reason for this decline. The practice of law is viewed by society as being treated by lawyers as a business, "where the entire human energy is geared to making as much wealth as possible within as short a period of time as possible."[1] In his forward to The Law, Practice and Conduct of Solicitors, Lord Donaldson of Lymington,[2] former Master of the Rolls wrote:

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1 *Extracted from the speech of the Mohamed Saied, the Hon. Chief Justice of Brunei delivered at the Opening of the Legal Year, 2004.*

2 *Bird and Weir, The Law, Practice and Conduct of Solicitors (1989).*

"A profession neither deserves to endure, nor will it endure, if it does not adapt to the changing needs of its clients. But equally, a profession neither deserves to endure nor will it endure, if it abandons or compromises the essential characteristics which make it a profession rather than a business." [3]

So, is this point of view fair and justified? Is this why we are discussing the issue of Legal Ethics?

BRIEF BACKGROUND OF LEGAL EDUCATION SYSTEM IN BRUNEI DARUSSALAM

The University of Brunei Darussalam ("UBD") currently offers the Diploma in Islamic Law and Syariah Practice (Dip. ILP). This is a two-year post graduate diploma course. To be eligible for this course, a student must have a bachelors degree in law or a law related subject. The first year of the course covers the subjects of Brunei Legal System the Islamic Legal System and Islamic Family Laws, while the second year covers the subjects of Syariah Criminal and Civil Procedures and Property Law. Students are also required to submit a dissertation in the second year of the course on a topic which is selected by the student and approved by their designated tutors. This course which was started in 2000, has produced 2 batches of graduates to date. The Diploma in Islamic Law and Syariah Practice is one of the qualifications [4] which entitles the holde to apply for admission to be Syari'ie lawyer with the right to appear as such in the Syariah Courts in Brunei Darussalam. [5]

Legal practitioners in the Civil Courts have to be 'qualified persons' as defined under Section 3 of the Legal Profession Act (Cap. 139 of the Laws of Brunei) ("LPA"), as amend ed and which came into force on 30 October 1999.

Section 3 stipulates the requirements of a "qualified person" for the purposes of the LPA as follows:

3(1) A person shall be a qualified person for the purposes of this Act if, subject to the provisions of subsection (3), he –

(a) is a barrister-in-law of England or Northern Ireland or a member of the Faculty of Advocates of Scotland;
(b) is a solicitor in England or Northern Ireland or a Writer to the Signet, law agent or solicitor in Scotland; or
(c) has been in active practice as an advocate and solicitor in Singapore or in any part of Malaysia.

3 *Cited by Mohamed Saied, Chief Justice of Brunei Darussalam in the speech delivered during the Opening of the Legal Year, 2004.*
4 *Syariah Courts (Syar'ie Lawyers), Rules 2002, Rule 10.*
5 *Syariah Courts (Syar'ie Lawyers), Rules 2002, Rule 16.*

(2) A person who is –

(a) a Brunei Darussalam national; or

(b) a person to whom a Residence Permit has been granted under regulations made under the Immigration Act;

on the date of his petition for admission shall, notwithstanding subsection (1), be a qualified person for the purposes of this Act if he has obtained such alternative qualification as may be prescribed.

(3) A person who is not, on the date of his petition for admission, either a Brunei Darussalam national or a person to whom a Residence Permit has been granted under regulations made under the Immigration Act, shall only apply for admission if, in addition to satisfying the requirements of subsection (1), he has been in active practice in any part of the United Kingdom, in Singapore, in any part of Malaysia or in any other country or territory or any part of a country or territory in the Commonwealth designated by the Attorney General by notice in the Gazette for at least seven years immediately preceding such application.

The alternative qualifications described in section 3(2) of the LPA [6] are:

(1) the Certificate of Legal Practice issued by the Qualifying Board pursuant to section 5 of the Legal Profession Act, 1976 of Malaysia; and

(2) a degree in law conferred by the Universiti Islam Antarabangsa of Malaysia.

The criteria for a 'qualified person' described above means that legal practitioners in the Civil Courts in Brunei Darussalam have to undergo the system of legal education of other countries in order to qualify to practice as advocates and solicitors of the Courts of Brunei Darussalam. Currently, the qualifications from England, Scotland and Malaysia will allow the holder of such qualifications, subject to the other conditions set out in the LPA, to be admitted as an advocate and solicitor in Brunei Darussalam. Most of the lawyers practicing in Brunei Darussalam today have qualified by passing the Bar Finals in United Kingdom or the Certificate of Legal Practice from Malaysia.

The system of qualification for lawyers was adopted for Brunei Darussalam in view of the size of her population in relation to the number of lawyers who are needed to provide legal services for the general population. This current system is perceived as sufficient to meet the current needs for professional legal services and there are no plans to introduce a locally based legal qualification apart from the Diploma in Islamic Law and Syariah Practice currently offered by the UBD.

6 *Legal Profession (Alternative Qualification) Rules, 1999 (Gazette Notification 51 dated 25 September 1999).*

CANONS OF LEGAL ETHICS

The Advocates (Practice and Etiquette) Rules (hereinafter referred to as "the Etiquette Rules") set out the rules of etiquette by which lawyers must abide. The Etiquette Rules are divided into the following parts:

I. Preliminary
II. Acceptance of Brief
III. Conduct in Court
IV. Conduct Out of Court
V. Restrictions
VI. Advertising, etc.
VII. Miscellaneous

There are a total of sixty rules divided into the various headings described above. The Etiquette Rules sets out the standards of practice and rules of ethics which are applicable to any person to whom a practicing certificate is granted.[7] The attention of the Chief Justice may be drawn by any person, whether or not an advocate, to any alleged breach of the Etiquette Rules.[8] The Chief Justice may take such steps as he considers proper in relation to the breach including any sanction authorized under the LPA.

SOME ISSUES OF LEGAL ETHICS IN ADVOCACY

This part of the discussion in this paper focuses on some of the applicable rules of ethics on the advocate in carrying out the role of advocacy in the courts. The argument put forward is that Legal Ethics has not been taken seriously enough in the system of legal education and is the basis for the decline in public perception of the legal profession. The discussion will also deal with the question whether Legal Ethics could be included in elective courses.

Being a member of the profession

Before any meaningful discussion can be had on the applicable legal ethics in advocacy, it is useful to remind ourselves of the reasons behind the imposition of a set of rules to which govern the legal profession as we know it.

The main reason for the imposition of the rules of ethics on the legal profession lie in the fact that lawyers are members of a profession. What is meant by being a member of a profession? What makes a profession different from that of other vocations? A useful description is one that was given by the Royal Commission on Legal Services set up some 25 years ago stated that: When a profession is fully developed it may be described as a body of men and women.

7 *The Etiquette Rules, Rule 59(1).*
8 *The Etiquette Rules, Rule 59(2).*

(a) identifiable by reference with some register or record;
(b) recognized as having a special skill and learning in some field of activity in which the public needs protection against incompetence, the standards of skill and learning being prescribed by the profession itself;
(c) holding themselves out as being willing to serve the public;
(d) voluntarily submitting themselves to the standards of ethical conduct beyond those required of the ordinary citizen by law;
(e) undertaking to accept personal responsibility to those whom they serve for their actions and to their profession for maintaining public competence.[9]

William Reece Smith, Jr., the then president of the International Bar Association, addressing the 9th Commonwealth Law Conference said:

> *"... [F]irst ... since lawyers are highly educated in a complex discipline, they are allowed the privilege of self-regulation: Those who are uninitiated in the learning of the law are considered unsuited to regulate the profession. Second, in recognition to the 'common calling' facet of the definition, members of the legal profession nurture a high degree of collegiality, civility, and mutual trust."*[10]

The description of a profession given by the Royal Commission and the statement of Mr. Reece, Jr. acknowledge that high ethical standards are essential to professionalism and a lawyers' exclusive privilege to practice law. This privilege can be said to rest on a bargain between society and the legal profession wherein society permits lawyers to regulate themselves in exchange for the profession's assurance that members of this profession will be ethical, competent, and place the public's interest above their own self-interest. If lawyers do not meet these high ethical standards, the rationale for self-regulation and the laws which give exclusive rights to lawyers to practice law fails.

The legal profession owes a duty to members of the public to ensure that they are protected from incompetence of the members of the profession. As often is the case, complaints against lawyers result from breaches of the rule of ethics by the lawyer in question. This makes a compelling case for constant reminders of the rules of ethics and the need to adhere to them, be given to members of the profession.

An Advocates' Duty

The two fundamental duties of an advocate are his duty to the client and his duty to the Court. This is expressly set out in Rule 17 of the Etiquette Rules which state that:

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9 *Cited by the Rt Hon Lord Alexander of Weedon QC in "The Role of the Advocate in Our Society" [1992] 1 MLJ xxxvii.*

10 *Cited by Prof. Godfrey Smith in his paper entitled Professionalism in the Legal Profession: An Overview presented at the International Seminar on 'Professionalism and Specialisation in Law Practice in Malaysia: Challenges and Prospects in the Coming Decade', organized by the Malaysian Muslim Lawyers Association on 10 June 1993 at Kuala Lumpur.*

"An advocate shall, while acting with due courtesy to the Court, fearlessly uphold the interests of his client, the interests of justice and the dignity of the profession, without regard to any unpleasant consequences, either to himself or to any other person."

The duty of an advocate to his client would sometimes cause a victim of rape being vigorously cross-examined by the counsel for the accused or a child witness being inundated by questions which cause considerable distress to the child and thereby reducing the child to tears. This duty to his client means that an advocate often has to put aside his personal feelings for the cause he is advancing for his client's case, even if this clearly causes suffering or torment to the witnesses.

However, even if this is an accepted facet of advocacy, this duty should not be carried out to any greater extent than is necessary to put a point across to the judge hearing the case. As stipulated in Rule 14 of the Etiquette Rules, questions put to witness shall not insult and annoy and counsel shall exercise his own judgment as to the substance or form of the question put. Counsel should always bear this duty, which is also enshrined as part of Legal Ethics, in mind whenever putting questions to witnesses.

This duty to put forward a client's case without fear or favour, is always counterbalanced with the counsel's duty to the Court. one would even say this is an over-riding duty which must be observed by counsel. One facet of this duty is described in Rule 16 in that an advocate shall maintain a respectful attitude towards the Court, which may, on some days, be a thing easier said than done. However difficult a case is turning out for the advocate, this rule must be observed to uphold a positive public perception of the profession.

On this point of respect to the Court, it is necessary to remind ourselves that as counsels, we are not the audience in a court hearing. Counsel should be aware that they have to address the Court and deal with any doubts which the Court may have on a point being argued. Sometimes the point may be buried deep in the woods and the Court is unable to see the trees, but nevertheless, it is counsel's duty to maintain respect to the Court and explain his line of thought carefully without insinuating any incompetence on the Court's part.

Closely linked to the duty to respect the Court is the advocate's duty not to practice any deception on the Court. This duty would include the citing of cases which may go against the point which is being advanced or indeed citing cases which may destroy the foundations of the client's case. I would ad that this rule is a much overlooked rule and is rarely practiced by fellow counsel. I would put this down to the natural human nature of being averse to the risk of losing. But it is worth remembering that the adversarial system used by the Court in our jurisdiction relies on this duty of counsel to put up both sides of any argument before it to ensure that justice is done. It only through sound argument that justice can be done.

SHOULD LEGAL ETHICS BE INCLUDED IN ELECTIVE COURSES?

It would be evident from the discussion above that ethics play an important role in the life and practice of an advocate. The role that ethics play in the professional life of a lawyer must not be underestimated. Any negative perception which the public has of lawyers can be attributed to the lack of adherence to the Legal Ethics which the profession has prescribed for itself. Part of the blame for this lack of adherence has its roots in the system of legal education which is prevalent today. Legal Ethics has become and remains "an unloved orphan of legal education."[11]

Many law courses include Legal Ethics as an elective rather than a compulsory subject and this, in my view, gives the erroneous impression to the aspiring lawyer that Legal Ethics should be viewed only as a choice. This mode of thinking is easily ingrained to a law student's mind and is carried on into his later years in practice.

The short answer to the above question would be that Legal Ethics should be taught a core subject and not merely as a topic in elective courses. By doing so, we would be preparing future lawyers for the responsibility of upholding the professionalism in a profession which has been a decline in respect for the profession. The number of tasteless lawyer jokes is testimony to this fact.

INCLUSION OF LEGAL ETHICS IN THE CONTINUING LEGAL EDUCATION OF LAWYERS

It has been suggested that Legal Ethics as a subject has not been accorded the level of 'seriousness' in law schools when compared to other subjects such as criminal law, the law of contract, etc. for three reasons: (1) a faith that the ethical guarantees of professionalism and the methods of legal education makes the teaching of legal ethics unnecessary; (2) the belief in the scientific basis of legal education; and (3) the assumption that adults lack the capacity for ethical development.[12]

The first reason is based on the belief that the elements of professional ideology which include the professional assertion of the lawyer's essential goodness, the legal education's promise of character building and the legal community's self-policing function, will all work together to produce lawyers of high ethical standards.

The second reason is based on the notion that the study of law is akin to the study of science which emphasizes the study of facts and has no room for the study of 'moral values' which incidentally what legal ethics is based on.

11 *Roger C. Cramton & Sysan P. Koniak, Rule, Story, and Commitment in the Teaching of Legal Ethics, 38 Wm. & Mary L. Rev. 145 (1996).*

12 *See Prof. Russell G. Pearce, Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School 29 LOY. U. CHI. L.J. 719 (Summer, 1998).*

The third reason is based on the idea that law students are adults by the time they reach law school and would therefore have little or no propensity for change. In short, the belief is that teaching Legal Ethics cannot make law students more ethical.

In his paper, Pearce argues that his research shows that the three reasons relied upon to deprive the subject of Legal Ethics its rightful place in legal curriculum were misplaced and have been proven by the passage of time to be mistaken. [13]

This view that Legal Ethics has not been accorded the same level as other more 'relevant' subjects which are taught in law school would have produced a generation of lawyers who are less enthusiastically inclined to treat the issue of Legal Ethics with sufficient gravity. If this is indeed the case, the increase in the number of complaints and the decrease in the level of perception of the public of the legal profession may be a result of this view of Legal Ethics.

This would make a compelling case for the inclusion of Legal Ethics in any continuing legal education of lawyers. It would be interesting to discover how much any one remembers of any Legal Ethics course which was attended during the studies for a law degree. It would not be surprising if more is remembered about the other more 'glamorous' subjects of criminal law, intellectual property than Legal Ethics.

CONCLUSION

It is indeed encouraging to note that initiatives such as the one in this forum, are being taken in promoting Legal Ethics in the legal profession. Such initiatives serve to remind lawyers of a core value of the profession in which they serve in. And it is a timely reminder in the light of negative publicity that the legal profession receives. Whether this negative publicity is warranted or not, it should be up to the members of the profession to fulfill their part of the social bargain that the legal profession has made with society.

The inculcation of Legal Ethics to practitioners could be the panacea for the ills which are perceived by society as having infected the profession. This effort in promulgating a Legal Ethics in the legal profession is and should be seen as an effort by a profession that is sensitive to the needs of its clients. It is the hallmark of a profession intent on maintaining the high standards of ethics and moral that it has placed in itself. This ASEAN Law Association initiative on Legal Ethics puts the subject back to its rightful place in the legal profession and deserves the full support of all members of ASEAN.

13 *Roger C. Cramton & Susan P. Koniak, Story, and Commitment in the Teaching of Legal Ethics, 38 WM. & MARY L. REV. 145 (1996).*

Legal Ethics in the Malaysian Legal Education System Quo Vadis...?

*By Mariette Peters**

Legal Ethics, like politeness on subways, kindness to children, or fidelity in marriage, cannot to a great extent be taught in schools or enforced by third parties.[1]

A. CANONS OF LEGAL ETHICS

There are numerous statutes[2] that deal with legal ethics in Malaysia. Emphasis however will be given to the three main ones, namely the Legal Profession Act 1976 (LPA); Legal Profession (Practice & Etiquette) Rules 1978 (LEPPER) and the Legal Profession (Publicity) Rules 2001 (LEPUB). Before I delve into the teaching of ethics and the methods employed to teach, I would like to mention some of the rules of ethics that exist in Malaysia. In order to provide clarity and to illustrate the application of the canon of ethics, several situations are envisaged.

1. General Duties

There are some general duties and obligations of an advocate and solicitor[3] that must be mentioned at the outset. As a general rule he is to uphold the interest of his client, the interest of justice and the dignity of the profession[4]. He shall, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.

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* *Knowledge Partner, Zul Rafique & Partners.*

1 *E. Schnapper, 'The Myth of Legal Ethics', 64 ABA J. 202 (1978).*

2 *Advocates and Solicitors (Issue of Sijil Annual) Rules 1978; Advocates and Solicitors' Compensation Fund Rules 1978; Solicitors' Account Rules 1990; Accountant's Report Rules 1990; Solicitors' Accounts (Deposit Interest) Rules 1990; Solicitors' Remuneration Order 1991; Legal Profession (Professional Liability) (Insurance) Rules 1992; Solicitors' Remuneration (Amendment) Order 1994 – P.U. (A) 80/1994; Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994; Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994; Legal Profession (Disciplinary Board) (Procedure) Rules 1994; Legal Profession (Discipline Fund) Rules 1994; Advocates and Solicitors (Issue of Sijil Annual) (Amendment) Rules 1995 – P.U. (A) 239/95; Legal Profession (Professional Liability) (Insurance) (Amendment) Rules 1999; Advocates and Solicitors (Issue of Sijil Annual) (Amendment) Rules 1999; Advocates and Solicitors (Issue of Sijil Annual) (Amendment) Rules 2000; Solicitors' Accounts (Deposit Interest) (Amendment) Rules 2000; Legal Profession (Publicity) Rules 2001.*

3 *A practising lawyer in Malaysia is referred to as an Advocate & Solicitor.*

4 *LEPPER, rules 16 and 31*

An advocate and solicitor is also prohibited from advertising his services[5]. Although the rules against advertising have been relaxed to a certain extent by the Legal Profession (Publicity) Rules 2001, they are still regarded by some quarters as archaic and outdated.

It must also be noted that an advocate and solicitor is not to divide costs or profits with an unqualified person[6], nor is he allowed to do or cause touting[7].

2. Duty towards one another

It is quite ironic, if not amusing that lawyers who are supposed to be well-educated and in many situations actually learned and respected, need rules to guide their conduct towards one another. These rules apply to lawyers, whether in court or non-litigious situations from one as non-eventful as a telephone call to a trial at the highest appellate court.

The rule of thumb is for an advocate and solicitor to conduct himself with integrity and professionalism[8]. In particular he:

a) SHALL NOT conduct a case in a way merely to facilitate delay[9]
b) SHALL NOT influence conduct of counsel[10]
c) SHALL NOT communicate with NOR appear for a person represented by another lawyer[11]
d) SHALL NOT make unnecessary objections[12]
e) SHALL be ready for the day for trial[13]

In addition to LEPPER, there are various rulings[14] issued by the Malaysian Bar Council and these rules deal with issues pertaining to courtesy[15]; soliciting and poaching of staff[16] and even exchanging of legal authorities[17].

3. Duty towards Clients

Lawyers wear the hat of a confidante when dealing with clients. Whether an individual, firm, company or society, clients take lawyers into their confidence and entrust them

5 *LEPPER, rules 37 and 38.*
6 *LEPPER, rule 52.*
7 *LEPPER, rule 51. See also Balakrishnan Devaraj v Patwant Singh v Niranjan Singh [2005] 4 CLJ 210.*
8 *He is to be characterized by candour, courtesy and fairness – Rule 18 of LEPPER.*
9 *LEPPER, rule 12.*
10 *LEPPER, rule 32.*
11 *LEPPER, rule 42.*
12 *Bar Council Rulings 1997, Ruling 19.*
13 *LEPPER, rule 24.*
14 *Bar Council Rulings 1997 ('BCR').*
15 *BCR, Ruling 10.*
16 *BCR, Ruling 12.*
17 *BCR, Ruling 20.*

not only with their money and confidential information, but also with the task of doing their best to protect, preserve and defend their rights and interests.

An advocate and solicitor therefore:

a) SHALL NOT accept the brief in specific situations where he knows he would be embarrassed[18]; or that his professional conduct is likely to be impugned[19]; or where it would be difficult to maintain professional independence[20]; or where he is unable to appear[21];
b) SHALL NOT abuse confidence reposed in him[22];
c) SHALL NOT stand surety[23];
d) SHALL undertake defence fairly and honourably[24];
e) SHALL disclose all circumstances to the client[25].

4. Duty towards the Courts

As officers of the court, it is the duty of every advocate to assist the court in coming to a correct decision. He shall therefore maintain a respectful attitude towards the court[26]. The conduct of an advocate during proceedings is also regulated by the LEPPER. For instance he:

a) SHALL supply the court with all relevant information[27];
b) SHALL be ready for trial on the day fixed[28];
c) SHALL put before the court any relevant binding decision[29];
d) SHALL guard against insulting or annoying questions[30];
e) SHALL NOT practise any deception on the court[31];
f) SHALL NOT refer to facts not proved[32];
g) SHALL NOT misquote[33].

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18 *LEPPER, rule 3*
19 *LEPPER, rule 4*
20 *LEPPER, rule 5*
21 *LEPPER, rule 6*
22 *LEPPER, rule 35*
23 *LEPPER, rule 40*
24 *LEPPER, rule 9*
25 *LEPPER, rule 25*
26 *LEPPER, rule 15*
27 *LEPPER, rule 23*
28 *LEPPER, rule 24*
29 *LEPPER, rule 20*
30 *LEPPER, rule 13*
31 *LEPPER, rule 17*
32 *LEPPER, rule 19*
33 *LEPPER, rule 21*

B. WHY DO WE NEED LEGAL ETHICS?

"... all law teachers have a responsibility to give attention to the ethical under-pinning of legal practice. We have a responsibility to sensitise students to the ethical problems they will face as practitioners to provide them with some assistance in the task of resolving these problems, and to expose them to wider issues such as the unmet need for legal services."[34]

1. An Influential Profession

Almost all decisions made by lawyers affect others and therefore have legal implications which makes ethics part of the everyday life of lawyers. From issues affecting clients, the court and society in general, the actions of a lawyer whether condoned or condemned could have far-reaching consequences. As very aptly studied by Lord Bolinbroke[35]

> *"... the profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement the most sordid and pernicious."*

2. Public perception of lawyers

From the Bible[36] to Shakespeare[37], from novels[38] to movies, lawyers never seem to escape negative perception.

The qualities generally associated with lawyers include 'a pre-occupation with money, egocentricity; attitudes variously described as pompous, patronising, condescending and arrogant; and tendencies to turn everything into a debate to be won, to complicate problems, to make more work and generate higher fees, and to distort or conceal the truth by resorting to technicalities (or worse) in the interest of winning'[39].

Is this perception due to plain ignorance of the public or is there some truth (whether a modicum or much more) to the generalisation? One must admit that to a large extent such perception is in fact due to public ambivalence which may be seen in the following:

a) Expectations

While decorum, decency and professionalism are qualities that are expected of a lawyer, many clients prefer lawyers 'with a touch of a scoundrel in them'[40]. Hence lawyers may have to juggle a Jeckell and Hyde personality and in the course of doing so may contribute to the misconception by society in general.

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34 R. Cranston, 'Legal Ethics and Professional Responsibility'

35 Quoted in G. SHARSWOOD, LEGAL ETHICS: AN ESSAY ON PROFESSIONAL ETHICS 171, 5th Ed (Philadelphia: T& JW Johnson & Co, 1984

36 "Woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne..."

37 Henry VI, Pt II, Act IV, Scene 2 – "The first thing we do, let's kill all the lawyers"

38 The Firm

39 G.A. REIMIR, ETHICS: THE DRS AND BEYOND 3 (1992).

40 J. Willis, "What I like and What I don't Like About Lawyers', LAW SOCIETY OF UPPER CANADA GAZETTE 52 (March 1970).

b) Media Portrayal

The media has always had a love-hate relationship with lawyers. Portrayals of lawyers in the media typically depict them as either larger-than-life heroes who advise and protect helpless clients against overpowering enemies or as sinister accomplices of criminals. Neither portrayal bears much resemblance to the actual realities of life where vast majority of lawyers actually provide legal services in a market economy and where law is just as much a business as it is a profession, where competition is stiff, bills have to be paid and overheads covered.

Such perception of lawyers therefore may cause the public to be disillusioned.

3. Non-commercial value

In recent years, lawyers' practices have become progressively more specialised resulting in several branches of law with which many practitioners have little need to be familiar. Legal ethics is one of them thus rendering a dire need for inculcation of such.

4. Descriptive method in reading law

The influence and popularity of the positivism expounded by John Austin and H.L.A. Hart has created a dichotomy between law and morality. The descriptive (as opposed to the prescriptive) method of studying law has left no place for moral values and ethics. This has created a need for the teaching of legal ethics.

C. LEGAL ETHICS IN MALAYSIA – 'LEGAL ETHICS WITHOUT THE ETHICS?'

In Malaysia, Legal Ethics is taught at the Bar Finals stage. At the outset it must be mentioned that there is no Common Bar Examination. The law students from the local universities sit for the Bar Finals Examination conducted by their respective law schools[41]. External students[42] and students who read law in foreign universities[43] have to sit for the Bar Finals examination conducted by the Legal Profession Qualifying Board and these exams are referred to as the Certificate in Legal Practice ('CLP'). There have been suggestions to synchronise all bar finals examinations into a Common Bar Examination but to date that has yet to materialise.

In Malaysia, legal ethics is compulsory and it is taught either as a subject itself or as a component of a subject spread over one academic year[44]. In addition to that, at

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41 *There are 5 local public universities conferring law degrees, namely, (a) Universiti Malaya (UM); (b) Universiti Kebangsaan Malaysia (UKM); (c) Universiti Teknologi Mara (UiTM); (d) Universiti Utara Malaysia (UUM); and (e) International Islamic Univeristy of Malaysia (IIUM).*

42 *In Malaysia, external law degrees are conferred by Universiti Malaya. It is known as the Bachelor of Jurisprudence (B. Jur).*

43 *In this context, foreign universities are almost synonymous to universities in the UK, although there are reasonable numbers reading law in Australia and New Zealand.*

44 *For example in Universiti Malaya, Legal Ethics and Professional Conduct is a compulsory subject whilst at the International Islamic Universiti of Malaysia, it is a component of Professional Practice.*

the pupillage stage[45], students are required to attend an Ethics course run by the Bar Council. This is a two day program that ends with a compulsory dinner for students.

Regardless of the law school, Legal Ethics is a compulsory paper and that, to a certain extent, endorses its importance.

However, in Malaysia, in teaching ethics, teachers adopt the passive approach, teaching the black letter rules rather than focusing on the application of such.

Lectures and tutorials are conducted based on the 'Socratic' method[46] where the rules of ethics are dictated to the students in lectures and followed by discussions in tutorials. In certain law schools, students are required to complete assignments that would be reflected in their final examinations grades.

D. OTHER METHODS

Besides the Passive approach, there are other methods employed in other jurisdictions.

1. Problem Based Learning (PBL)

ethod of teaching involves the posing of ethical dilemmas to students as a lems. Students are required to resolve these dilemmas without too much the substantive law issues.

d has been adopted in some of the local universities in Malaysia in nd has proved successful.

sive Method

ve method refers to the process of incorporating or inculcating ethics ons into all aspects of the legal curriculum. The pervasive method has been npioned by many, most notably by Deborah L. Rhode[47] where she explains why it is preferred to one required course:

"No matter how well conceived, a simple required course has other limitations. Timing is an inherent problem. If the course occurs in the first year of training, many students will not yet know enough to grasp the full dimension of professional dilemmas. If it occurs later, many students will be too cynical or preoccupied to give it full attention, and they will also have lacked the background to raise relevant issues in the other classes."[48]

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45 *After having completed the Bar Finals examination, a 9 month pupillage awaits the students. Commonly referred to as the 'chambering period' students are absorbed by legal firms before they are admitted to the Bar.*

46 *Sometimes referred to as the 'Passive Approach' where students are required to memorise the rules and regurgitate them at examinations.*

47 *Professor of Law, Stanford University*

48 *Ethics by the Pervasive Method 42, 42 J. OF LEGAL ED. 31 (1992); See also J.E. Starrs, Crossing a Pedagogical Hellespoint via the Pervasive System, 17 J. OF LEGAL ED. 365 (1967).*

3. Clinical Stimulation Approach

This approach involves the teaching of ethics in an actual situation. Students are attached to legal aid or law offices (with a supervisor) and cases involving real people in actual situations are posed to them. The clinical approach involves combining the learning of the substantive law with the teaching of professional legal ethics, in an environment that at least in part, represents the realities of the professional legal practitioners.

E. THE PREFERRED CHOICE?

"There are three basic steps that must be taken; teaching ethics in such a way that it encourages students to treat its study as an active and continuing challenge rather than a passive and finite undertaking, teaching ethics in such a way that the method of instruction obliges students to deal with ethical problems in an engaged and participatory session and teaching ethics in such a way that ensures that the process of the product of ethical reasoning is connected to the messy socio-political context in which ethical controversies and their proposed solutions arise."[49]

The main challenge in teaching ethics in Malaysia is how does one go beyond the teaching of a series of rules to be applied in standard situations? It must also be noted that Legal Ethics is sui generis – different from other courses in that it requires, to a certain extent, personal introspection. It requires students to address their core personal values and this may sometimes involve internal conflict.

We need to produce critical and creative law graduates who are self-reliant, self-determining and self-motivating individuals who are able to communicate well and work co-operatively as well as independently.

In doing so, law teachers need to equip students to enable them to:

a) Appreciate the relevant principles, issues and complexities of ethics;
b) Face and resolve ethical dilemmas in practice;
c) Contemplate ethical conduct in the context of justice

It must be admitted though, that legal ethics is, if not the most, a very difficult subject to teach and even more difficult to instil the interest of students in it. It has been described[50] as 'the dog of the law school (curriculum) – hard to teach, disappointing to take, and often presented to vacant seats or vacant minds'.

49 *Professor Hutchinson of Osgoode Hall.*
50 *D. Moss, 'Out of Balance Why Can't Law Schools Teach Ethics?' Student Law, (Oct 1991)*

Is the method adopted in Malaysia an ideal one? Several criticisms have been made of the passive method of teaching as it is passive learning by preaching, intellectualisation and memorisation and where legal ethics is taught in one single course.

First it preserves the unsatisfactory mindset that the ethics may be learnt in vacuum, confined to a single subject in the curriculum. Students will be unable to appreciate the relevance of ethical decision-making in other parts of the curriculum.

"Such an approach also tends to portray "ethics" merely as knowledge of professional responsibility rules that can be learned and applied like other 'black-letter' principles, as if they provide complete or sufficient guidance for the would-be ethical practitioner - which they do not."[51]

Although it is important for a student to familiarise himself with the rules as stipulated, there is more to teaching ethics than merely regurgitating its rules. The teaching of ethics requires much more before the students realise that scoring an 'A' in Ethics & Professional Practice is just as laudable as an 'A' in Intellectual Property Law.

An assessment of their method could not have been described better than prominent scholar, Deborah L Rhode.[52]

"The current state of professional ethics leaves much to be desired. In most law schools it is relegated to a single required course that ranks low on the academic pecking order. Many of these courses...constitute the functional equivalent of 'Legal ethics without the ethics', and leave future practitioners without the foundations for reflective judgment."

The pervasive method has proved to be popular and successful, especially in the United States. This method has been viewed as the solution to the challenges posed by the passive method.[53]

There is some scepticism of the pervasive method and it stems from the perception that implementing such method may not be an easy task, since it requires the proper incorporation of material on ethics into substantive law subjects. However, just like a thousand mile journey begins with a single step, implementing a pervasive method in the Malaysian legal education system is not impossible. In fact some ethical

51 *M. Robertson, 'Renewing a Focus on Ethics In Legal Education'.*

52 *'If Integrity Is The Answer, What Is The Question' 72 FORDHAM L. REV. 333 at 340 (2003).*

53 *See D.T. Weckstien Boulder II, Why and How, 41 UNIV. OF COLO. L. REV. 304 where at p. 308 he states: '... we cannot expect too much from ethics classes held, like church services, a couple of hours a week. We need to pervade the entire atmosphere of legal education'.*

components are already fused into core curriculum subjects, save for the fact that it has not been highlighted as issues of ethics. For example, in the Law of Evidence and Procedure, examination of witnesses is already dealt with; in the Law of Evidence the issue of privilege of the client vis-à-vis non-disclosure by the advocate is also addressed. Rules against touting, advertising and the general duties of an advocate are drilled into First Year students through subjects such as Law & Society and Malaysian Legal System; advocacy and the role of the prosecutor in Criminal Procedure; and the role of the advocate as stakeholder in Property Law. What may be required therefore in the Malaysian context is a more comprehensive coverage of ethics in the individual subjects[54] and the emphasis that it is part of Legal Ethics.

The pervasive method however is not fool-proof. It has been stated[55] that in order to be accepted, a legal ethics course ought to become as much like a traditional law course as possible, increasing the number of units, stressing law over theoretical, empirical or clinical approaches, and preferring Socratic interrogation or lecture to open discussion – a single required course.

In fact by teaching ethics in a manner different from contracts, crime or competition law, are we running the risk of delivering the message that ethics education is not nearly as important as courses in other subjects?

F. SUGGESTIONS FOR REFORMS

There are advantages and disadvantages in each and every method employed. I am suggesting therefore that we incorporate all methods in the teaching of legal ethics.

The first thing that we should do is to ensure that Legal Ethics is taught in all four years, from the First Year to the Bar Finals stage, focussing not only on different aspects but different methods as well.

In the First Year, it is suggested that Legal Ethics be taught adopting the Socrates approach. This is because one must appreciate the fact that being the product of the Malaysian Education system[56], first year law students may not adapt well to other methods of teaching. The 'cold-turkey' approach of converting to a more innovative method of teaching may be counter-productive.

54 *See S.J. Burnham, Teaching Legal Ethics in Contracts, 41 J. OF LEG. ED. 105 (1991).*

55 *R.M. Pipkin, Law School Instruction In Professional Responsibility: A Curricular Paradox, 1979 AM B, FOUND. RES. J 247.*

56 *In the Malaysian education system, the teaching method employed is primarily 'passive' focusing more on the absorbing and memorising in classrooms and regurgitating at examinations.*

There is some scepticism in teaching Legal Ethics to First Year law students, as they have a tough time seeing the rules as anything but a set of abstractions to be mastered intellectually, or least memorised. Furthermore, their substantive knowledge of the law is limited and this may restrict their ability to engage hypotheticals on a realistic level. On the other hand, it has bee argued that if Legal Ethics is so important, why should it be taught on the way out, at the Bar Finals stage?

It is suggested therefore that the emphasis in the first year should be general rules of ethics[57] and the role, function, duties and powers of the Bar Council. This perhaps should be fused into a compulsory first year subject, such as the Malaysian Legal System (MLS).

In the subsequent years (Second, Third and the Bar Finals), what could be adopted is the pervasive approach based on the PBL. For instance, rules pertaining to conflict of interest and fiduciary duties towards clients may be fused into subjects such as Contracts and Property Law; the lawyers duty towards courts may form a component in Civil Procedure and Criminal Procedure and law relating to privilege may be highlighted in the Law of Evidence.

The PBL method may be implemented in various stages but what is most important is for the lecturer to relinquish control. He should merely be their guide, prompting the discussion by asking questions or even playing devil's advocate. Role-playing may be something to consider in the PBL as it adds enormous value.

At the pupillage level, a clinical stimulation method should be adopted. This is suitable as it would provide students with opportunities to confront and engage in ethical dilemmas.

"Clinical legal education offers students the chance to integrate theoretical knowledge of law, based largely on appellate decisions learnt in the classroom, with the everyday experience of legal practice and the legal system. Students discover that there may be no appropriate legal solution or that a legal solution may be not available to a client for a variety of reasons including cost, unavailability of legal aid, delay, lack of evidence or enforceability."[58]

Since the students have analysed the trees with a fine-tooth comb, we do not want them to miss the forest.

57 *Students should familiarise themselves with general canons of ethics such as the rules against advertising and touting.*

58 *Jerome F, 'Why Not a Clinical-Lawyer School' 81 UNIV. PENNSYLVANIA L. REV. 907 (1933)*

The suggestion is to have the students directly involved in legal practice in a legal aid environment. They should perform their duties under supervision, perhaps one day a week throughout the 9 month pupillage or whatever period as the Bar Council deems fit to prescribe.

G. CONCLUSION

I must admit that it may be difficult to implement the teaching methods suggested because of the difference in the content of the syllabi of the foreign and local law programmes. What has been suggested therefore may be workable only in the law programmes taught at the local public universities as there is no control over the content of courses taught in the external or foreign programmes.

There is also the need for cooperation amongst the Bar Council, Legal Profession Qualifying Board and the respective law faculties of the public universities to ensure that the content of the course is standardised.

Until and unless there is some consistency in the law degrees recognised in Malaysia, it may be difficult to adopt the suggestions made and those who are foreign-trained may only have the benefit of familiarising themselves with legal ethics in Malaysia at the pupillage stage.

Last but not least is the importance of implementing Continuing Legal Education (CLE) programmes. What has to be ensured is for Legal Ethics to be one of its components and this should form the forum to discuss current and future issues in Legal Ethics.

It appears therefore that the co-operation of every sector in the Legal Profession may be required – not just law lecturers and the respective faculties. We are looking at the involvement of the Bar Council and maybe even the judiciary, if the need arises.

The Power and Limits of Teaching Ethics in the Classroom

By Raul C. Pangalangan*

> *"I remember ... how I felt every time a disciplinary case came before the Supreme Court involving a former student for gross and willful violation of the canons governing the conduct of members of the bench or the bar. The question I asked myself and my colleagues in the Supreme Court who were once law teachers was: "Where did we fail?" But then, there are those who believe that ethics like virtue cannot be taught. They are attributes each individual develops from childhood and through life as a consequence of interrelationships in the home, at school, and the community."*
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> *-- Irene R. Cortes, Towards Effective Teaching of Legal Ethics, in ESSAYS ON LEGAL EDUCATION, 229 (1994)*

In the past decade, international institutions and foreign aid programs have focused on the need to insulate institutions from corruption, and an important part of that effort has focused on cleansing the legal profession and the courts. As the Philippines takes part in that global effort, I invite you to re-examine the tried-and-tested strategies for promoting ethics in the legal profession, and to ask whether much of this work is wasted in what Filipinos call "sermonizing", i.e., the tendency to preach from the pulpit oblivious to whether the faith is lived out in the streets and outside the temples.

Historical Framework of Legal Education in the Philippines

Following the defeat of the Spanish colonial government in Manila, the Revolutionary Government of 1898, during its brief existence, established a national university (the "Literary University of the Philippines"). A Faculty of Law was created, patterned after Continental European law schools. It had a six-year curriculum, which combined, on one hand, philosophy and political economy, and on the other, traditional law courses that we will recognize today: the civil code, the penal code, political and administrative law, commercial law, procedural law and public international law.

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The Spanish-American War no sooner broke out and, with America's invasion of the Philippine islands, followed the Filipino war of resistance. The Philippines became America's colony, and after a decade-long pacification effort, in 1911, the Americans established the first American-style law school in the Philippines, the University of the Philippines (hereinafter, the U.P.) College of Law.

Thus began the transplantation, virtually wholesale, of an entirely new system of law and legal education. The U.P. used the case-method devised at the Harvard Law School, and adopted the common law reliance on decided cases. It discarded the traditional lecture method, and pioneered in the country the Socratic method, based on a question-and-answer format. The law course also became a post-baccalaureate degree, following American practice, instead of a first university degree as practiced in many European jurisdictions. However, huge chunks of laws inherited from the former Spanish colonizer remained, governing mainly penal law and civil law, together with the civil law reliance on annotators. The principal body of law inherited from the Americans was constitutional law, which established, for the nation, the "rule of law" tradition, which has persisted through the changing seasons in the political life of our country.

Today, there are more than 100 law schools all over the country. It is difficult to say how far the case method has taken root, or conversely, how far the Spanish legacy of the civil law has been uprooted. On one hand, Supreme Court decisions are systematically reported, and case-law expressly declared to be a source of law. Legal reasoning, in judicial decisions, law practice and published articles, are rich in case citations. On the other hand, the most persistent civil law influence lies in the lawyer's mind-set, which which seeks a pervasive, internal rationality within a statute code, which favors the tight textual reading of statutes and deters the creative, sometimes flamboyant, interpretations of laws seen in American judicial decisions. Statute codes remain, e.g., the Civil Code, the Revised Penal Code, and more focused codification projects (e.g., the Family Code), and every major reformer purports to think up new encompassing codes. A generation of famous annotators continues to hold sway as authoritative publicists, though again they are slowly dying out.

The Stage of Normativization

We have begun with the premise that, in order to promote legal ethics, it is important to codify ethical standards. The formalization of ethical standards in the Philippine legal profession began when the Philippine Bar Association, a private, voluntary society of lawyers, in 1917 adopted Canons 1-32 of the American Bar Association (ABA) Canons of Professional Ethics, and in 1946, adopted further Canons 33-47. When the Philippine bar was formally integrated, the Integrated Bar of the Philippines adopted in 1980 a proposed Code of Professional Responsibility, which they submitted to the Supreme Court and which the Court promulgated in 1987. The Code consists of four parts: The Lawyer and Society; The Lawyer and the Legal Profession; The Lawyer and the Courts; The Lawyer and the Client.

Indeed its enforcement has constitutional foundations. The charter vests the Supreme Court with the exclusive power over "admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged."[1] The Court has actually promulgated the Rules of Court, which sets forth rules on Admission to the Bar (Rule 138) and Disbarment and Discipline of Attorneys (Rule 139.B).

Parallel to this, the Department of Justice issued Administrative Order No. 162 in 1946 (when the supervision of the lower courts was still lodged with the Department) containing canons of judicial ethics. In 1989, the Supreme Court promulgated a Code of Judicial Conduct.

The inherited wisdom among lawyers is that ethics must be transformed from open-ended moral duties into formal codes of law. At the outset, therefore, there is a clear preference for clarity and fixity in the rules, versus the open contestation of the philosophers on what is right and what is wrong. If we judge the advance of legal ethics in the Philippines by the test of codification, the existing codes and the enforcement mechanisms certainly meet global standards.

This overweening trust in words and rules ignores entire schools of thought – e.g., Legal Realism (Karl Llewellyn, Bramblebush) or Critical Legal Studies (Roberto Mangabeira Unger, The Critical Legal Studies Movement) – that have demonstrated the malleability of meaning and the elasticity of language, captured in Holmes' admonition: "Certainty is an illusion and repose is not the destiny of man." The Filipino legal imagination is, in the language of jurisprudence (or "Legal Theory"), excessively Formalist, and has remained oblivious to more sophisticated intellectual developments abroad. In fact, the U.S. Supreme Court, reversing a Philippine Supreme Court decision (when the Philippines was still a U.S. colony), had occasion to comment on the Philippine court's mechanistic reasoning, saying that the separation of powers cannot be seen as setting "fields of black and white", dividing it into "watertight compartments" with "mathematical precision."[2]

The Teaching of Norms

Both the Report of the Study Group on the Bar Examinations (chaired by Justice Amerufina Melencio-Herrera, created in 2003) and the Reform Proposals submitted by Justice Vicente V. Mendoza acknowledge the place of the bar examinations in shaping legal education in the Philippines. The subject of Legal Ethics is included as one of the eight subjects in the Philippine bar examinations. This is doubly significant. One, as a practical matter, it means that law schools will teach, and students will study, the codes of professional conduct.[3] Two, as an institutional matter, it shows that the Supreme Court no less, pursuant to its power over admission into the bar, has placed the full weight of its authority behind the strengthening of ethical standards.

1 *CONST. art. VIII §5.5.*

2 *Justice Holmes, dissenting opinion in Springer v. Philippine Islands, 277 U.S. 189, 209; 72 L. Ed. 845, 852 (1928).*

3 *IRENE R. CORTES, Towards Effective Teaching of Legal Ethics, ESSAYS 232-3 (1994).*

At the same time, Justice Irene Cortes says that what this means is the teaching of the "substantive and procedural content" of legal ethics as a subject in the law curriculum and the bar examinations, and concedes that, indeed, that is all that can be taught in the law school classroom.[4] Further in this direction, the campaign to strengthen legal ethics has taken the form of increasing the number of hours of instruction at various levels. For law students, the reforms in the bar examinations have proposed increasing the weight given to Legal Ethics. For lawyers, the Mandatory Continuing Legal Education requires almost a third of the lecture hours in Legal Ethics. For judges, there is likewise an increase in the instruction in Legal Ethics.

The "Concentrated Approach" versus the "Pervasive Approach"

Justice Cortes uses the term "concentrated approach" to describe the teaching of legal ethics in one self-contained course exclusively on this subject.[5] She contrasts it to the "pervasive approach" in which professors in all law school courses incorporate ethical perspectives in their subject: in commercial law, the duty of disclosures before the SEC; in agency and partnership, the relationship of trust amongst the parties; or in evidence, the principles protecting relationships covered by testimonial privilege.

She says that the concentrated approach is of varied effectiveness. The overeager will jumpstart the teaching of Legal Ethics in the early years, before the students know enough about law to agonize over law's dilemmas. Yet when the pervasive approach has been tried in many other areas of law, the result is that the particular interest – in this case legal ethics – becomes all-present but oft-ignored. In other words, in the mass of laws and cases packed into one semester, the ethical perspective is the first one that goes out the window. Worse, given the pressures from the bar examinations toward blackletter rules, ethical perspectives will be seen as poor "second-class" cousins to hornbook doctrine. I will go back to this very important issue of lawyers' and law students' attitude to Legal Ethics.

Use of Decided Cases in Legal Ethics

The next problem is pedagogy. The case-method, as developed by Dean Christopher Columbus Langdell of the Harvard Law School, aimed to make law a scientific discipline by using actual cases as the "laboratory" from which we can generalize the actual rules by which we live, or in Holmes' felicitous phrase, the "oracles of the law." For teaching Legal Ethics, this in fact should be a step forward. After all, how can you teach the "do's and don'ts" of lawyers unless these rules come to life in the context of actual ethical dilemmas brought before the courts?

On the other hand, for law schools, by the time the law professor takes up the case with his students, the ethical dilemma is already resolved – indeed, rather authoritatively

4 *Irene R. Cortes, ESSAYS ON LEGAL EDUCATION 229, 235-6 (1994).*

5 *Ibid., p. 235*

– by the Supreme Court. While this may not be a problem elsewhere where teachers and students are not deferential to Supreme Court decisions, in the Philippines, it poses a real challenge. The effect on the law school classroom is that the Supreme Court decision forecloses any real ethical debate. The game is not to understand how the Court resolved the moral dilemma. Rather it is to remember what the Court said, in case the question is asked in the bar examinations.

Contrast this to business schools, and how they use "case-studies." These are open-ended problem-based cases. Just like in law's case method, they examine detailed facts and problems, not abstract propositions. However, unlike law school, there is no single, right answer to the problem, and much more – an answer given by a Supreme Court which is "infallible because it is final." Thus business schools foster ethical debate, law schools deter them.

Finally, the business school approach frankly acknowledges the "gray areas" in ethics, where rules yield no black-and-white solution. Again, contrast that to the tendency of law schools to seek the single, right answer in a Supreme Court decision, completely oblivious to the "penumbra shading from white to gray" that emanates from blackletter rules. I ask you: If your goal is to produce morally-attuned lawyers, which way is better? Who is the more ethical lawyer: the one who memorized all the "do's and don'ts" and remembered what the Supreme Court said? Or the one who candidly recognizes the bona fide dilemmas, the gray areas, and genuinely agonizes?

(A practical note. The law school's case method is cheaper. The cases are published "full grown" in the Supreme Court Reports Annotated. The business school's approach is expensive. The "case studies" are written – much like short stories – and reviewed and edited by panels of experts, all of whom are commissioned for the task.)

In answering, please note that when Holmes said that decided cases are important because "law is nothing but a prediction of what the courts in fact will do, and nothing more" – he also said that law must work by imagining the "bad man" who doesn't care a whit about good or evil and will decide solely on a rational basis, to avoid pain and seek profit.

"Do's and Don'ts" Degenerate into Sermonizing

I have thus far tried to cast a doubt on the wisdom of current campaign to strengthen Legal Ethics by producing more codes and requiring more classroom hours. We must, I insist, look at what we do inside the classroom and ask whether it actually produces more ethically attuned attorneys.

Justice Irene Cortes lamented that the Legal Ethics course can merely teach the substance of the rules on professional conduct, but cannot guarantee that these ethical standards are absorbed by the students. Indeed, students enter law school

in their 20s, when their moral compass is already set by family, community and friends, and two hours a week over sixteen weeks learning Legal Ethics can do little to change them.

This has actually been widely acknowledged but there is what I consider a characteristically Filipino twist. If merely teaching the rules is not enough, then – some teachers say – we should do more: we must moralize. We must preach goodness and rectitude to the students, hector them to join the forces of light, and demonize the forces of darkness. Does this work?

First of all, if we build on the Cortes assumption that their moral formation is just about complete by the time students get to law school, this will not redeem their sinful souls. At best, it will make them feel guilty while they keep on doing what they used to do. Indeed, it seems part of the medieval Roman Catholic mindset that feeling guilty is actually a good thing, that it somehow assuages the sin if you say that you really didn't have fun doing it.

Second, the "sermonizing" may actually deter moral behavior. In idealizing the forces of light versus blackening the forces of evil, it actually posits an unrealistic model of rectitude that may be impossible to sustain in the real world. In other words, if Holmes' rule-bound lawyer assumes the "bad man", the moralizer builds legal ethics around saints. Contrast that to the "case-study" approach in business schools, which asks not just "what ought to be" but also "what can be done."

The Power of Example

George Malcolm no less recognized these limits and embarked on a most interesting experiment in pedagogy, one that his successor Irene Cortes would speak of three decades later.

Malcolm began his 1949 book Legal and Judicial Ethics by lamenting the "iniquities of the legal profession", and the emergence of the lawyer as the "pettifogger, the shyster, the runner, the touter, the rustler, the leguleyo, the picapleito, all the ilk who live by sharp practices."

To teach his students "that honorable dealing between lawyers is to be expected", he said:

> *The roll will not be called. The student will keep a record of his own attendance. At the last meeting of the class, he will make a written report of the number of his absences. When the examination is held, the lecturer will not be present, but the participants will be placed on their honor neither to give nor to receive assistance.*

(He does not say how the experiment worked.) Moreover, to teach that law is "a profession not a business" dedicated to the "ideal of ... service and not of monetary

or political gain", he donated his lecturers' fees to a Prize for the biography of the late Chief Justice Jose Abad Santos ... "to encourage legal scholarship."

Irene Cortes would speak of this as the law professor's "gatekeeper" function in the legal sub-culture. She quoted an N.Y.U. law professor:[6]

> *"Law teachers should start and finish classes on time. We should respect the time of students, as we expect them to respect ours, by keeping appointments or letting students know in advance if we cannot be available. Grading of papers should take precedence over all but the most urgent of personal or professional considerations."*

A Plea for a Sociological Approach

Thus far, we are trapped between the proverbial rock and a hard place. On one hand, we teach the hard rules of legal ethics, because that is what will be asked in the bar examinations and that is what local lawyers consider the true legal ethics (in contrast to lofty moral debates). On the other, we acknowledge that teaching just the rules is not enough, and what will push the students toward ethical behavior is a moral urge – which no sooner degenerates into guilt-tripping moralizing.

What I propose is to make students understand the "why" of legal ethics, not the "what" (as in "what are the rules?") or the "how" (as in "how do I go around the rules?"). The why will entail the following:

First, it will entail the sensitization of students to ethical dilemmas. In other words, Legal Ethics remains in the realm of the intellectual – does not cross over into the realm of guilty-inducement – but aims to ensure that the student or lawyer is intellectually aware that his decision or action has a moral dimension. You will recall the sage advice: "The unexamined life is not worth living." Here, we compel the law student or lawyer to examine his day-to-day choices as ethical choices, whether it is a seemingly innocent postponement, or deferment of cross-examination to the next hearing, or less innocent, like finding padrinos with the court.

For this, the case study is the best mechanism, not decided cases, and the seminar or workshop type discussion is more fruitful, rather than the hard Socratic.

Second, any serious campaign for Legal Ethics in the Philippines must look at its sociological milieu. Already, in the United States and Japan, sociological studies abound to examine the decline in values. For instance, Yale Law Dean Anthony Kronman, in The Lost Lawyer, examined how the rise of the big firms weakened the

6 *GEORGE A. MALCOLM, LEGAL AND JUDICIAL ETHICS, 11-12 (1949).*

attorney-client relationship, the organic bond that is the cornerstone of all legal ethics. He noted that all the rules of Legal Ethics were drawn in the classical age when attorneys came face-to-face with their clients in sustained relationships of trust, and contrasted that to the business-like transactions where the "rainmaker" who wins the trust of the client is different from the "workhorse" who must deliver the job.

In the Philippine context, this means looking at the moral universe of the Filipino. When we speak of conflicts of interest, how do we reconcile the legal definitions with the true allegiances of Filipinos in real life, where all relationships are translated into kin-like obligations? When we speak of cleansing the profession, should we not upgrade the salaries and offices of our judges, and ensure that they maintain their stature vis-à-vis the lawyers who appear before them? When we speak of "justice", should we not confront the cultural tendency toward awa (mercy) and kapwa tao (good neighborliness)?

Legal Ethics in Asean Legal Education Systems, A Singapore Perspective

By Patrick Nathan

(A) Introduction

The question whether legal ethics should be a component of legal education in law schools has been a matter of much debate. Some legal scholars are of the view that legal ethics should be part of the law curriculum at the University. In Singapore, legal ethics is not part of the law curriculum at the Law Faculty of the National University of Singapore (NUS) as a discrete subject. This does not mean that ethical issues are not taught at undergraduate level. The teaching method employed at NUS is such that ethical issues are taught and examined interstitially across several subjects throughout the four (4) year degree course. This method can be very effective, if taught properly. Legal ethics however is a core component of the Postgraduate Practical Law Course (PLC) conducted by the Board of Legal Education (Board). The Board is entrusted by legislation with the task of providing training, education and examination of all "qualified persons"[1] intending to practise the profession in Singapore.[2] All qualified persons are required to attend and satisfactorily complete the PLC (by passing the necessary examinations) before they can be admitted to practise as advocates and solicitors[3] (lawyers) of the Supreme Court. It is intended in this short paper to examine legal ethics in the Singapore legal education system under the following headings:

(i) Brief Background of Legal Education System.
(ii) Canons of Legal Ethics.
(iii) Teaching of Legal Ethics at the PLC

(a) Teaching Methods
(b) The Legal Profession Act (LPA)[4] and The Professional Conduct Rules (Conduct Rules)[5].
(c) Problems/Recommendations.

(iv) Legal Ethics in the Continuing Legal Education of Lawyers:

(a) Courses conducted by Law Society of Singapore.
(b) Courses/Lectures organized by the Law Academy.

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1 *Only "qualified persons" are eligible for admission to the Bar. The definition of qualified person includes law graduates from NUS and barristers and solicitors from the United Kingdom.*

2 *See section 4 of the Legal Profession Act (Cap. 161).*

3 *In Singapore, we have a fused profession.*

4 *The LPA was passed in 1967 to inter alia establish the Board of Legal Education and consolidate the law relating to the legal profession.*

5 *See Government Gazette No. S 156 of 1998.*

(B) Brief Background of Legal Education System

The Singapore law school, then called the Law Department of the University of Malaya (in Singapore) was set up in 1956. Until then, students wishing to become qualified lawyers had to pursue their law studies in the United Kingdom. The first batch of law students were admitted to the Law Department in September 1957. The first Professor of Law and Head of the Law Department was L.A. Sheridan. He was 29 years of age and was already a distinguished scholar. He became the Dean when the Law Department became a Faculty of Law in 1958. He had the unenviable task of setting up a law library, recruiting staff, devising an internationally acceptable syllabus, introducing teaching methods to inexperienced teachers and developing legal research. What Professor Sheridan achieved in a short span of some seven years was remarkable. The Law Faculty produced its first batch of twenty two (22) graduates in 1961. The first local law graduate was admitted to the Singapore Bar on 26th January 1962 [6]. The first local law graduate was admitted to the Malayan (now Malaysian Bar) on 31st January 1962 [7]. From then on, the ascendancy of local law graduates over overseas law graduates was only a matter of time. As of the 31st March 2005 there were a total of 3439 practising lawyers on the Roll of Advocates and Solicitors of whom 2094 are graduates of the Law Faculty of the University of Malaya (in Singapore) or NUS.

(C) Canons of Legal Ethics

The legal profession in Singapore is governed by the LPA and a plethora of Rules passed under the LPA including the Conduct Rules. The Conduct Rules cover a wide range of topics and can be said to constitute our canons of legal ethics. The ninety (90) or so Conduct Rules deal with topics like Relationship and Dealings with Clients, Conduct of Proceedings in Court, Defending Accused Persons and Conduct of Criminal Prosecutions. Added to the above is a body of case law that had been developed by our Courts over the years particularly after the LPA became law in 1967.

Both the NUS and the Board are fully aware that from the very inception of legal training all lawyers who practise at the Bar should be imbued with high standards of professional and ethical conduct. In fact this is the "ethical challenge" referred to in the English Lord Chancellor's First Report on Legal Education and Training published in 1996. What has been set out in that Report is of application to all if not most common law jurisdictions. The relevant parts of paragraphs 1.19 and 1.20 of the Report state as follows:

> *"1.19 As the organizations in which law is practised become larger and more complex, as competition and instability in the market for legal services increases, and as many legal practitioners experience a growing sense of insecurity, there are real dangers that professional standards will be threatened unless counter-balancing steps are taken to reinforce ethical values. .... However,*

6 Mr T P B Menon was the 3rd President of ALA and Deputy Chairman of the Board for many years.

7 Mr Chan Sek Keong is currently the Attorney General of Singapore and Chairman of the Board.

no amount of external regulation of professional practice will serve as an adequate substitute for the personal and professional values and standards that lawyers should internalise from the earliest stages of their education and training. Teaching in ethical values should include more than a familiarization with professional codes of conduct and the machinery for enforcing them. Nor is it clear that the present approach, whereby professional ethics are taught pervasively across a wide range of legal subjects and topics, is sufficient to meet the complex ethical issues that lawyers are likely to face in modern practice. Professional ethics and conduct should certainly form a central part in the extended education that we hope intending solicitors and barristers will receive in future. Students must be made aware of the values that legal solutions carry, and of the ethical and humanitarian dimensions of law as an instrument which affects the qualify of life. ....

1.20 The ethical challenge goes beyond the obligations that solicitors and barristers owe to their particular clients. The legal profession also carries wider social and political obligations to society as a whole. If the profession is to fulfill its role in protecting the rights of minorities within society and promoting the welfare of the disadvantaged, it is vital that its own composition reflects the social and cultural diversity of today's society." [Emphasis added]

The sentiments expressed in the Lord Chancellor's First Report are echoed in Rule 2(2) of the Conduct Rules in these terms:

"2(2) In the interpretation of these Rules, regard shall be had to the principle that an advocate and solicitor shall not in the conduct of his practice do any act which would compromise or hinder the following obligations:

(a) to maintain the Rule of Law and assist in the administration of justice;
(b) to maintain the independence and integrity of the profession;
(c) to act in the best interests of his client and to charge fairly for work done; and
(d) to facilitate access to justice by members of the public."

Our Courts have given life and meaning to Rule 2(2) of the Conduct Rules. Two recent examples would suffice. In *Lie Hendri Rusli*[8] the plaintiff sued a legal firm for negligence. The question before the Court was whether the legal firm owed a duty to disclose to the plaintiff that the legal firm was acting for other parties in a conveyancing transaction and consequently there was a conflict of interest. Judicial Commissioner V K Rajah (as he then was) encapsulated the spirit of Rule 2(2) of the Conduct Rules in these words:

8 *Lie Hendri Rusli v. Wong Tan & Molly Lim [2004] 4 SLR 594.*

"The Court is ever anxious to maintain and police the standards of the legal profession, which performs a vital role in a society that is predicated, and places premium, on the rule of law. In the discharge of its duty to uphold the legal system, the legal profession must seek not only to jealously maintain high standards but to unfailingly remain alert and acutely conscious of the fact that the public perception and the standing of the profession is indivisibly determined by the standards it embraces and observes. Rule 2 of the Legal Profession (Professional Conduct) Rules 1998 explicitly prescribes that solicitors have the following obligations: ...."

A more startling case was where the solicitors acting for certain claimants to the estate of a testator named Shaik Ahmad Basharahil [9] misled the Court into releasing funds which had been paid into Court by the Public Trustee in the course of the administration of the estate. Justice V K Rajah again after making reference to certain provisions of the Conduct Rules touched upon a lawyer's duty to the client and the Court in the following words:

"A solicitor's duty to act in his client's interest must therefore take into account prevailing standards of conduct prescribed by the LPPCR [10], ethical rules and practices prescribed by the Law Society as well as general professional and ethical conventions and practices established through the effluxion of time. If a client insists on a course of action which is inimical to the prevailing professional standards prescribed for or expected of a solicitor, that solicitor has no option but to discharge himself from the matter: rule 58 of the LPPCR. All solicitors qua officers of Court have an absolute and overriding duty first and foremost to the Court to serve public interest by ensuring that there is proper and efficient administration of justice. They should never mislead the Court either actively or passively. Nor should they consciously furnish to the Court erroneous or incomplete information or for that matter incorrect advice that may subvert the true facts. This is a sacred duty which every Court is entitled to expect every solicitor appearing before it to unfailingly discharge. So overwhelming is the public interest in maintaining the dignity and honour of the legal profession through the preservation of the highest ethical and moral standards amongst solicitors that the Courts cannot risk allowing it to be compromised by even a few recalcitrant individuals within the profession. If and when any such breaches come to light, they must be dealt with swiftly and severely." [Emphasis added]

(D) Teaching of Legal Ethics at the PLC

The Board has produced a Manual on Professional Responsibility which includes several chapters on various aspect of legal ethics and the Conduct Rules. Legal ethics

9 *See Public Trustee v. By Product Traders Pte Ltd., [2005] 3 SLR 449.*

10 *The abbreviation LPPCR is a reference to the Conduct Rules.*

is taught at the PLC by way of lectures, tutorials and seminars conducted by senior members of the Bar. In addition all students are required to

(a) discuss problems which have been prepared based on decided cases or hypothetical fact situations, and
(b) undertake a case study based on a "mock" file prepared by the Board.

The object of the PLC is to familiarize those intending to practise law with the provisions of the LPA, the Conduct Rules and the decided cases on professional conduct and ethics. The PLC is compulsory for those intending to practise at the Bar. The PLC Handbook contains a paragraph on seeking advice from senior members of the Bar and Judges which bears repeating:

> *"During the course, students will come into contact with many members of the profession who will willingly place their time, knowledge and experience at the disposal of younger members of the Bar. Students should make the best use of the opportunity to learn from them by seeking their advice and discussing problems with them. They should, however, remember that they will obtain assistance most easily from other lawyers and from the members of the judiciary by learning from the outset to approach them with due respect, tact and courtesy at all stages."*

It is brought home to all students at the PLC that the Conduct Rules and the provisions of the LPA relating to disciplinary proceedings are not only meant for punishment of errant lawyers but as a deterrence against similar defaults by other like minded lawyers and the protection of public confidence in the administration of justice. The learned Chief Justice Yong Pung How summarized the law in *Samuel*[11] in the following words:

> *"…. It is not simply a question of punishing the solicitor concerned. A further consideration must be what course should the Court take to protect the public and to register its disapproval of the conduct of the solicitor. In the relevant sense, the protection of the public is not confined to the protection of the public against further default by the solicitor in question. It extends also to the protection of the public against similar defaults by other solicitors through the Court publicly marking the seriousness of what the instant solicitor has done. … In short, the orders made should not only have a punitive but also a deterrent effect.*
>
> *There are also the interests of the honourable profession to which the solicitor belongs, and those of the Courts themselves, to consider. The administration of justice can only proceed on the basis that solicitors can place reliance upon the honesty of the solicitors with whom they deal. The public too must be able to*

11 *See R Samuel v Law Society of Singapore [1999] 1 SLR 696.*

repose confidence in a profession which plays so indispensable a part in the administration of justice. Similarly, the Courts of this country must be able to depend on the honesty and integrity of all practitioners appearing before them and to expect that they will maintain the highest standards of personal honesty and integrity in their dealings with the Courts."

(E) Recommendations

The writer would like to make the following recommendations:

First NUS (working together with the Board and the Law Society) should consider whether Professional Ethics should be introduced as a compulsory subject at the law school in the second or third year of the LLB (Hons) curriculum. The main reason for this is that the concerns expressed in the English Lord Chancellor's First Report appear more real than illusory and that if we fail to act promptly we may well find in some years to come that we are not in tune with developments in law schools in other common law jurisdictions. As the PLC extends for only a period of five months there is a limit as to what can be achieved at the PLC - however well organized it may be. This is because qualities like honesty, integrity, civility and courtesy cannot be taught by reference to the cold print of the Manual or by lectures and tutorials conducted by well intentioned senior lawyers. Much will depend on the individual, his background (the environment in which he was brought up) and perhaps to some extent his years at law school at NUS and the period of pupilage with his pupil master.

Secondly the Law Society (which is doing laudable work in organizing lectures and seminars) should conduct regular workshops on selected topics in professional ethics (or on current topics including case law relating to professional ethics) for the benefit of the legal profession. The Judges of the Supreme Court and senior members of the Bar should be invited to participate in this project.

Thirdly lawyers must be made to realize that success at the Bar does not depend on one's success in any individual case or run of cases or the wealth one acquires from law practice but *inter alia* on qualities like honesty, courtesy, chivalry and unshakeable integrity. Lord Hailsham summarized these qualities thus :[12]

"....Success at the bar depends in the end upon the respect in which one is held by one's fellow-practitioners ....and perhaps particularly, the Bench, and not upon one's success in any individual case or run of cases. If you once deceive the Court ....they will ever forget it .... The Bar is one of the most competitive professions in the world but, like many other activities in life, it is a field where generosity, courtesy chivalry and above all, unshakeable integrity pay material dividends."

12 *Passage from Lord Hailsham's Memoirs entitled "A Sparrow's Flight".*

In the same vein, Chief Justice Warren Burger of the United States Supreme Court once cautioned that "lawyers who know how to think but have not learned how to behave are a menace and a liability not an asset to the administration of justice"[13]. More recently Justice Sandra Day O'Conner of the United States Supreme Court cautioned that "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase effectiveness of our system of justice and improve the public's perception of lawyers"[14]. In short "civility is the lubricant which gives justice a chance to be done"[15].

(F) Legal Ethics in Continuing Legal Education

Section 38 of the LPA sets out the purposes of the Law Society which include the maintenance and improvement of "standards of conduct and learning" of the legal profession in Singapore. Section 4 of the Singapore Academy of Law Act [16] states that the functions of the Academy of Law include the promotion and maintenance of "high standards of conduct and learning" of the legal profession in Singapore and the standing of the profession in the region and elsewhere. Both the Law Society and the Academy of Law have done and are doing admirable work in organizing lectures and seminars in their respective continuing legal education programmes. However the emphasis in each case in the past had been the upgrading of skills in the various fields of substantive and procedural law. It is heartening to note that in July 2005, the Law Society launched its Inaugural Forum on Legal Ethics with senior lawyers participating in discussions on Ethics and Professional Courtesy in the different areas of practice. The writer understands that the Professional Affairs Committee of the Academy of Law is looking into ways of developing and maintaining high ethical standards amongst young lawyers. These are steps in the right direction.

(G) Conclusion

The writer is of the view that the quality of our legal education system is due to a large measure on the efficiency of our law school at NUS and the Board which together give to the young lawyer of today a training of "breadth and intensiveness" which was unknown to the young lawyer some decades ago. As expected the years have brought their change and the law school and the Board have evolved with the times. With liberalization the focus will be on new legal services and cross border transactions, it is of paramount importance to a country like Singapore that we stay attuned to such changes so that we will continue to play a vital role in the region. The writer is confident that the NUS working in tandem with the Board, Law Society and the Academy of Law will be able to inculcate in our young lawyers the high ethical standards that would be expected of them in the years to come.

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13 Warren Burger, The Necessity of Civility, 52 F.R.D. 211 (1971).

14 Sandra Day O'Conner; Professionalism, 76 Wash. ULQ 5 at 8 (1998).

15 Philip Jeyaratnam (Senior Counsel) current President of the Law Society of Singapore in an address to students attending the PLC in July 2005 - reproduced from Law Gazette, August 2005.

16 See Statutes of the Republic of Singapore (Cap. 294A).

Legal Ethics in Vietnamese Legal Education System

*By Le Thi Kim Thanh**

1. Brief background of legal education system in Vietnam

1.1 Undergraduate studies in Hanoi Law University

The Hanoi Law University ("HLU") is organised under the Ministry of Justice and is the principal institution for undergraduate legal training. The HLU offers a wide variety of courses and the total number of full-time students is approximately 5,000.

There are four faculties at the HLU: the Faculty of Civil and Criminal Law, the Faculty of Constitution and Administrative Law, the Faculty of Economic Law and the Faculty of International Law. These are further divided into specialised sections. There are also supporting training departments which serve all faculties, e.g. the Department for Foreign Languages and the Department for Physical Training.

The HLU has a staff of about 430 employees, of whom, 230 work as full-time teachers. About 190 of this number teach law, while 40 teach subjects such as foreign languages and physical training. A number of faculty members received some form of training in the Soviet Union, East Germany or other Eastern European countries. There are almost 20 Doctors of Law professors, who all received their degrees (mostly "Candidate of Science") in the Soviet Union or East Germany.

The HLU offers a graduate programme consisting of two different stages. The first and second year are common for all students and consist of basic scientific courses, e.g. politics, philosophy, political economy, history of state and law, and languages. The curriculum further includes short introductory courses in administrative, economic, criminal, and international law to give the student a chance to decide the direction of further studies. The students may also choose between studies in English, French or Russian as a foreign language. One foreign language is mandatory, but others have the option to study two or even three languages.

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The first two years are completed with an examination. The certificate entitles the students either to continue to the second stage of the programme, which virtually all students do, or apply to other colleges. The students at the second stage may choose among the four faculties. The Faculty of Economic Law and the Faculty of Civil and Criminal Law admit about 30 per cent each of the student body. The Faculty of Constitutional and Administrative Law and the Faculty of International Law admit about 20 per cent each. All four faculties teach the same subjects, but in different proportions. The second stage also ends with examinations, usually in three subjects, but the most successful students may choose to write an essay. More than 600 students graduate each year in Hanoi.

The HLU also has about 12,000 students who follow part-time programmes. Such programmes are offered in Hanoi and in almost all provincial capitals. Persons who already hold positions which require a law degree are given priority in the admission.

A "Judges Training Center" was established within the HLU in 1996 with the purpose of enhancing the skills and expertise of judges. It offers short to middle term courses in various legal matters, mainly for judges from the people's courts. In the future, the program intends to expand the range of participants to include other legal professionals such as court clerks, public notaries and prosecutors. The permanent staff of the Center is relatively small and the HLU hopes to invite visiting teachers to hold courses.

1.2 Law School of the National University in Ho Chi Minh City

The Law School of the National University in Ho Chi Minh City was established in March, 1996. The National University and its faculties are organised under the Ministry of Education and Training.

About 165 are teachers, of whom 65 are tenured and 100 are contractuals in status. Most of them received their training in the former Soviet Union, East Germany, or at the Hanoi Law University. Four teachers are Doctors of Law. The total number of teachers is considered too low and the School therefore often invites, e.g. teachers from the HLU, judges and lawyers working within the administration, to assist in the teaching.

About 4,000 students enroll in the full-time graduate programme and there are about 7,000 part-time students, most of them working in the government. Those who graduate find it relatively easy to be employed in the government as judges, prosecutors, or in the private sector.

The School also runs special and shorter part-time graduate programmes for government officials in the Southern provinces. These courses are more specialised and do not contain any of the general subjects such as history, literature and economics. The participants study full-time one month annually and the whole programme takes three and a half years to finish.

1.3 Faculty of Law at the Hanoi National University

The Faculty of Law at the Hanoi National University is administered by the Ministry of Education and Training. This results in a slightly different, perhaps more "theoretical", training than that offered by the HLU organised under the Ministry of Justice. Both institutions are nevertheless subject to the same national curriculum and their LL.B. exams are equal.

A little more than 100 students per year are admitted to the graduate programme. More than half of the students are female. The students must pay the tuition and living expenses themselves. Those who perform well which is approximately 25 per cent of the students, can be eligible for special scholarships from the State.

The Faculty has been able to offer a larger variety of courses than the HLU, among them comparative law and history of political theory, but the difference is diminishing as the HLU has gradually amended its curriculum. The Faculty's emphasis on theory moves in a direction such that the graduating students mainly work as researchers and lecturers. The Faculty has recently begun to offer LL.M. and J.D. programmes.

1.4 Postgraduate Studies and Research

The Institute of State and Law and the Department for State and Law at the National Political Academy were until recently, the only domestic institutions that could supervise and examine master and doctoral candidates in law. Some of those who studied in Eastern European countries could also take a doctoral degree. Another opportunity for higher studies was opened in September 1993 when the Hanoi Law University was licensed by the Ministry of Education and Training to give LL.M and J.D. degrees. The Faculty of Law at the National University of Hanoi has also recently been allowed to offer a 3-year LL.M. programme. Both LL.M and J.D. students take 15 credit courses, but LL.M. students write an essay and J.D. candidates write a dissertation. Those who apply to enter the LL.M or J.D. programme must have a full-time LL.B. degree and pass an entry exam. The tuition for J.D. students is VND three million per year and for LL.M. students VND two million per year. Students who performed well in academic are required to exams may be granted a scholarship by the Ministry of Education and Training.

The Institute of State and Law, an institution especially designed for postgraduate studies and research, also offers a three-year LL.M. programme for about 150 students and a four to five year J.D. programme for about 40 students. About 25 per cent of the currently enrolled students are females. Many of the participants are former civil servants. Both programmes use the same curricula, but the time for writing the final thesis is longer for those who attend the J.D. programme. The first mandatory part consists of courses in philosophy, informatics, scientific method, etc. The second part allows one to specialise in subjects, e.g. administrative law, economic law or criminal law. The time needed to complete both parts varies from two to three years. The masteral students have six months to complete their theses, while the doctoral

students have two years to finish their dissertation. The first group of doctoral students graduated in 1996. The dissertations are usually published while the masteral essays are made public, at least in summarised forms.

The universities may also define and carry out various research projects on their own initiative and independent of the curriculum for postgraduate training. For example, the Faculty of Law previously focused mainly on State and Socialist Law, but now emphasises research on market-related subjects such as State Sovereignty, human rights, legal and administrative reforms and comparative law. Most of its projects are said to be based on domestic and foreign publications, legal texts and precedents. A dialogue is also held with domestic and foreign colleagues. However, all research efforts are constrained by scarce resources. There is a lack of both domestic and foreign literatures, and none of the research libraries is an inspiring sight.

The Institute of State and Law organised under the National Center of Humanities and Social Sciences, is perhaps the most important research institution in the legal area. It has 44 full-time professional researchers, some administrative staff and another 30 part-time cooperating researchers from other institutions. Most of the researchers have been trained abroad, particularly drafting of laws or other technical efforts. Six to seven books on law related topics are produced annually. The leading law journal of the country, State and Law is also published by the Institute.

The Institute maintains extensive contacts with other research institutions in countries like Russia, Germany, U.S.A., France, Japan and several ASEAN countries. A Department for Comparative Law was recently established within the Institute.

Ministries and other State agencies also carry out researches. The Department of International Law and Treaties and the Institute of International Relations, both organised under the Ministry of Foreign Affairs, carry out researches on international law. The National Political Academy, which trains Party cadres and teaches law and political science, also has a faculty of law. the Hanoi University of Foreign Trade has a law section which is engaged in training and research in foreign trade and investment law.

2. Legal ethics in the Law School curriculum

2.1 Methods of teaching

As mentioned above, at present Vietnam has three main Law schools: Hanoi law University, Ho Chi Minh Law University and Law faculty of the National University based in Hanoi. Until now, none of these three legal institutions have legal ethics as a subject in their curriculum. They merely teach basic laws. The only institute having this subject in their curriculum is the Judicial Academy. The Judicial Academy is a special training school for people who already have bachelor of laws degree and want to become lawyers, judges or notary public officers. In Vietnam, all individuals having

bachelor of laws degrees and would like to become lawyers, judges, and other legal careers, have to pass a six-month course in this Academy. But even in this Academy, legal ethics subject is not adequately given focus. During the whole period of six-month training in this Academy, participants only have half a day to study legal ethics. The method of teaching is still being done the traditional way, wherein teachers introduce the main concepts of the Canons of Legal Ethics and participants only listen. There is no active participation from the students and no case study is given due to time limitation. In this course participants mainly learn professional skills such as legal counseling, representation, communication with clients, and investigation of a case.

2.2 Problems/recommendation

From the cited situation, it can be said that legal ethics education in Vietnam still needs to be improved in the future. It is apparent that half a day teaching of legal ethics in the Judicial Academy is not sufficient. It is therefore recommended in the future that all law Universities should have legal ethics as a subject in their teaching curriculum. The subject should be more focused on the theory. As a result, the Judicial Academy law graduates will be refreshed with this subject and at the same time be equipped further with more practical issues such as case studies. The total duration for teaching this subject should at least be three or four days.

2.3 Inclusion of legal ethics in the continuing legal education of lawyers

In some countries it is compulsory that lawyers should have some hours of continuing legal education, including some hours of legal ethics. In Vietnam lawyers are not bound to have continuing legal education. Therefore, it is up to the lawyers to decide if they want to have this training or not. Despite this provision, lawyers do still often update themselves with newly promulgated legal documents by way of reading documents by themselves or attending a training course organized by the Ministry of Justice. But this course often only covers the contents of the newly promulgated laws, not the contents of the legal ethics.

For information, the Canons of legal ethics of Vietnam is attached herewith as Annex "1."

Annex "1"

MINISTRY OF JUSTICE Socialist Republic of Vietnam
Independence – Freedom - Happiness
Sample canons of legal ethics

(Issued according to Decision number 356b/2002/QD-BT dated 5 August 2002 of the Minister of Justice)

Preamble

The highest function of lawyers is to protect justice, ensure social justice, protect citizens' rights to freedom and democracy and other legitimate rights and interests of individuals and organizations, protect socialist legacy by ways of providing legal representation, legal advice and other legal services.

To fulfill the above mentioned functions, lawyers should not only be a mirror in respecting and obeying the law, but should also follow the legal ethics during their process of professional practice and social communication.

The canons of legal ethics provide for ethical standards and professional behaviors of lawyers in their practice of law and life style. These canons are instruments to measure ethical quality of lawyers. Each lawyer must take these ethics as a standard to train themselves, to keep professional prestige and reputation and to deserve the respect and credibility of the society.

Chapter I - General requirements of legal ethics

Canon 1. Preserving dignity and professional prestige

Lawyers should always preserve dignity and professional prestige; continuously improve morality and professional qualification in order to fulfill their professional functions and respect for the lawyers' career.

Canon 2. Independence, honesties and objectivity

Lawyers should be independent, honest and objective in professional practice; they should not distort the truth or violate the law for any material or spiritual benefits or under any pressure.

Canon 3. Behavior standards in practice and life style

Lawyers should behave themselves reasonably and literately in practice and life style in order to preserve credibility and respect of the society towards themselves and their career.

Canon 4. Legal aid obligation.

1. A lofty obligation of lawyers is to take part provision of legal aid to the poor and people enjoying preferential policy of the Government.
2. Lawyers should undertake legal aid cases as actively and enthusiastically as other fee paying cases.

Chapter II – Relationship with clients

Canon 5. Receiving and dealing with a case

1. Lawyers should respect for the clients' right to choose lawyers; they should only undertake cases within their capability and handle the cases according to the scope of requirements of clients.
2. When receiving a case, lawyers should inform clients of the rights, duties and professional responsibilities of lawyers when providing legal services to clients.
3. Lawyers are responsible for protecting their clients in the best way within the framework of the law and professional ethics.
4. Lawyers should not transfer a case they have undertaken to other lawyers unless they obtain an agreement of the clients or under the major force.
5. Lawyers should actively and quickly handle cases of clients and inform them of the progress of the work so they can have a timely decision.
6. When providing services to clients, lawyers should not only follow material benefit or consider it as the unique purpose of their practice.
7. Lawyers should not refuse to handle cases that they have undertaken, except where there is a conflict of interest or under force major as stated in Canon 6.

Canon 6. Lawyers' conduct in case of conflict of interest between clients.

1. Lawyers should not undertake to provide services to two or more clients in the same case if their interests are in conflict.
2. Lawyers should not undertake to provide services to a client if their relatives already undertake to help another client in the same case with opposite interest, unless the client agrees.

Canon 7. Refusing to provide services

Lawyers may refuse to provide services if the request of the client is unjustified or illegal or against the social morality.

Canon 8. Unilateral termination of services

1. Lawyers may unilaterally stop providing legal services to a client that he has already undertaken if there is sufficient ground to believe that the client intentionally uses the services of the lawyer to conduct unlawful acts or to seriously violate social ethics.
2. When terminating the services, lawyers should inform clients within reasonable time, so that he/she can hire another lawyer. At the same time, they should promptly resolve all issues relating to the termination of the services.

Canon 9. Confidentiality

1. Lawyers should not release details on clients and their cases unless clients allow to do so.
2. Lawyers also have to make sure their staff do not release information on clients and their cases.

Canon 10. Things lawyers are not allowed to do

Lawyers are not allowed to:

1. take part in business activities that may affect lawyers' prestige and reputation.
2. conduct business activities together with clients or use clients' money and assets during the process of legal practice;
3. help clients draft a contract on property offering if lawyers themselves or their relatives are the subject of the offering.
4. receive money or any material benefits from others in order to handle or not handle their cases, if this may damage the benefit of the clients who they already undertake to assist.
5. use information of clients' cases for personal benefits.
6. hire somebody as a broker for their work.
7. promise the result of cases in order to attract clients or increase fee.
8. ask clients or people with related rights and interests for additional fee or gifts apart from those that have been agreed with clients..
9. When providing legal aid at the request of a legal aid organization, lawyers are not allowed to receive any money or material benefits from legal aid clients.

Chapter III – Relationship with legal proceeding agencies and other state agencies

Canon 11. Lawyers' behavior in relationship with legal proceeding agencies and other state agencies.

Lawyers should strictly observe regulations and rules relating to relationship with legal proceeding agencies and other state agencies; show a polite and respectful attitude towards legal proceeding officers and other civil servants when contacting with them for professional purpose.

Canon 12. Things not allowed to do in relationship with legal proceeding agencies and other state agencies

1. Lawyers should not indirectly or directly get in touch with legal proceeding officers, legal proceeding participants or other civil servants in order to embroil them in illegal acts when handling cases.
2. Lawyers should not provide information and evidence that they suspect to be wrong
3. Lawyers should not do or help their clients do illegal acts in order to delay or extend the process of handling of cases.
4. Lawyers should not express their opinion on mass media or in public places in order to create bad effects on the activities of legal proceeding agencies and other state agencies.

Chapter IV – Relationship with colleagues

Canon 13. To respect and cooperate with colleagues

1. Lawyers should show friendly and respectful attitude to their colleagues. Any comments or criticism of colleagues should be made objectively, at the right time, in the right place and in the spirit of mutual assistance.

2. Lawyers should have a sense of cooperation and assistance during their process of professional practice and life style.

Canon 14. Things not allowed to do in relationship with colleagues

1. Lawyers should not offend or lower their colleagues' prestige.

2. Lawyers should not impose pressure, threatening or use any other tricks towards their colleagues to gain advantage in the process of practice.

3. Lawyers of two different clients with two opposite interests should not collude with each other in order to seek illegal personal benefits.

WTO, Regional and Bilateral Trade Liberalization: Its Implication for Indonesia

By Agus Brotosusilo

I. INTRODUCTION

Foreign economic policy is now and has long been a strategic instrument used by great powers in their dealings with one another.[1] The practice of international trade among nations are no more than uses of foreign economic policy to realize goals other than solely those of maximizing the economic welfare of nations or interest groups. Rather, foreign economic policy is a tool by which governments can (and often do) pursue non-economic ends.[2]

The purpose of this paper is to assess the implication of Indonesia's foreign economic policy, as reflected in the membership of the country in the multilateral as well as regional trading arrangement, and the involvement of the country as a third party in the USA-Singapore FTA bilateral trade relationship. This paper is structured as follows: Part I provides information necessary to understand the legal and institutional framework for multilateral trade liberalization in Indonesia. Part II examines the implementation of the rights and the duties as consequences of the country membership in the WTO. Part III takes into account of the brief history as a background of the establishment of the ASEAN Free Trade/AFTA. Part IV describes the legal and institutional framework for regional trade liberalization in Indonesia. Finally, Part V delves deeper into the implication of two existing free trade frameworks in the vicinity area – regional and bilateral free trade agreements – to Indonesia.

I argue that the frozen Doha Round has been displayed in a temporary shift away from multilateral trading system, and lead the way into the increasing regional or bilateral trade relationships. However, regional or bilateral trade liberalization will only result in positive implication if its outcome is trade creation, not trade diversion. The just trade cooperation among countries should not be established based on charity, in an asymmetric relationship. Its basis should be founded on equality among its parties. The economic attainment of AFTA members should not be sacrificed by the political considerations in the establishment of ASEAN.

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1 *See LARS S. SKALNES, POLITICS, MARKETS, AND GRAND STRATEGY: FOREIGN ECONOMIC POLICIES AS STRATEGIC INSTRUMENTS 1 (2000).*

2 *Id., at p. 10.*

II. LEGAL AND INSTITUTIONAL FRAMEWORK FOR MULTILATERAL TRADE LIBERALIZATION IN INDONESIA

Indonesia ratified The Agreement Establishing the World Trade Organization (WTO) on November 2, 1994 by the Law No. 7/1994. The country has in principle adopted a quite liberal foreign trade regime and taken a number of important steps to reduce protection. To date, there is no import tariff exceeding Indonesia bound rates as stated on Indonesia Schedule of Commitment under WTO Agreements.[3] As of January 2002, 67.4 percent of Indonesia's tariff lines were assessed import duties ranging between zero and five percent. Indonesia's average un-weighed tariff is 7.3 percent, compared to 20 percent in 1994, before the country membership in the WTO.

The applied tariff on all food products are zero since 1999, except the rice imports which are subjected to a specific tariff of 430 rupiah per kilogram (approximately 30 percent at an exchange rate of US$ 1 = Rp 10,000),[4] import duties on raw sugar are 20 percent and refined sugar 25 percent.[5] In sum, Indonesia has liberalized its trade regime by issuing periodic deregulation packages that have incrementally reduced overall tariff level, simplified the tariff structure, removed restrictions, and replaced non-tariff barrier with more transparent tariff. Indonesia is committed to remove import surcharges on items bound in the Uruguay Round by the year 2005.

Indonesia promulgated the free trade zones provisions by the Law No. 3/1970. The law followed by several Laws that specified free trade zones in a specific area, among others the Law No. 10/1985, the Law No. 36/2000, and the Law No. 37/2000 which stated Sabang area and its port as free trade zones.

Environmental requirement in Indonesian law has been imposed on imported products such as CFC materials, pesticides, methyl bromides and hazardous wastes disposal.[6]

Although there is a complaint among several WTO members that Indonesia's applied tariff rates tend to be substantially lower than its bound rates and the gap has widened since 1998 as a result of scheduled tariff cuts. This tendency shows Indonesia's seriousness to fulfill its commitment to trade liberalization in line with the WTO spirit.

There is a growing concern among business persons regarding the enforcement of the trade laws since the promulgation of the Law No. 22/1999 and the Law No.

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3 *WTO Trade Policy Review of Indonesia: Replies to Questions Raised by Argentina, 27 and 30 June 2003, p. 1.*

4 *Rice is a strategic food commodity in Indonesia. Since poor people spends most of their income for food, the increase of 33% rice price in the country in the period of February 2005 to March 2006 drags more than 3.1 millions peoples into poverty, increases the poverty level from 15.97% (3.95 millions peoples) to 17.75% (30.05 million people). See World Bank East Update November 2006 (The World Bank: 2006).*

5 *On December 27, 2002, the Coordination Meeting of the Ministries on Economic Affairs decided to impose a specific tariff of 510 rupiah per kilogram of imported rice.*

6 *WTO Trade Policy Review of Indonesia: Replies to Questions Raised by Brazil, 27 and 30 June 2003, p. 11.*

25/1999 on Decentralization and Regional Autonomy. On January 1, 2001, Indonesia began to implement a large-scale decentralization of authority and finances from the central government to the province and district level governments. Since many of the technical guidelines related to these decentralization and autonomy laws have not yet been drafted, some regions have attempted their own interpretations on these two laws by drafting their own local regulations based on their interpretation.[7] It was not uncommon that the local regulations resulted in unnecessary trade barriers.[8]

In 1999, Indonesia promulgated The Law No. 5/1999 regarding the Prohibition of Monopoly Practices and Unfair Competition. However, there were complaints among several business persons who were unsatisfied by the performance of Komisi Pengawas Persaingan Usaha/KPPU (the Oversight Commission for the Business Competition), due to the lack of expertise among some of its members. The lack of expertise of the members of KPPU was the result of the improper recruitment that was more political-laden than expertise-based consideration.[9]

In the same year, Indonesia enacted the Law No. 30/1999 on Arbitration which provides for non-discriminatory trade disputes resolution through international bodies or through local bodies in conformity with international law. Indonesia also adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958 (the New York Convention) by Presidential Decree No. 34/1984.

III. MULTILATERAL TRADE LIBERALIZATION IN INDONESIA[10]

A. Supports for Multilateral Trade Liberalization

1. Government Support

The support for trade liberalization from the government is relatively strong in Indonesia. Indonesia has not only liberalized its trade regime, but has also taken a number of important steps to reduce protection. There are several high level

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7 *See Agus Brotosusilo, "Rancangan Akademik Undang-undang Tentang Lalu Lintas Barang dan Jasa di Dalam Negeri (Indonesian Domestic Trade in Goods and Services Law: An Academic Draft)," A Paper for Seminar on Domestic Trade in Goods and Services Law. Faculty of Law – University of Indonesia, in cooperation with the Ministry of Industry and Trade, Jakarta, March 1, 2002, p. 4. Ryaas Rasyid, former Ministry of Internal Affairs and Local Autonomy, the drafter of the Law No. 22/1999 and the Law No. 25/1999 on Decentralizaton and Regional Autonomy is of the opinion that the implementation of the Law No. 22/1999 and the Law No. 25/1999 on Decentralization and Regional Autonomy should be supported by hundreds of Government and Presidential Decrees. He affirmed for government affairs only the local governments need more than 190 Presidential Decree for their guidance.*

8 *USAID, Partnership for Economic Growth, and Departemen Perindustrian dan Perdagangan RI. Domestic Trade, Decentralization and Globalization: Conference Papers. Jakarta, USAID, Partnership for Economic Growth in cooperation with Departemen Perindustrian dan Perdagangan RI, 2001.*

9 *See "Research on Business Actors' Awareness on the Enforcement of the Competition Law and Awareness on the New Commission, An Executive Summary," p. 52-53. The research was conducted by USAID, Georgetown University, PEG, Partnership for Business Competition, and Pusat Studi Hukum & Kebijakan Indonesia, Jakarta, 2000.*

10 *Most of the information in this part is based on a research conducted by Agus Brotosusilo, Riyatno, Yetty K. Dewi and Rudy, in August 2003 which is a part of "Commercial Legal and Institutional Reform (CLIR) Assessment," made with the cooperation between Graduate Program in Law – University of Indonesia and USAID.*

government officials that recognized the importance of international trade and foreign investments. The government has not only created an environment generally supportive of liberalized trade – such as lowering tariffs and reducing non-tariff trade barriers – but it also has been issuing reform decrees that provide the reduction of taxes, tariffs and quantitative restrictions on exports and imports. The Indonesia government continues to reduce the number of products subject to import restrictions and special requirements. 1412 tariff lines are now subject to import licensing, which were reduced from 261 tariff lines in 1994 and 1,112 in 1990. Alcoholic beverages, lubrications, and explosives, and certain dangerous chemicals compounds continue to be subjected to special import licensing regulations.

The government does not only actively seek to improve the participation of the country in multilateral trade agreements, but also to include its country into the regional trade agreements (e.g. ASEAN Free Trade Area/AFTA). The government actively seeks to enforce liberalization provisions of existing multilateral as well as regional trade agreements.

2. Improvement of Laws

In order to reduce the legal uncertainty in the country, the Indonesian government actively seeks to improve transparency. The government offices provide copies of laws, regulations, instructions, application forms and similar subsidiary instruments readily available to the business community and other end users. However, the community complained that there is no one-stop information-centre publicly accessible to look for regulations issued by the government.

The government has been providing the business community with meaningful notices and an opportunity to comment on draft laws or legislative amendments affecting trade. It is also providing the community with meaningful notices of and opportunity to comment on draft implementing regulations. Regarding formal mechanisms for soliciting inputs from the business and professional communities for formulating and amending trade policy, there are still complaints from some business sectors that the government does not represent their interests when it creates regulations.

3. Private Sectors

Indonesia not only has a very promising economic opportunity (abundance natural resources, prospective market), but also rests on a very high level political stability (the 3rd biggest democratic country in the world). However, the country has been suffering from legal uncertainty. Generally, the business and professional communities in Indonesia perceive the legal and regulatory environment to be confusing, especially because there are many regional regulations, which sometimes overlap with the previous-centralized regulations issued. There are also regulations which are inconsistent (contradictory) not only in the making of the regulations but also in interpreting them within the ministries. The communities are of the opinion that major laws and regulations do not only tend to be difficult to predict, but also lack consistency in its interpretation and enforcement. In addition, there is lack of transparency for end-users.

Most of the business and professional communities perceive the law and regulations issued by the government are not really precise in that they can be generally read and understood by a business person (or any other end-user), and provide adequate indication of what is required thereunder. Most of the communities perceive that the law and regulations issued by the government to be relatively not complete in that even if they address the main needs of the business community, they do not address significant gaps. Since many of the regulations are not detailed, it often creates many interpretations.

Most of them perceive that the law and regulations issued by the government to be relatively not responsive to their needs as reflected in "favorable" (pro-business) policy measures. The communities generally feel that they do not have a meaningful role to play in shaping policy reform in the area of trade. This phenomenon is reflected in the fact that they have already tried to give some inputs to the government in shaping policy reform especially in trade, but to date there is not much improvement despite their efforts.

The business and professional communities generally feel that the State is not really effectively meeting the basic needs for legal reform in trade because most of the legal reform seems to be the result of the pressure given by the International society, such as IMF, and World Bank.

4. Demand for Effective Implementing Institutions

The existence of an effective implementing institution is crucial in order to realize the goal of foreign economic policy to maximize the economic welfare of the nation. In Indonesia, both business community, as well as officials of implementing institutions, affirm the existence of one or more high level government officials with responsibility to implement and champion the cause of more efficient and effective provision of services by the implementing institution.[11] The business community and officials of implementing institutions confirm that several international lending institutions (e.g. UNDP, ADB, World Bank) and donor agencies (e.g. USAID, CIDA) have instituted assistance programs with the government to upgrade and improve the implementing institutions, however, the assistance programs do not always meet their actual needs.

Professional associations, trade organizations and special interest groups that favor liberalized trade in the country actively pressure the implementing institutions more actively than protectionist groups to apply the laws in a manner favoring their positions. In addition, the business community opine that in service areas where the implementing institutions are weak, the private sector has offered competing or replacement services to fill the gap.

Despite the fact that most of business community perceive that they are well represented by trade and special interest groups, they feel that their aspirations are

11 *The last Indonesia Trade Policy Review by the WTO was conducted on 27 and 30 June 2003.*

often not accommodated by government, neither in trade policy-making nor in multilateral as well as regional trade negotiations (WTO, APEC, and AFTA).

5. The Effectiveness of Implementing Institutions

The effectiveness of the implementing institution mostly depends upon the qualifications of the person in-charge. The Indonesian officials of implementing institution have stated that it actively utilizes an internal plan which provides a written basis for all the decisions made according to existing published law. They also confirm that all regulations, forms, applications and other documents as well as information are available to end-users. However, most members of the business community have a contrary opinion.

Despite these criticisms, the implementing officials assert that actively utilizes a system of accountability, but they also affirm that it actively utilizes a feedback mechanism. However, most of business sector disagree with this observation.

6. The Role of Private Sectors

Some of the Indonesian business community confirm that the provision of services and the execution of functions by the implementing institutions are not satisfactory because they are not transparent. On the contrary, others substantiate that although such services and execution of functions are satisfactory, the supply of services are non-discretionary and discriminatory. Moreover, they charge unreasonable prices for their services.

The end-users feel that they do not have adequate opportunities to provide feedback to the institution on the implementing institution's performance and consider its decisions to be unpredictable. Generally, they consider decisions made by the implementing institution to be inappropriate under existing law and not understandable. They also consider its decisions are not supportive of liberalized trade.

Persons from private sector feel that there are no mechanisms needed to provide services required for effective trade especially an environment in the area of professional associations in specialized services and for trade and special interest groups.

Not only is there inadequacy in facilitating or supporting the implementation of the framework law in terms of the number of institutions, but in the quality of institutions, as well. Moreover, there is no sufficient mass of private sector associations supporting free-market trade principles to counterbalance the protectionist groups.

The role of the Indonesian business community in the trade law reform is really ambiguous. Despite their claim that they always emphasize the demand for legal reform in order to improve the business climate, most of the national top level

business persons reject the challenge to join in the legal reform struggle, even to participate as respondents in the research on this related field.

Since the structure of Indonesian economic has been characterized by conglomeration and highly corrupt, collusive, and nepotistic practices, joining the legal reform does not seem as the best choice for the opportunistic business persons. The more highly level of corrupt, collusive, and nepotistic business climate, the easier it is for opportunistic rent-seeking business persons to get the profit in the shortest time. To date, after more than last three decades of Indonesian economy it is still strongly influenced by the habits of the corrupt, collusive, and nepotistic actions. Among the most destructive practice is the collusion between the high ranking government officers with the business persons in the top levels. This practice has led to the catastrophic multi-dimensional crisis in the country.

7. Abolition of non-tariff barriers

Since 1997, Indonesia has dismantled many formal non-tariff barriers. In September 1998, the Indonesia Government sharply curtailed the role of the National Logistics Agency (BULOG), which has been the sole importer and distributor of major food commodities, such as wheat, sugar, rice, and soybeans. BULOG is now an independent body with the responsibility of maintaining stocks for distribution to military and low-income families and managing the country's rice stabilization program. BULOG is no longer entitled to use its credit liquidity from the Central Bank. [12]

The remaining quantitative limits apply to wines and distilled spirits. The Government of Indonesia restricts import of alcoholic beverages to three-registered importers, including one state-owned enterprise. The import duty for the product is 170 percent, a 10 percent VAT and 35 percent luxury tax. These restrictions are imposed in order to protect the Indonesian people from moral hazards.

The Indonesia government continues to reduce the number of products subject to import restrictions and special requirement. 1412 tariff lines are now subject to import licensing, reduced from 261 tariff lines in 1994 and 1,112 in 1990. Alcoholic beverages, lubrications, and explosives, and certain dangerous chemicals compound continue to be subjected to special import licensing regulations.

As a notable exception, though, the Government of Indonesia does not impose an import ban of chickens in its whole form. However, the country continues to maintain a ban on imports of chicken parts, which the Directorate General of Livestock Service imposed in September 2000. Despite the efforts of several ministries to repeal the ban, the Ministry of Agriculture continues to insist that it is necessary to assure consumers that imports are halal (produced in accordance with Islamic practices). [13]

12 *US Foreign Trade Barriers, 2002: Indonesia, p. 187.*

13 *The US system of Halal certification was reviewed by an Indonesia team in 2000, but since then, Indonesia frequently experienced that the non-halal chicken parts have entered the local market. See: WTO Trade Policy Review of Indonesia: Replies to Questions Rose by USA, 27 and 30 June 2003.*

In the services sectors, even though some restrictions have been relaxed, services trade barriers to entry continue to exist in many sectors, e.g. legal services, distribution, financial-accounting and banking services, audio-visual, construction-architecture and engineering, and telecommunications services.

Standardization is not an instrument of non-tariff barrier to trade in Indonesia. Most of Indonesian standards are voluntary, and only several are mandatory. Most of the mandatory standardization has come into effect due to health, security, environment and safety reasons which include, among others, iron, helm, passenger car tires, fertilizers, fortified flours, iodized salt, and sealed water drinking. As a comparison, not to mention the US Bio-Terrorism Act of 2002 or the similar instrument of 2003 European Food Safety Legislation, the USA standardization is utilized traditionally as an instrument of non-tariff barrier to trade. In our country there are more than 2700 State and Municipal authorities which require particular safety certifications for products sold or installed within their jurisdictions. The problem of excessive reliance on mandatory certifications in the USA is contrary to the international trend towards deregulation or minimizing third party intervention in the regulatory process, which is experienced by our country due to the continued reliance on third party conformity assessment procedures for many industrial products. [14]

Since January 2001, Indonesia regulations required labels identifying food containing "Genetically Engineered" ingredients and "Irradiated" ingredients. However, as of January 2002, implementation is pending until the government determines a threshold-presence level. If the government chooses to enforce strictly the regulation, import of approximately $210 million in soybeans and soybean meal would be affected. [15]

8. Trade Defense Instruments

In 1995, Indonesia enacted the Anti-dumping and Countervailing Duty provisions in the Law No. 10/1995. Indonesia Anti-dumping Committee (KADI) has conducted its investigation in accordance with Article VI-GATT 1994. Since 1996, KADI had imposed definite measures on 12 cases and 13 cases terminated for various reasons.

The Government of Indonesia enacted the safeguard provisions through Presidential Decree No. 84, dated 6 December 2003 which deal on the Safeguard of the Domestic Industry Against the Impact of Increased Imports. The safeguard provisions are supported by the Decree of Minister of Industry and Trade of the Republic of Indonesia No. 84/MPP/Kep/2/2003 dated 17 February 2003 establishing the Committee of Trade Remedy of Indonesia or Komite Pengamanan Perdagangan Indonesia (KPPI), and Decree of Minister of Industry and Trade of Indonesia No. 85/MPP/Kep/2/2003 dated

14 *Report on United States Barriers to Trade and Investment, European Commission, Brussels, July 2001, p. 19.*

15 *US Foreign Trade Barriers, 2002: Indonesia, p. 190.*

17 February 2003 laying down the Procedures and Requirements of Application for Investigation with respect to Safeguarding Domestic Industry from an Increase Import. This supporting legislation lays down the institutional framework required. KPPI had imposed a safeguard action on the import of ceramic tableware in May 5, 2005;[16] however, the action has been criticized as a "non-WTO consistent."[17]

B. Implementing Institutions

Traditionally, the institution responsible for implementation of laws relating to trade (on goods) is the Ministry of Industry and Trade. Since the WTO Agreements expand the scope of the trade, not only limited to Agreement on Trade in Goods, but also covers: General Agreement on Trade in Services (GATS); Agreements on Trade-Related Intellectual Property Rights (TRIPS); and Agreement on Trade-Related Investment Measure, the membership of Indonesia in the WTO resulted in division of power among several ministries and institutions responsible for implementation of the WTO agreements. The Ministry of Justice is responsible for the implementation of Agreements on Trade-Related Intellectual Property Rights; the Ministry of Finance and Indonesian Central Bank are responsible for the implementation of General Agreement on Trade in Services; and the State Ministry of Investment is responsible for the implementation of Agreement on Trade-Related Investment Measure. However, Presidential Decree No. 102/2001 clearly defines the mandate of the Ministry of Industry and Trade as an institution responsible for implementation of laws relating to trade. The internal regulations and operating procedures are set forth in the Ministry of Trade Decree No. 86/MPP/2001. The officials of the Ministry say that the Ministry of Trade has sufficient authority, mandate, funding, internal regulations, operating procedures, an active staff, and development program to carry out its mandate. However, respondents from the Chamber of Commerce as well as Business Associations hold the opposite opinion as to the insufficiency of funding, an active staff and a development program to carry out its mandate.

Despite the affirmation of the officials of the implementing institution of its adoption of "customer-oriented" approach and the contrary answers to the research survey between the implementing institution and most of the business community reveal the general inconsistency in understanding the implementing institutions' role and functions between the government and the end-users.

Based on the Law No. 22/1999 and the Law No. 25/1999 on Decentralization and Regional Autonomy, the roles and functions of the implementing institutions are sufficiently decentralized to enable users throughout the country to have reasonable

16 *The safeguard action has been taken on import of ceramic tableware originating from China, Hongkong, India, South Korea, Singapore, Japan, Taiwan, Thailand, Italy, Great Britain, Malaysia, USA, Germany, Australia, and France.*

17 *Agus Brotosusilo Globalisasi Ekonomi dan Perdagangan Internasional: Studi Tentang Kesiapan Jukum Indonesia Melindungi Produksi Negeri Melalui Undang-Undang Anti Dumping dan Safeguard (Economic Globalization and International Trade: Research on the Preparedness of Indonesian Law to Protect the Domestic Industries Through Safeguards and Anti-dumping Law), Fakultas Hukum Universitas Indonesia, Dissertation, 2006.*

access. In addition, the Ministry of Trade has an active, current website, at least for the purpose of monitoring and disseminating the dynamics of the daily price of major food commodities throughout the country.

1. Operations

The implementing institution, through an Indonesian representative in the WTO, actively monitors level of compliance with the terms of WTO accession requirement and other trade agreements. The institution also actively pursues increased compliance with trade agreements. To ensure compliance with international standards, the Ministry of Trade also maintains active contacts with counterpart organizations in other countries.

Most of business community articulate that the implementing institution does not distribute (or make available for a nominal fee) copies of all procedures, relevant laws, government regulations, fee schedules and other information governing trade and related activities.

The business community also affirm that Indonesia has no special unit established mechanism to provide protection for private sector enterprises from unfair trade practices through enforcement of defensive instruments. The country also has no special unit to enforce the laws in a non-discretionary, consistent and transparent manner even when its decision will result in a negative impact on domestic enterprises. The private sector business does not generally consider the special unit providing satisfactory protection from unfair trade practices.

Most of business community held that the implementing institution does not provide import and export licenses transparently in accordance with the published standard. They also affirm that in order to obtain import and export licenses, they are not free of bribes or other inappropriate rent-seeking behavior.

C. Supporting Institution

1. Government entities

The Customs Office as the supporting institution in international trade has clearly a defined mandate to implement the trade laws (Act No. 10 Year 1995 on Customs). The Office not only has sufficient professional and administrative staffing to carry out its mandate, but also has sufficient authority and support to carry out its mandate, including clear policy statements and support from the government. The Office has detailed internal regulations and operating procedures and an active staff training and development program utilizing appropriate training materials, guidebooks or procedural manuals to improve staff competency and service. But some customs officers maintain that the office does not have sufficient funding through state budget, fees collected, or a combination of both to maintain its equipment and services.

The Custom Service interprets and applies custom laws uniformly throughout the territory. It is provided in the general explanation of the Act No. 10 Year 1995 on Customs. The Office has implemented a risk profiling system in which less than 50% of shipments are inspected and delay in procedures for overland shipments through land border posts averages less than 2 hours. The Customs Office's main operations have been computerized and networked. It applies a "customer-oriented" approach to fulfill its mandate; however, most of the staff do not have international inspection certificates.

Among the government, the Customs Service, and end-users, there is general consistency in understanding of the Customs Service's role and functions. The Custom Service has an active, current website, including contact information, trade legislation and policy papers, and other relevant materials.

2. Courts

Most of business community affirm that the Courts and other relevant administrative bodies adjudicate disputes involving foreign investors without regard to the nationality or residence of the litigant, nor in accordance with clear, published laws, regulations, and standards. They also confirm that the Court does not consistently adjudicate appeals from administrative decisions in a transparent, impartial manner. They also conclude that the Court does not make decisions regarding trade issues independently, since it is not uncommon that inappropriate political pressure or non-judicial considerations determines their decisions.

A pervasive lack of transparency and widespread corruption are significant problems for company doing business in Indonesia. Many of the new laws passed since late 1997 have established new institutions and agencies to respond to popular demands to deal with corrupt, collusive, and nepotistic practices. Law No. 28/1999 established stiffer penalties for corruption and an independent commission to investigate and audit the wealth of senior government officials. Law No. 31/1999 established an Anti-Corruption Commission. The press has reported a number of high profile corruption cases from the last five (5) Presidential Administrations; however, to date, few individuals have been prosecuted and of those, even fewer convicted. In sum, the Judiciary System is often arbitrarily deciding these kinds of cases.[18] In some of the international trade dispute cases, the courts' decisions are influenced by 'non-juridical' factors.

3. Professional Association

There are no specialized groups of lawyers' association dedicated to trade law issues except the Indonesian Capital Market Lawyer Association. Lawyers generally do not

18 *US Foreign Trade Barriers, 2002: Indonesia, p. 196.*

examine trade law issues and promote better understanding of market-oriented trade policy since there are not many lawyers who really understand about the international trade issues.

4. Specialized Services

Inspection services are provided on a reasonable cost basis to importers and exporters. Despite most of the officials are not yet internationally accredited, however, the inspection services is using international standards in its inspection and certification.

Sufficient facilities are maintained at land border posts to conduct on-site health, safety, and environmental inspections. There is also a well-developed industry of freight forwarders and customs brokers in the country.

Importer and exporters are generally not satisfied with the quantity, quality, and cost of bond warehouses and warehouse services. While the price is not reasonable, the safety in warehouses is questioned, and the services are not professional. When goods belong to importers and exporters in warehouses get lost, warehouses deny to be responsible for the loss which account for their non-satisfaction with the quality of such services.

Government provides trade forms (customs document, bills of lading, certification), which are printed and readily available locally, or when they use freight forwarders services, freight forwarders will provide trade forms for exporters and importers. Experienced local consultants and service providers are available to assist with trade missions, marketing and other trade promotional activities.

Local financial institutions offer trade finance to domestic importers and exporters on reasonable terms through the letter of credit facility that commonly used by business communities in international trade. Local insurance agencies provide insurance on imports and exports at reasonable commercial rates in accordance with international standards. Every general insurance company in Indonesia provides the Marine Cargo Insurance. This type of insurance will cover risks of the goods imported to or exported from Indonesia. Most of the Indonesian insurance companies have been using and regulating its business practices in accordance to the International Insurance Standard set by the London market at Lloyds of England.

IV. HISTORICAL BACKGROUND OF THE ESTABLISHMENT OF THE ASEAN FREE TRADE AREA (AFTA)

Asean Free Trade Agreement (AFTA) has been established based on Tokyo Round enabling clause, nor founded on Article XXIV, 8(b) of the General Agreement on Tariffs and Trade. The Article stipulated:

"A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce... are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

The embryo of AFTA was the trade cooperation agreement among the original members of ASEAN to establish the ASEAN Preferential Trading Arrangements/PTA, signed in Manila on February 24, 1977. The cooperation was improved by the Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangements/PTA, signed in Manila on December 15, 1987.[19] The PTA was based on Tokyo Round enabling clause, which allows GATT members to create preferential trading arrangements.[20]

AFTA was established by the Singapore Declaration of 1992 on January 22, 1992 by six (6) original members of ASEAN (Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, and Thailand).[21] The Declaration applied the Common Effective Preferential Tariff (CEPT) Scheme on 15 products,[22] and extended to non-processed agriculture products. According to the scheme the import duty for the products will be reduced to 0-5% within 7-10 years, not 15 years as the normal tariff reduction.

Based on the 36th ASEAN Economic Minister (AEM) 3-5 September 2004 agreement tariff reduction, the import duty for 98.2% of six (6) initial ASEAN members' (Indonesia, Thailand, Brunei Darussalam, Malaysia, Philippines, and Singapore) total products covered by CEPT-AFTA was deducted into 0-5%. In reality, the implementation of AFTA often conflicts with the national interest of each member. It put the high cost investment of Malaysian automotive manufacture "Proton" into crucial dilemma, since the product is unable to reach the ASEAN market not only because some of the AFTA member-countries produce a more competitive –in price as well as in quality-products, but also due to the tariff peak has been retained by some AFTA members on this sector. Philippines cancelled its commitment to liberalize its petrol-chemicals. Indonesia in the September 2004 proposed to include sugar – formerly in the "normal track" category, into highly sensitive list (HSL) category, however, the proposal strongly was opposed by Thailand, since most of Indonesia sugar has been imported from the country.

19 *Interpretative Notes to the Agreement on the CEPT Scheme for the AFTA, Article 1: Definition.*

20 *PAUL J. DAVIDSON, THE LEGAL FRAMEWORK FOR INTERNATIONAL ECONOMIC RELATIONS 84 (Singapore: Institute of Southeast Asian Studies, Heng Mui Keng Terrace Pasir Panjang, 1997).*

21 *Fourth ASEAN Summit, Singapore, 27-28 January 1992, Documentation: Annex I.*

22 *The product covered in the scheme are: vegetable oil; cement; chemicals; pharmaceuticals; fertilizers; plastics; rubber products; leather products; pulp; textiles; ceramic and glass products; gems and jewelry; cooper cathodes; electronics; and wooden and rattan furnitures.*

V. LEGAL AND INSTITUTIONAL FRAMEWORK FOR REGIONAL TRADE LIBERALIZATION IN INDONESIA

In 1995, the Government of Indonesia signed the Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) by Presidential Decree No. 85/1995.

Indonesia also fully implemented the final stage of its commitments under the ASEAN Free Trade Agreement (AFTA); but expressed its reservations about the pace of liberalization within AFTA, which is much more liberal than WTO Agreements (WTO Plus).[23] To illustrate, on the services sector in ASEAN, there is a principle of "GATS Plus" which means the commitments under ASEAN should be more liberal than under the WTO. In general, Indonesia commitments under ASEAN Framework Agreements on Services (AFAS) consist of widening and deepening the existing commitments under WTO.[24]

In January 1, 2002, Indonesia implemented the final phase of the ASEAN Free Trade Area (AFTA). It has reduced tariff for all products included in its original commitment (7,286 tariff lines) to five percent or less for product of at least 65 percent ASEAN origin.

VII. REGIONAL AND BILATERAL TRADE LIBERALIZATION AND ITS IMPLICATION TO INDONESIA

The frozen Doha Round has been displayed as a shift away from multilateral trading system, which led the way into the increasing regional or bilateral trade relationships. However, regional or bilateral trade liberalization will only result in positive implication if its outcome is trade creation, not trade diversion. The regional as well as bilateral trade arrangement can act as building blocks for the multilateral trade liberalization if it resulted in trade creation. The contrary results when the regional or bilateral trade arrangements act as stumbling blocks for the multilateral trade liberalization if it resulted in trade diversion.

The trade relation most likely to occur in the trade among countries which is complementary, however, UNSP comtrade database shows that most of the AFTA members merchandise trade are similar, not only in the kind of commodities, but also their export destinations. The database also has been shown that the trade among ASEAN countries after the establishment of AFTA in 1992 to date tends to decrease.

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23 *Wollcock describes WTO-plus as an RTA which applies non-discrimination principle beyond the obligations undertaken in the WTO. He stresses that RTAs may create regional preferences if they do not extend non-discrimination (most favoured nation and national treatment) to third countries. See Stephen Wollcock: "A Framework for Assessing Regional Trade Agreements: WTO-plus," in GARY P. SAMPSON AND STEPHEN WOLLCOCK, ED.: REGIONALISM, MULTILATERALISM, AND ECONOMIC INTEGRATION: THE RECENT EXPERIENCE 19 (United Nations University Press, Tokyo, 2003).*

24 *WTO Trade Policy Review of Indonesia: Replies to Questions Raised by Argentina, 27 and 30 June 2003.*

This phenomenon means that it is not likely that the regional trade is trade creation. If it is true, so the existence of AFTA has been maintained based on non-economical considerations. AFTA has been sustained in order to support the continuance of ASEAN. The dilemma among the AFTA members is whether the trade-off is worthy enough for each of the individual country. The answer is lies in the foundation of AFTA, which is established not based on Article XXIV: 8(b) of the General Agreement on Tariffs and Trade, but founded on the Tokyo Round enabling clause.

The Tokyo Round enabling clause stipulated that the PTA only applies among the developing countries. Misapplication of the PTA to developed countries will lead into injustice because it is benefiting the developed countries at the expense of the developing countries. This phenomenon has been experienced among the AFTA members, since some of the country GNP per capita is more than US$25,000.00 (e.g. Singapore), while the other member GNP per capita is only around US$1,000.00 (e.g. Indonesia).

The detrimental effects on Indonesia have been increasing due to the application of the bilateral USA-Singapore FTA. The trading goods flow from Indonesia to Singapore has increased dramatically, either through legal transaction, or mostly by illegal trading. It has been estimated that Indonesia experienced a total loss of approximately US$8 billion on smuggling of tin from Bangka and Belitung Islands alone.

The inclusion of Indonesian islands (Batam and Bintan) in the Integrated Sourcing Initiative/ISI as a part of USA-Singapore FTA has been benefited Singaporean firms operating in Singapore to take advantage of the complementarities between Singapore and Indonesia. Singapore officials went to great lengths to describe the ISI as not just good for Singapore, but for all the countries in ASEAN.[25] John Coyle stated that these arguments were partly aimed at deflecting criticism from ASEAN countries – many of which were not pleased when news of the US-Singapore FTA was announced.[26] No doubt, the ISI makes firms in Singapore more competitive. By outsourcing labor-intensive production to Batam and Bintan (or any other suitable location) and then exporting to the United States without paying any administrative costs of proving origin, these firms are better equipped to compete in the US marketplace.[27]

The ISIS has been benefiting US multinational corporations/MNCs with operations in Singapore to capture the existing complementarities within the Growth Triangle (Singapore, Indonesia, and Malaysia) and to eliminate extra red tape, fees, and

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25 Singapore Minister for Trade and Industry George Yeo, Remarks at a Press Conference at Venture Manufacturing Plant in Bintan Industrial Estate.

26 Telephone interview by John Coyle with anonymous USTR official (Nov. 14, 2003).

27 See Singapore Minister for Trade and Industry George Yeo, Connections: Singapore and Indonesia Link Up With New Gas Pipeline (Radio Singapore International Broadcast, Aug. 14, 2003), http://www.rsi.com.sg/english/connections/view/200330814131752/1/html.

paperwork.[28] Ambassador Robert Zoellick has said that the ISI is intended to provide a degree of economic assistance to Indonesia because of US concerns about "economic stability in a world where we are concerned about security and terrorist threats."[29] In his view, the ISI represents a "creative" attempt to "try to help the Indonesians economically and in so doing, help prevent "failed states, broken societies, [and] extreme poverty... in which the seeds of terrorism can grow."[30]

The ISI permits non-signatory third countries (especially Indonesia) to take advantage of certain provisions of the US-Singapore FTA.[31] However, not only the Vienna Convention on the Law of Treaties (Vienna Convention), but also the General Agreement on Tariffs and Trade (GATT) limit the ability of states to use rules of origin to benefit third states. Article 34 of the Vienna Convention on the Law of Treaties (Vienna Convention)[32] establishes the principle that, for a bilateral treaty to create "rights or obligations" on the part of a third State, that state must consent to their imposition.[33] However, there is not even a reference to third countries in a generic sense in the text of either of US-Singapore FTA documents; Article 3.2 of the Free Trade Agreement simply states that "[e]ach Party shall provide that a good listed in Annex 3B is an originating good when imported into its territory from the territory of the other Party."[34] John Coley identifies the first question on the arrangement is whether Article 3.2, when read in conjunction with the various public statements made by officials from the United States and Singapore identifying Indonesia as the primary intended beneficiary of the ISI, is sufficient to confer upon Indonesia a right to benefit from the ISI. The second question is whether, if a right has been conferred, Indonesia has a viable remedy if it is violated. The ICJ held that France's high-ranking officials oral statements pledging to refrain from nuclear testing in the Pacific were binding because France intended that they be so.[35] By contrast, it is highly doubtful that any of the high-ranking officials in the United States or Singapore intended to assume a binding obligation (the flipside, after all, of conferring a right) to Indonesia by virtue of their public statements. They expressed a desire that the ISI benefits Indonesia, but this is very different from expressing an intention that Indonesia has a right to the benefit. Coley argues that Article XXIV of the GATT – which permits the creation of free trade areas and customs unions generally – does not authorize bilateral treaty partners to use rules of origin to confer benefits upon third states, thereby imposing a significant constraint upon the ability of states to use rules of origin to realize non-

28 *Telephone interview by John Coyle with anonymous USTR official (Nov. 14, 2003.*

29 *US Trade Representative Robert Zoellick, Address to the US Asia Pacific Council Symposium, April 24, 2003.*

30 *Peter Hartcher, US Links Free Trade to Global Security, Australian Fin. Rev., Nov. 15, 2002, at 28, LEXIS, Nexis Library, News Group File (quoting Ambassador Zoellick).*

31 *Products covered by the ISI include all those listed in Annex 3B of the Agreement and include semiconductors*

32 *Vienna Convention on the Law of Treaties, May 23, 1969, arts. 34-38, 1155 UNTS 331, 341 reprinted in 8 I.L.M. 679, 693-94 (1969).*

33 *Ibid., art. 34, 1155 UNTS at 341 ("A Treaty does not create either obligations or rights for a third State without its consent.").*

34 *US-Singapore Free Trade Agreement, supra, note 5, art 3.2(1).*

35 *See Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 267 (Dec. 20), at 269-70.*

economic goals.[36] He stresses that the ISI mechanism was chosen for permitting the continued exploitation of the Indonesian cheap labor through rules of origin regime.[37] Thus, Indonesia's possibility to take advantage of certain provisions of the US-Singapore FTA is not even a right without remedy. It is no more than one-sided charity, from the richer country to the poorer country. The just trade cooperation among countries should not be established based on a charity. It should be founded on equality standards. So, it is more justifiable to establish the US-ASEAN FTA in ASEAN area, not exclusively limited to the US-Singapore FTA.

VII. CONCLUSION

Considering the nature of AFTA members' merchandise trade and the members export destinations, most of AFTA member countries are competitors, not complementary to each other. Seeing the trend of decrease in trade among the member countries since the establishment of AFTA, and in order to increase the benefits from the trade cooperation as well as to decrease the tension among the member countries, my proposal is that the regional free trade agreement should be extended into a broader free trade agreement between AFTA and its main trading partners (e.g. USA, China, Japan, or EU). Moreover, the just trade cooperation among countries should not established based on charity, in an asymmetric relationship. It should be based on standards of equality among its parties. The economic attainment of AFTA members should not be sacrificed by the political considerations in the establishment of ASEAN. The exclusive agreement between any AFTA member and its main trading partner will lead into injustice since it is only benefiting the exclusive member country of AFTA at the expense of the rest of member countries.

36 *John Coyle, Rules of Origin as Instruments of Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the US – Singapore Free Trade Agreement. 29 YALE J. OF INT'L LAW, vol. 29, 545-580 (2004).*

37 *Ibid.*

Trends in the Philippines on Foreign Direct Investments*

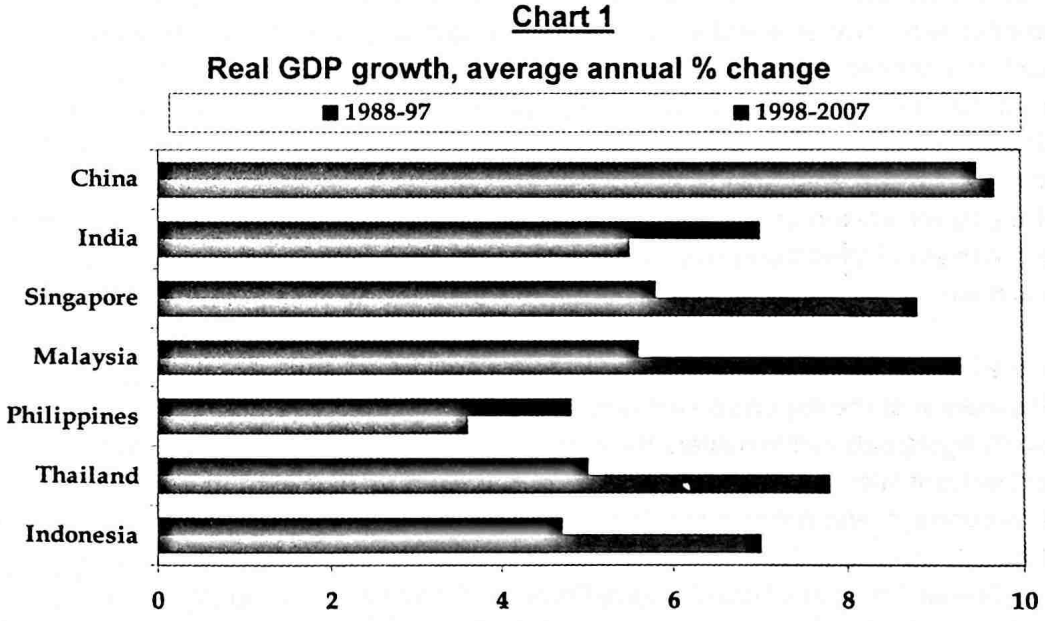
By Avelino V. Cruz **

1. The Philippines in the Asean regional setting

Philippine business operates within the Asean regional setting as one of the five main economies. On the subject, therefore, of trends and investment appetites, it is perhaps useful to first dwell on a regional setting – meaning Asean plus China and India, with previous years' GDP growth as key indicator.

Chart 1 (sourced from IMF) shows the stark contrast between China and India, which in recent years, have powered on, versus Southeast Asia, the world's fastest developing region until 10 years ago, but which has somewhat stalled.

Chart 1



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* *Paper delivered during the Asia Law In-House Counsel Summit, March 12-13, 2008, Intercontinental Hotel, Hongkong.*

** *President, Asean Law Association (ALA) of the Philippines; Founding Partner & Senior Partner. Angara Abello Concepcion Regala & Cruz Law Offices; Magna cum laude from San Beda College, a Master of Laws degree from the University of Michigan and was a Ford Fellow for International Legal Studies at the University of California, Berkeley. He is the incumbent President of the Asean Law Association (ALA) of the Philippines and former Secretary-General of the Asean Law Association.*

The Philippines, a relatively smaller scale economic model, has however shown consistent steady growth. GDP records 2003 to 2007 confirms an upward trend (Philippine GDP growth shown in Chart 2).

Chart 2

GDP of the Philippines from 2003 - 2007

Year	GDP (in Million Pesos)	Growth Rate
2003	1,085,072	4.7%
2004	1,154,295	6.1%
2005	1,210,497	5.1%
2006	1,276,435	5.4%
2007	1,508,618	7.3%

After the crisis of 1997 which stalled Asean's head start, the Philippine economy began to steadily recover. A recent study points up certain adverse symptoms though, such as the near absence of companies that could truly be called world class, i.e. a consumer brand of the stature of South Korea's Samsung and LG or Taiwan's AU Optronics and semiconductor or India's Tata's steel. In fact, global investors, if asked to name a recognized brand could perhaps only answer: "Singapore Airlines". A recent study by the Boston Consulting Group of the 100 largest multinationals from emerging economies contained only five from the Asean region (e.g. Indonesia's Indofood, Malaysia's Petronas and Thailand's Pokphand) out of a total of 61 from Asia.

In the book "Asian Godfathers", journalist Joe Studwell blames the continuing domination of the region's business scene by old fashioned sprawling conglomerates run by aging patriarchal owners, the core competence of which is exploiting cosy connections with governing elites, in short, this refers to "rent seeking" for generous state contracts and concessions. In some ways, this could be said of the Philippines, although some of its largest conglomerates such as real estate developers, Ayala and Ortigas, Philippine Long Distance Co. and SM Prime are now run by skilled professionals. Also blamed is the failure of the Asean countries to construct a potential single genuine market of 572 million people as shown by the fact that Asean member still do three times as much trade with non-member as they do among themselves. Natural handicaps such as a huge variety of languages, religions, political systems and histories, all lower the competitiveness of local firms as well as multinational companies operating in the region contribute to this state of affairs.

On the positive side, the foregoing can only mean ample investment opportunities remain for foreign direct investment (FDI for short) as the region's emerging

economies turn around and shed off some archaic practices. The rise of China and India, with their huge home markets, may mean tough competition for South East Asia to become big in manufacturing. But it does still have the prospect of producing world leading firms in other areas where it has an edge. Tourism and the hospitality sector are obvious examples, especially as the region's neighbors become richer. South East Asia could become both "the Mediterranean and the Caribbean of Asia".

2. Foreign Direct Investment (FDI) in the Philippine setting

Let me now proceed to FDI in the Philippine setting. Given the favorable outlook in terms of GDP at 7.3% in 2007, equally favorable are key economic indicators as shown in Chart 3.

Chart 3
Philippine Economy Key Indicators

	2001	2007
External debt percentage	68.3%	36.8%
Foreign Debt Service as percentage of export receipts, tourism and overseas remittances	14.9%	9.45%
Budget Deficit	64%	9.0%
Inflation Rate	8%	2.8%
Net International Reserves (US$)	11.42 Billion	34.79 Billion
Per Capita Income in Relation to GNP (US$)	725.70	913.00

Unemployment figures have been reversed partly by Filipino overseas workers' remittances at USD 16 billion last year plus the fact that USD 5 to 6 billion are earned by business process outsourcing (BPO) outfits such as call centers. This rapidly growing BPO sector in the 2010 medium term Philippines development plan includes:

Contact center, Software development, Animation/creative services,
Data transcription, Back office processing, Engineering design

The Peso thus strengthened against the US dollar from P51.00 to USD1.00 in January 2001 to P48.90 in January 2007 and at P40.90 last January this year. This resulted in an all time high of USD 34.7 billion national reserves in January 2008 compared to USD 11.4 in 2001. Cushioned were the impact of sky rocketing oil prices and continuing heavy importation of rice and medicines.

All these point up to favorable opportunities for FDI in the Philippines as an emerging moderately-sized economy with plenty of room to spare.

3. FDI Legislation and Investment Promotion Agencies

In the Philippines, FDI refers to "investments made to acquire a lasting interest by a resident entity in one economy in an enterprise resident in another economy", using OECD bench mark concepts with 10% or more as the cut off in equity. Foreign investors may conduct business in the Philippines with or without a local partner, and may choose to establish any of the following forms of business enterprises:

Branch office, Subsidiary, Representative office, Regional headquarters or Regional Operating Headquarters

The only restrictions are those falling within the Foreign Investment Negative Lists restricting foreign ownerships such as land, public utilities or those relating to security and defense. Chart no. 4 (See Annex A).

There are a number of FDI promotions agencies. The Philippine Economic Zone Authority (PEZA), for example, establishes after income tax holiday the privilege of paying tax at a preferential rate of 5% on gross income in lieu of all local and national taxes except real property tax on land. It is also a special customs zone. Chart no. 5 (See Annex B). Parenthetically, the other eco zones such as the former US bases, namely, Subic Freeport in Zambales and the Clark Airbase Eco Zone are soldiering on with similar incentives. Chart 6 shows the approved FDI in the 3rd quarter of 2006 and 2007 in billion pesos.

Chart 6

Approved Foreign Direct Investment; Third Quarter 2006 and 2007 (in Billion Pesos)

Agency	Approved FDI		Percent to Total Q3 2007	Growth Rate Q3 2006-Q3 2007 (%)
	Q3 2006	Q3 2007		
Board of Investments ("BOI")	6.8	4.8	13.8	(29.4)
Philippine Economic Zone Authority ("PEZA")	21.7	27.5	78.8	27.2
Subic Bay Metropolitan Authority ("SBMA")	0.3	2.3	6.5	b
Clark Development Committee ("CDC")	3.5	0.3	0.9	(91.1)
Total	32.3	34.9	100.0	8.1

4. WTO entry and target areas for foreign investors

It is apparent that the Philippines has increased the pace in attracting foreign investors and has taken steps to integrate it into the world economy. In fact, when the Philippines joined the World Trade Organization agreement, our Supreme Court ruled the statute valid in the case of Tañada vs. Angara (GR # 118295, May 2, 1997). ACCRA's founding partner, Ed Angara, who has moved on to Government service and was then President of the Senate, managed to stir such entry into WTO successfully, recognizing the need for business exchange with the rest of the world and limiting protection to Philippine enterprises only as against "unfair practices."

There are a number of laws enacted to attract FDI's, beginning with the Omnibus Investments Code of 1987 which established investment priorities and fiscal and non-fiscal incentives. Notable are:

The Build and Operate Transfer law (Republic Act 6957). Allowing investments in large infrastructure projects with a contractor who provides construction and financing but in return gets a period of 50 years to operate the facility and to charge fees for its use.

The PEZA law of 1995 or the Philippines Special Economic Zone Act of 1995 allowed for continuing establishments of special economic zones all over the Philippines

The Electric Power Industry Reform Act of 2001 "EPIRA" which restructured the electric power industry with a focus on privatizing the assets of the National Power Corporation after the law declared power generation as not a public utility and therefore open to all foreign investments.

5. Ecozones under PEZA

Out of the several investment promotions agencies (IPAs) established, PEZA is considered the most successful. For the ten-year period from 1995 to 2005, PEZA generated investments amounting to USD 23,366,748,166. In its first year, enterprises in PEZA has generated 304,557 jobs while in 2005, PEZA locators have generated 1,128,197 jobs. In terms of exports, PEZA enterprises have generated exports amounting to USD 4.284 Billion in 1995 while in 2005, PEZA locators have generated exports amounting to Php 32.03 Billion. In 2006, PEZA led all IPAs in terms of approved FDIs, with a total approved FDI of Php 68.9 Billion. CDC was second with an approved FDI of Php 52.3 Billion, while the SBMA was third with an approved FDI of Php 36.5 Billion. Fourth was the BOI, with a total approved FDI of Php 8.0 Billion.

The following are some of the companies that have located in the Philippines and registered with the PEZA: Panasonic, Lufthansa, Convergys, Philips Semiconductors, Samsung Electronics, Toshiba, Texas Instruments and Dell. With two exceptions, all are being serviced by ACCRA.

6. Privatization of government properties and businesses

The privatization of generation assets under EPIRA has resulted in successful bids made by foreign investors working with local partners. This is indicated in Chart number 7 (See Annex C).

ACCRA has acted as counsel for bidders or prospective bidders in a number of the above instances. In addition, the National Transmission Corporation or TRANSCO, the country's national grid, has been privatized through open competitive bidding of its transmission facilities under a 25 year consortium. The bidding was completed December 12, with a winning bid of USD395 billion, so far the biggest on record. ACCRA had acted as counsel for one of the bidders.

There are also cross border privatizations in the sense of government bidding out development projects for its valuable properties abroad, particularly those located in Tokyo and Kobe, as authorized by law in 2003, to help reduce fiscal deficit. ACCRA has counseled for a successful bidder in the Kobe property and is involved in the Tokyo Fujimi property privatization now on its final stages of bidding.

7. Favorable judicial resolution of foreign investor issues

The trend in Supreme Court decisions is also favorable to foreign investors. In the Manila Prince Hotel case (GR#122156, February 3, 1997), the Filipino first policy of our Constitution on the grants of concession was declared open if there is no qualified Filipino bidder. As earlier mentioned, in Tañada vs. Angara (GR # 118295, May 2, 1997), the court upheld the Philippine agreement to the World Trade Organization. Then in the case of La Bugal-B'laan Tribal Association (GR # 127882, December 4, 2004), the court liberally interpreted the constitution so that technical financial agreements with foreign-owned corporations were declared valid insofar as foreign investment and management of enterprise for large scale exploration, development and utilization of minerals are concerned. Foreign service contracts have been approved as exceptions to the restrictive 60-40 equity requirement in the large scale development of mineral and petroleum resources.

In addition to the judicial system, the Philippines has an arbitration law that provides fair and speedy procedures for resolution of dispute outside the Courts thru enforcement of arbitration clauses, or thru voluntary submission to arbitration by the parties.

Court litigation is a core competence for which ACCRA is widely known. Many landmark corporate and business law decisions of the Supreme Court have been successfully litigated by the firm's lawyers, including cases of foreign investor clients. Currently some notable cases being handled by ACCRA, include the defense of Microsoft Corporation in an infringement case, the handling of Shell Oil Exploration in civil damages cases and the derivative suits filed against Nishimuru Daikin Industries Ltd.

8. Dispute Resolution thru court litigation and arbitration

Philippine law affirms the right to sue of all foreign corporations or persons licensed to do business in the Philippines or, even if not licensed the right to sue in an isolated transaction. The Philippine Court system consists of several levels: Trial Courts, Court of Appeals and the Supreme Court, applying a unique blend of Roman Law, Anglo American Law and, in some respects, even Islamic Law. Thus, the Constitutional requirement of due process protects foreign direct investment. The guarantee of due notice and hearing in all disputes safeguards investor interests. A constitutional provision on non-impairment of obligation of contracts ensures enforcement even as against arbitrary government action.

Judges of Philippine Courts have security of tenure and works under an environment of judicial independence. This ensures judicial scrutiny of government action where arbitrary or unconstitutional. The glare of public scrutiny of official acts and policy making is further ensured by a free if noisy press in a robust democracy. Sometimes hysterical, media reports are often misinterpreted as signs of instability. Such public scrutiny thru media, however will, in the long run, ultimately create a level playing field for all investors, foreign and local.

9. Legislative advocacy for clients

Within the practice of ACCRALAW is a core competence on legislative advocacy for clients, including foreign investors. Our members have been engaged as consultants to various legislative committees or bodies on major legislative initiatives in business law and corporate practice.

We were consultants in the first major revision in 1984 of the Corporation Law and the Securities Act, initiated by our late founding partner, Mr. Abello, who he was then Securities and Exchange Commission Chairman. Following the 1997 financial crisis, we counseled legislation on corporate recovery rules and more recently, helped draft a special purpose vehicle law to assist banks on the disposition of non-performing assets. Currently, we are consultants to the Philippine Stock Exchange being run by its President, Mr. Francis Lim, a former ACCRA senior partner. ACCRA is in the forefront of consultants in the more recent Congressional initiative to rationalize about 120 separate incentives law, with an efficient "one stop-shop" as a goal for all investors, local and foreign. There are currently five bills being deliberated to enact a single consolidated investment and incentives code. Some of the suggested features are: more generous incentives to export enterprises and those within the poorer provinces, more performance based incentives, longer net operating loss carry over, accelerated depreciation, double deduction for training, research and development and import duty concessions.

Likewise, our corporate and securities lawyers are currently involved in the drafting of the proposed Collective Investment Schemes Law which governs mutual funds and unit trust funds, as well as the proposed law on Real Estate Investment Trusts (REITS).

Thank you and let us enjoy the next two days.

WTO and Regional Trade Liberalization: Implications for ASEAN

By Kenneth Goh

1. INTRODUCTION

The topic of globalization has been argued and debated at countless conferences over the years. It is a topic that evokes a sense of trepidation, expectancy or optimism, depending on which side of the divide one is standing.

There are essentially two positions adopted in discussions on globalization. One is that globalization involves a lost of national sovereignty even cultural identity. The other is the diametrically opposite view that rather than lost or weakening of national sovereignty and identity, globalization in fact strengthens it.[1]

The WTO, GATS, FTAs, RTAs, AFAS are but some of the acronyms bandered about in a maze of interconnecting for a. Rules, procedures and substantive legal issues are created and argued, and they litter the maze with stumbling blocks and trapdoors. Forums such as this, are not meant for rhetorical discourse but they serve as avenues in which answers are sought, and explanations delivered in a common pursuit of understanding and cooperation.

A recent development in this era of globalization is the growing acceptance of regionalization as a political and economic formation for reasons of geographical affinity. The EU, AFTA, NAFTA and APEC are examples of this trend. The removal of tariffs and immigration barriers has enabled these regions to grow and develop.[2]

There will be many aspects of the legal profession that will be affected by the liberalization process, including the business structures (for law firms). However, this paper will be confined to the following areas –

- Domestic regulations governing the legal profession
- Development of national laws
- Harmonization of laws
- Self regulation of the legal profession

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1 *Professor Seong Chee Tham, "Globalization Implications for Environmental Protection," Department of Malay Studies, The National University of Singapore.*

2 *Ibid.*

As the factors driving the liberalization process in other countries, there will be references in this paper to international developments and trends.

2. DEVELOPMENTS UNDER THE WTO AND OTHER REGIONAL /BILATERAL AGREEMENTS

Before an examination of the above areas, a synopsis of the recent developments under the WTO and regional/bilateral agreements is necessary.

2.1 General Agreement on Trade in Services (GATS)

Pursuant to the GATS, it is fundamental right of a government to regulate in order to pursue its national policy objectives. The Agreement's preamble recognizes, *inter alia*, "the right of Members to regulate and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives". [3]

The Doha Round collapsed recently as a result of the failure on the part of the US and the EU, and some developing countries to reach a consensus on reducing farm subsidies and tariffs. The 21 Apec leaders at the Apec Summit of leaders meeting in Hanoi held in November 2006, issued a Hanoi Declaration reaffirming their support for the resumption of the WTO negotiations.

The grouping (APEC) has also agreed to look into ways to provide a model of measures by 2008, that can be used by members in drafting future regional trade agreements and FTAs. At the summit, the US and Singapore proposed a Free Trade Area of the Asia Pacific (FTAAP) as alternative to the Doha Round, in the event it fails. The proposal has been placed on the backburner for now.

It is submitted that regardless of whether the WTO negotiations resume, the liberalization process in the ASEAN region will continue to progress, Intra-ASEAN and Framework trade (reflected in the proliferation of free trade agreements) and the ASEAN Framework Workshop III WTO and Regional Trade Liberalization:

Agreement on Services will serve as the impetus for the continuing liberalization in this region.

2.2 ASEAN Framework Agreement on Services (AFAS)

Articles II(I) and V of the GATS provide for the formation of agreements between and among member countries to remove discriminatory measures and provide an environment conducive to a free flow of trade in services between and among them.

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3 *Pursuant to Article XIX (2), the process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors.*

These provisions allow ASEAN Member Countries to enter into an agreement more liberal than the GATS without extending the same concessions to all GATS members.

In moving towards this increased liberalization of trade in services, ASEAN Members Countries signed the ASEAN Framework Agreement on Services (AFAS) on 15 December 1995. Its objective is to eliminate substantially, restrictions to trade in services amongst Member Countries and to liberalize trade in services by expanding the depth and scope of liberalization beyond that taken by Member Countries under GATS.

Services offers under AFAS are GATS Plus, meaning that it must be improvements over the ASEAN Member Country's existing GATS commitments or the addition of a new sub-sector which was not previously committed under GATS. In the case of non-WTO members, their offers must not be less favourable than its existing regime and must be more favourable than those offered to non-ASEAN countries.

In order to hasten the process of liberalizing trade in services, the Coordinating Committee on Services (CCS) formulated an "Alternative Approach to Liberalization of Services in ASEAN'. The objective of this plan is to set the long term target for liberalization of services through a free flow of services by 2020. The free flow of services across the region will be achieved national treatment of services and service providers and the elimination of barriers to market access in the four supply modes. There will be progressive liberalization under the AFAS, on a three-year cycle, toward full liberalization of services by the year 2020.

During the signing of the Bali Concord II, concrete goals were drawn up towards realizing the establishment of the ASEAN Economic Region (AEC), which envisages a common economic region, with free flow of goods, investments, capital and services by 2020. Liberalization of legal services is now supposed to take place by 2015 with up to 70% of foreign equity participation in law firms.

2.3 Free Trade Agreements

ASEAN is in the process of negotiations with its trading partners, including the following:[4]

- ASEAN-Japan Framework for comprehensive economic partnership (CEP) signed on 8 October 2003, expected to bring in an FTA by 2012;
- ASEAN-China framework agreement on comprehensive economic cooperation signed in 4 November 2002 which is expected to conclude an FTA by 2010 for older ASEAN states and 2015 for newer ASEAN states;

4 *Martin Khor, "Bilateral/Regional Free Trade Agreements: An Outline for Elements, Nature and Development Implications" (Third World Network).*

- ASEAN-India agreement signed on 8 October 2003 and to be concluded by 2011;
- U.S. enterprise for ASEAN initiative (announced by U.S. on October 2002) to create a network of bilateral FTAs linking ASEAN with U.S.; and
- Transregional EU-ASEAN economic partnership.

ASEAN countries have entered into bilateral agreements with other countries .e.g.

Singapore – has signed FTAs with New Zealand, Japan, Australia, U.S., European Free Trade Association and Jordan.
Thailand - has signed or is pursuing FTAs with U.S., New Zealand, Australia, China, Japan.
Malaysia has signed an Economic Partnership Agreement with Japan (MJEPA), and is currently in FTA negotiations with the U.S., Australia, New Zealand and Pakistan. In addition, it was recently announced that Malaysia and Chile will be starting FTA negotiations. [5]

2.3.1 Some Issues Arising From FTA Negotiations

There are non-governmental organizations in Malaysia that have raised their concerns concerning the ongoing Malaysia-U.S. FTA for the following reasons: [6]

a) Positive/Negative List

At the WTO, services liberalization occurs via positive list where only those sectors, listed will be opened to foregoing competition. Furthermore, a country has no legal obligation to liberalize, and can liberalize at its own pace, and under its own conditions. It can even choose not to liberalize certain sectors, In contrast, in some U.S. FTAs, services liberalization occurs on a negative list basis where all sectors are opened to foregoing competition, unless they are listed in a "carve-out" or reservations list.

b) Investment

An investment agreement was consistently and strongly opposed by developing countries, including Malaysia, at the WTO, as they were concerned that this would prevent or reduce their policy space to determine their own investment policies. However, the obligations of the investment chapter in U.S. FTAs go far beyond the provisions proposed at the WTO because it requires U.S. investors and investments to be treated at equal to locals (national treatment), including in pre-establishment

5 *It was reported in the press that the coverage of the FTA will be comprehensive, involving liberalization of bilateral trade in goods and services and investments.*

6 *Report by Third World Network on the 'Workshop on Malaysia-US Free Trade Agreement: Issues, Implications and Challenges' which was held at Kuala Lumpur on 6 September 2006.*

rights, which affords national treatment before an investor enters the country, unless the exceptions are listed in the FTA. Performance requirements such as transfer of technology are also prohibited except in certain circumstance or for listed exceptions.

c) Intellectual Property Rights

Malaysia is a member of the WTO, it must abide by the minimum standards of intellectual property (IP) protection set out in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and is afforded flexibilities in its implementation.

U.S. FTAs require stronger levels of intellectual property protection than stipulated by the TRIPS Agreement, U.S. FTAs also remove the flexibilities provided for in the TRIPS Agreement. The IP chapter of U.S. FTAs also covers trademarks, copyright, patents and other forms of intellectual property. For example, the copyright provisions typically extend copyright protection from 50 years (as obliged under the TRIPS Agreement) to 70 or 95 years after the death of the author.

There is also the concern that the IP chapter of U.S. FTAs will have an adverse impact on access to affordable medicines. Patented medicines will be more expensive than their generic equivalents.[7]

3. DOMESTIC REGULATIONS GOVERNING THE LEGAL PROFESSION

3.1 Disciplines Under the GATS

Pursuant to Article VI (4) of the GATS, the WTO, through its Council for Trade in Services is required to develop disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.

Article VI also states that such disciplines shall aim to ensure that these requirements are, *inter alia*:

a) based on objective and transparent criteria;
b) not more burdensome than necessary;
c) in the case of licensing procedures, not in themselves, a restriction on the supply of the service.

The WTO focused on the accountancy sector and came up with the Disciplines for the Accountancy Sector (Accountancy Disciplines).

7 *This is the concern expressed by the non-governmental organizations. However, there are also contrary views expressed by pharmaceutical companies in countries that have singed FTAs with the US that the prices of medicines did not escalate.*

If the Accountancy Disciplines is extended to the legal services sector, this would effectively mean that a WTO member country could complain that a certain measure imposed by the regulatory body (in a host country) is more burdensome than necessary and is trade restrictive. This complaint would be referred to the WTO dispute settlement body. This issue of whether the Accountancy Disciplines should be extended to the legal profession was considered by the Canadian Bar Association, as well as the Council of the Bars and Law Societies of the European Union (CCBE). The Canadian Bar Association in its paper [8] raised several concerns about extending the Accountancy Disciplines to the legal profession. Their overall concern was that the law society rules relating to the public interest would be subject to review by a third-party dispute settlement body. This would be inconsistent with the principle of self-regulation. The CCBE [9] was of the view that the Accountancy Disciplines does not take account the core principles of the legal profession, including the element of independence. The CCBE recommended certain changes to the Accountancy Disciplines if it is to be extended to the legal profession.

At the WTO, there is now no move towards extending the Accountancy Disciplines to the legal profession. However, there is a move towards agreeing to some form of disciplines for the services sector. It is important that the disciplines that comes into force, if at all, is one that is not adverse to the legal profession. It is important that the law association work closely with their government negotiating agencies so that the interest of the legal profession is properly reflected in the country's negotiations in respect of the disciplines.

3.2 Code of Ethics

There is no international 'model code of ethics' that has regulatory force throughout the world. Lawyers practicing in foreign jurisdictions or lawyer in multi jurisdictional firms will be subject to different regulations, rules of ethics, and standard. In the EU, the EU lawyer who practices in another EU country is subject to the Code of Common Conduct of the CCBE. There are some differences between the CCBE Code of Common Conduct and the U.S. ethics code. For example, on conflict of interest, the US ethics code focuses on whether new client's matter is 'substantially related', whereas the CCBE Code discusses the 'risk of breach of confidence' and whether the new client will receive 'undue advantage'. [10]

To assist ASEAN lawyers who may be exporting their services within the region, what is required is a readily accessible compilation of the different regulations and standards of the ASEAN countries. In this regard, links between the regulatory bodies in different

8 *'Submission on the General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession November 2000'*

9 *CCBE Response to the WTO Concerning The Applicability of the Accountancy Disciplines to the Legal Profession May 2003*

10 *Paper by John Bean presented at the UIA / ABCNY colloquy in the WTO negotiations concerning international legal services held in New York on 30 January 2003.*

countries is necessary. For example, the International Bar Association recently set up a Bar Issues Commission (BIC) to support member organizations and to give them a platform to discuss issues of common interest, including multijurisdictional practice. Another example of grouping of law associations that is looking into providing the necessary linkages is the Organization of Commonwealth Caribbean Bar Associations (CCBA). The CCBA members meet on an annual basis. It is currently looking into promoting greater convergence in the ethical codes of conduct for the legal profession. [11]

3.3 Mutual Recognition Agreements

With a view to facilitate the free flow of professional services in the ASEAN region by the year 2020, ASEAN leaders at the 7th Summit held on 5th November 2001 in Bandar Seri Begawan instructed officials to commerce negotiations on Mutual Recognition Agreements (MRAs). AN MRA is a bilateral or multilateral agreement to establish mechanism of equivalency that recognize qualifications of professionals (in a certain sub-sector) from another jurisdiction as equivalent to that of domestic qualifications. Its purpose is professional equivalency and reciprocity and it is recognized under the Framework Agreement on Services (Article V).

An example of a MRA is the recommended guideline by the International Union of Architect on MRAs which provides that if the eligibility for recognition is based on qualification, the MRA should state:

i) the minimum level of education required (entry requirements, length of study, subjects studies);
ii) minimum level of experience required (location, length and conditions of practical training, internship, licensing, certification);
iii) how professional knowledge and ability are demonstrated in the home jurisdiction;
iv) whether possession of a certain qualification allows for recognition of all or just some of the activities that architect are entitled to practise in the guest jurisdiction.

At the WTO, the Working Party on Professional Services (WPPS) issued its Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector. These Guidelines are nonbinding. The purpose of which is to provide suggestions to WTO Members States about how they might negotiate bilateral or multilateral recognition agreements. [12]

11 *Nancy Anderson, We are Sailing: Multi-National Legal Practice and Overseas Bar Associations – The Commonwealth Caribbean Prospective, 31 Commonwealth Law Bulletin (Nov. 4, 2005).*

12 *General Agreement on Trade in Services – A Handbook for International Bar Association Member Bars.*

In moving towards an integrated region by 2015, with free flow of services, it appears inevitable that the law associations will have to (at some point of time) begin discussions and negotiations on an MRA with one, or more of their ASEAN counterparts.

With MRAs, there will be some freedom of lawyers in the region. However, the freedom of movement brings with it the issue of professional indemnity insurance,[13] and this is a factor for consideration.

Although ASEAN governments have agreed to the deadline of 2015 for the legal services sector, there does not appear, at this stage, to be a clear mechanism as to how this process will take place. It has in fact been raised at CCS meetings that it is difficult to move forward and liberalize the legal services sector due to the differing legal systems, unless there is firstly, harmonization of laws.

4. HARMONISATION OF LAWS

The laws and legal systems in the ASEAN region vary greatly. Some countries practice the common law system, while others are influenced by continental Roman and Napoleonic legal systems, Dutch continental law, Adat laws and Islamic laws.[14]

The call for harmonization of laws was made at the first ASEAN Law Association (ALA) Meeting in Manila in 1977 by the then Minister of Justice of Indonesia. He proposed that steps be taken to harmonize the laws of contracts and the company laws. He devised against trying to harmonize laws in matters where cultural values play a part, e.g. marriage and divorce laws of ASEAN member countries. He was of the view that chances of success for efforts at regional harmonization are much greater if the subject is culturally neutral.[15]

The former Prime Minister of Singapore, Goh Chok Tong, once said that process of globalization will compel ASEAN to move in the direction of harmonization and coordination. Without some degree of harmonization, the long-term credibility of ASEAN as a regional organization will be difficult to maintain. Investors tend to rate ASEAN as a region, and not only as individual countries. He was of the view that ASEAN countries must seek a balance between their own distinctive national legal structures and the need for more harmonization and institutionalization in some common legal areas.[16]

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13 *In the EU, pursuant to the Establishment Directive, bars are obliged to recognize the PII of the lawyers from another member state, although it requires a top-up when the home insurance falls short of the requirements of the host state.*

14 *Speech by the (former)Prime Minister of Singapore, Goh Chok Tong, at the 4th ASEAN Law Ministers Meeting held on 5 November 1999.*

15 *Professor Mochtar Kusuma-Atmadja: Harmonization of Laws in the Region.*

16 *Supra., note 14.*

The experience of the EU serves as a useful reference for the harmonization of laws. There is a diversity of European contract laws and the diversity is seen to be an impediment to cross-border trade. In his article [17], Tony Ridge explains that in 2003, the EC unveiled a project, to run until 2009, to create a 'Common Frame of Reference' with a view –

i) to improving EC lawmaking in the area of contract law;
ii) to finding solutions to the diversity of European contract laws.

This may have major implications because English mercantile law is used the world over and it is often specified as the applicable law in contracts that have no connection with England. Because of the diversity of contract laws, rules derived from the acquis[18], are applied in different ways in different Member States – e.g.:

- different rules about the formation of contracts;
- different ways of calculating loss and damages;
- limitation periods.

The Network for the Common Frame of Reference on European Contract Law (CFR-Net) comprises experts from private practice, representatives from interest groups, the judiciary and academics.

Tony Ridge suggests that the Euro Code should be as close as possible to what the 'reasonable European man in the street' would expect it to be. The object should be to consolidate, not to innovate. Secondly, the Euro Code should remain optional. This would mean that it would have to compete in the market with existing system of choice, i.e. English law.

In ASEAN, it would be beneficial if the laws that facilitate foreign and intra-ASEAN investment are consistent. Apart from company and contract laws, intellectual property laws is also an area that could be considered for purposes of harmonization. Since the Trade Related Aspects of Intellectual Property Rights (TRIPs), there have been a number of treaties that have been signed or ratified, e.g. the WIPO Copyright Law Treaty 1996, and the 1996 Treaty on Intellectual Property in Respect of Database. A commentator has expressed his opinion that as a consequence of this, any harmonization will have to start not from where the ASEAN member states find themselves but from the position that their trading partners, particularly those in the WTO, have reached. ASEAN harmonization will have meaning only if a start is made by adopting the contents of, if not all, at least the major international IP treaties, whether relating to substance of procedure as the foundation. [19]

17 *Tony Ridge, "Contract Law –Will a Euro Code oust English Law?" 31 Commonwealth Law Bulletin (No. 4, 2005) ISSN 0305 -0718.*

18 *Technical term used for the body of EU law and regulations as it exists at any given time*

19 *Assafa Endeshaw, "Harmonization of Intellectual Property laws in ASEAN: Issues and Prospects," Nanyang Business School, Nanyang Technological University, Singapore*

However, as seen in the EU, where the process is ongoing, the harmonization of laws is a difficult task, but one that may be inevitable for ASEAN.

5. DEVELOPMENT OF NATIONAL LAWS

As a result of the requirements and developments under the WTO and other international trends, there is a need for ASEAN countries to develop their national laws accordingly.

5.1 E-Commerce

ASEAN entered into an e-ASEAN Framework Agreement in November 2000 to facilitate the establishment of the ASEAN Information Infrastructure in order to promote the growth of electronic commerce in the region. As envisioned, the ASEAN Information Infrastructure would link ASEAN with other major ICT plans of individual ASEAN member countries, such as Brunei Darussalam's RaGAM 21, Indonesia's Njusantara 21, Malaysia's Multimedia Super Corridor, IT21 of the Philippines, and IT2000 of Singapore.[20]

The e-ASEAN Working Group, through its sub-working group on legal infrastructure, has been established to promote coordination in the formulation of e-commerce laws and regulations.

In Malaysia, the E-Commerce Act 2006 was introduced to reaffirm the validity and legal effect of transactions by electronic means, to provide certainty in electronic communication, and to remove legal obstacles to e-commerce. As to cross border transactions, there are no specific provisions under this Act. However, the issue is being studied at the ASEAN level. Among the current initiatives being undertaken are the following –

- Harmonization of E-Commerce laws in ASEAN;
- Malaysia will carry out bilateral arrangements/discussions on enhancing cooperation on consumer protection with Singapore, Thailand, Indonesia, Brunei Darussalam, and Philippines;
- Regional cooperation on consumer protection.[21]

5.2 Intellectual Property Rights

Most of the ASEAN countries have in place, intellectual property (IP) laws. As a result of WTO member countries' obligations under the TRIPs, some of the ASEAN countries have revised their IP laws.

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20 *Based on the ASEAN official homepage as maintained by the Public affairs Office of the ASEAN Secretariat*

21 *Arunan Kumaran, "Policy and Planning Division, Ministry of Domestic Trade and Consumer Affairs," MyICMS 886 WORKSHOP, August 8, 2006, Broadband for All Malaysians Realising MyICMS 886 Goals.*

As far back as 1995, ASEAN leaders adopted the 'ASEAN Framework Agreement on Intellectual Property Cooperation' including the setting up of a regional patent and trademark office that was followed by another agreement reached in April 1996 on a two-year plan for IP cooperation. The plan was to work towards the establishment of a regional electronic information network, an IP database and a common system of protection for industrial designs, patents and copyright.

Currently, the ASEAN IPR Action Plan 2004-2010 is designed to build on the progress which has been achieved in collaboration among ASEAN governments, ASEAN dialogue partner countries and institutions, and civil society organizations. [22]

In line with the obligations under the TRIPs, Malaysia amended the Copyright Act, the Patents Act and the Trademarks Act as well as introduced legislation on layout designs of integrated circuits and geographical indications. In 2004, Malaysia passed the Protection of New Plants Varieties Act 2004 in line with the requirements under TRIPS.

Malaysia is now a contracting state of the Patent Cooperation Treaty (PCT). The Malaysian Patents Act 1983 was amended by the Patents (Amendment) Act 2003 to give effect to the provisions of the PCT. A further Patents (Amendment) Act 2006 is currently tabled before Parliament. Under the PCT, there is a procedural framework which allows for multiple applications to the designated members states. As of the enforcement date of 16 August 2006, Malaysia will be one of the 132 contracting states, including the U.S.A., the European countries and Asian countries in offering applicants a choice to designate Malaysia for protection of their invention. [23]

5.3 Competition Laws

In line with the regional developments, there is a need to provide effective protection against unfair competition. The harmonization of ASEAN competition laws, rather than shaping separate and diverse competition is evaluated on a regional basis, thus maintaining the "principle of open regionalism" [24] in ASEAN.[25]

Dr. Lawan Thanasillapakul in his article, writes that in an emerging ASEAN free market economy, monopolies and restrictive business practices are viewed as undesirable, since they are likely to distort prices and inhibit the efficient allocation of resources. As regards foreign investment, the implementation of competition law

22 *Ibid.*

23 *Lim Pui Keng, Tay & Partners Malaysia, "Malaysia's Accession to the Patent Cooperation Treaty," ASIAN LEGAL BUSINESS Issue 6.9.*

24 *"Open regionalism" represents an effort to resolve one of the central problems of contemporary trade policy: how to achieve compatibility between the explosion of regional trading arrangements around the world and the global trading system as embodied in the World Trade Organization. The concept seeks to assure that regional agreements will in practice be building blocks for further global liberalization rather than stumbling blocks that deter such progress. Bergsten, C.F./ Institute for International Economics (IIE), USA, 1997*

25 *Dr. Lawan Thanasillapakul, The Harmonization of ASEAN Competition Laws and Policy from an Economic Integration Perspective.*

in ASEAN countries would yield further advantages apart from liberalizing the entry of, establishment and operation of foreign investors. It would regulate and control mergers and acquisitions as well as abuse of dominant market position in the ASEAN economy.

As a result of the liberalization of trade in good and services, developing countries must formulate and implement effective mechanisms to enable them to compete on a level playing field and they must have effective avenues for fair trade and fair practices in the global market place. [26]

Currently, not all ASEAN countries have competition laws in place. In Singapore, the Competition Commission of Singapore administers and enforces the Competition Act. There is no statutory obligation to notify particular agreements / conduct to the Competition Commission of Singapore. The onus is on the parties to an agreement to ensure that their agreement or business practices do not infringe the prohibition against anti-competitive agreements and abuse of dominance. [27]

Currently, Malaysia does not have a comprehensive competition law. there are a number of legislation in force, that deal with consumer protection, e.g. the Hire Purchase Act, Consumer Protection Act and the Price Control Act. However, there are no controls / regulations over contracts relating to matters such as exclusive dealings, monopolies and price fixing.

Under the Eighth Malaysia Development Plan, the Government announced that "...a fair trade policy and law will be formulated to prevent anti-competitive behaviour such as collusion, cartel price fixing, market allocation and the abuse of marker power..." At the recent National Convention on the Ninth Malaysian Plan, one of the speakers announced that a Fair Trade Bill is being drafted and it may be completed by end 2006 or early 2007.

6. SELF-REGULATION

Certain recent developments have resulted in an intrusion into the domain of self-regulation of the legal profession. One example of such an intrusion, is the money laundering requirements which now require solicitors to report transactions. In Malaysia, there is now an obligation to report suspicious transactions pursuant to the Anti-Money Laundering Act 2001. There is a specific provision in the Act that overrides the obligations of an advocate and solicitor as the confidentiality of information and professional privilege.

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26 *Paper by Dato' Seri Talaat Bin Hj Hussain Secretary General Ministry of Domestic Trade and Consume Affairs & Professor Dr. Rugayah Mohamed Universiti Teknologi Malaysia.*

27 *Sanda Seah-Partner, Competition Practice Group, Alban Tay Mahtani & de Silva, "Increasing Awareness of Competition Rules," ASIAN LEGAL BUSINESS ISSUE 6.9*

An illustration of the erosion of the rights to self-regulate is the development in England & Wales. Sir David Clementi was appointed to carry out an independent review of the regulatory framework for legal services in England and Wales in July 2003. The terms of reference were:

- To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector.
- To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.

In December 2004, Sir David published a Report following his Review. The government broadly accepted the main recommendations of the review. These were:

- Setting up a Legal Services Board – a new legal services regulator to provide consistent oversight regulation of front-line bodies such as the Law Society and the Bar Council.
- Statutory objectives for the Legal Services Board, including promotion of the public and consumer interest.
- Regulatory powers to be vested in the Legal Services Board, with powers to devolve regulatory functions to front-line bodies, subject to their competence and governance arrangements.
- Front-line bodies to be required to make governance arrangements to separate their regulatory and representative functions.
- The Office for Legal Complaints – a single independent body to handle consumer complaints in respect of all members of front-line bodies, subject to oversight by the Legal Services Board.
- The establishment of alternative business structures that could see different types of lawyers and non-lawyers managing and owning legal practices. [28]

The rationale for the alternative business structures is to create a more consumer-orientated market within the legal profession. It is perceived that this will increase competition in the legal sector and allow an influx of fresh capital that would drive down solicitors' prices. Sir David Clementi believed that liberalization could allow new types of legal practices that would improve access to justice by lowering prices. [29]

The erosion of self-regulation is also seen in the move towards allowing non-lawyers to provide legal services. In England, Halifax has become the first major bank to enter the

28 *Official website of the Department of Constitutional Affairs*

29 *Nancy Anderson, "We Are Sailing: Multi-National Legal Practice And Overseas Bar Associations - The Commonwealth Caribbean Prospective," Commonwealth Law Bulletin (No. 4, 2005).*

legal services market with the launch of Halifax Legal Solutions. The bank is offering legal products that include discounted conveyancing, will preparation, and a 24 hour legal helpline. It will also provide access to a Website where customers can prepare their own documents, including tenancy agreements, powers of attorney and also letters of complaint about faulty goods.[30]

This trend is not confined to England & Wales. New Zealand has passed legislation that could pave the way for 'Tesco law'. The Lawyers and Conveyancers Act 2006 will establish a new statutory framework for the legal profession. Lawyers will no longer have exclusive right to carry out conveyancing work. Under the Act, a professional licensed conveyancer will be able to work in competition with lawyers. It will also allow non-legal organizations such as banks and accountancy firms to offer a range of services including advice on contracts, tax and wills. It is the come into effect in mid-2008.

In light of this trend of establishing environments where there is fair competition, a number of measures imposed by regulatory bodies may be seen to be anti-competitive, e.g. rules that prohibit MDPs, or rules regulating conflict of interest, or confidentiality. It could also be argued that professional privilege, which applies only for lawyers is itself anti-competitive.

The CCBE takes the position that there are certain areas where competition should not be the sole judge of the activities of the legal profession, as lawyers are involved in the field of administration of justice, which has values that go beyond the economic. The core values of the legal profession can take priority over competition considerations. A regulation that restricts such freedoms can also be justified if it serves the core values of the profession or access to justice and maintenance of the rule of law as public interest aspects.[31]

It is submitted, in line with the position taken by the CCBE, that the rights to self-regulation is an important aspect that must be maintained and the international trends should not be a basis on which to remove or to diminish such rights.

7. CONCLUSION

The developments under the WTO and regional developments cannot be viewed in isolation. International developments and trends must also be considered when considering the wider implications for ASEAN.

The domestic and external forces, the logic of globalization, and the imperatives of regionalism will move ASEAN to resemble the EU more closely than it does today,

30 *UK Law Society Gazette, 2 November 2006.*

31 *CCBE Response To The Clementi Consultation Document.*

and as ASEAN evolves, more closely than we can foresee today.[32] Linkages and cooperation between law associations in the region is vital. Law associations must be vigilant and they must guard against the introduction of any undesirable elements that will affect the legal profession.

ALA could play an important role in promoting cooperation and mutual understanding amongst lawyers in the region. ALA could play a role in compiling the rules of ethics of the different ASEAN countries, and carrying out a comparative study of the various rules. Another area that could be looked into is the harmonization of laws. A study should be undertaken to determine whether harmonization is in fact necessary, and if so, the laws that could be harmonized. After which, an action plan as to the mechanics of undertaking such an exercise should be prepared.

A close working relationship between the law associations and their respective government agencies involved in the trade negotiations is an important factor. Law associations should play a role in shaping policies so that the interests of the legal profession are preserved. On certain issues, a position taken by ALA, as the representative of ASEAN lawyers, may be effective in lobbying governments on certain issues, for example, on the issue of disciplines for the legal services sector.

(The views expressed in this paper are personal views and should not be ascribed to the Bar Council)

32 *Remarks by Rodolfo C. Severino, Secretary-General of the Association of Southeast Asian Nations at the European Policy Center, Brussels, 23 March 2001.*

Parallel International Arbitration Procedures

*By Teresita J. Herbosa**

INTRODUCTION

Recent developments indicate that there are issues that have arisen between commercial arbitration, whether institutionalized or ad hoc, and the specialized investment arbitration. While clearly the latter is still in the minority, it has already effectively carved out from the big wide world of international commercial arbitration, a significant number of disputes, invariably between a State and a foreign investor, which are submitted to the International Center for the Settlement of Investment Disputes or the ICSID and its arbitration rules, rather than to any of the many other arbitration institutions and procedures.

The growing popularity of ICSID investment arbitration has renewed interest in certain arbitration concepts such as jurisdiction of arbitral tribunals, appeal, recognition and enforceability of arbitral awards, and judicial intervention or review. As we all know, due mainly to numerous systems, procedures and rules pertaining to international commercial arbitration, there is bound to be confusion and misunderstanding. After all, while arbitration rules of permanent bodies or institutions administering arbitration, ad hoc arbitration rules, and national laws and rules on arbitration proceedings, are similar in many aspects, there are also dissimilarities. The discussion is an attempt to sort out these differences and in the process give a clearer picture of current trends and practices in international commercial arbitration, in general, and international investment arbitration, in particular.

LEGAL BASES FOR INTERNATIONAL ARBITRATION

The New York Convention

The New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (of 1958) sought to promote arbitration as a mode of resolving disputes by ensuring that an arbitral award rendered in one country is recognized and enforced in another country. Article 1, par. 1 provides that the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and

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* *Senior Partner, Angara Abello Concepcion Regala & Cruz Law Offices; A.B. Pol. Science, U.P., 1972, LL.B., U.P., 1978 and LL.M., University of Michigan, 1980.*

arising out of differences between persons, whether physical or legal. It also applies to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.[1]

The New York Convention covers both ad hoc and administered arbitration. Thus, its definition of "arbitral awards" refers not only to awards made by arbitrators appointed for each case or "ad hoc arbitration" but also those made by permanent arbitration entities with their own set of rules or "administered arbitration".

A Contracting State to the New York Convention is bound to recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.[2] The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.[3] The Convention further contains a provision which is common to all rules of arbitration in that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement to arbitrate, at the request of one of the parties, refers the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[4] Verily, each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.[5]

The ADR Law of the Philippines

Philippine jurisprudence used to be lukewarm about arbitration because it was then perceived as ousting the courts of their jurisdiction. With the enactment of the Civil Code of the Philippines in 1950, however, arbitration as a mode of settling disputes was expressly recognized.[6]

Shortly thereafter, the first arbitration law was passed by the Philippine legislature. Republic Act No. 876 or the "Arbitration Law" which became effective on 19 December 1953 provides the mechanics of domestic arbitration proceedings.

1 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, N.Y. 330 UNTS, 38 No. 4739 (1959), Art. 1, par. 1 (hereinafter cited as the N.Y. Convention).*
2 *New York Convention, Article II, par. 1.*
3 *Ibid., par. 2.*
4 *Ibid., par. 3.*
5 *New York Convention, Article III.*
6 *Puentebella v. Negros Coal Co., 50 Phil 69 (1927); CIVIL CODE, Arts. 2042 to 2046.*

More than ten years after Republic Act No. 876, the 1958 New York Convention was approved and ratified by the Philippine Senate. In *Del Monte Corporation-USA v. Court of Appeals*,[7] the Philippine Supreme Court said that foreign arbitration as a system of settling commercial disputes was recognized when the Philippines adhered to the United Nations "Convention on the Recognition and the Enforcement of Foreign Arbitral Awards of 1958" under the 10 May 1965 Resolution No. 71 of the Philippine Senate, giving reciprocal recognition and allowing enforcement of international arbitration agreements between parties of different nationalities within a contracting state.[8] Accordingly, Philippine courts are obliged to recognize and enforce arbitration awards made in countries which are signatories to the New York Convention. In the same manner and on the basis of the underlying principle of reciprocity, awards by Philippine arbitration bodies should be enforced through courts of other signatory countries.

Notwithstanding RA 876 and adherence to the 1958 New York Convention, there was no Philippine law specifically applicable to international commercial arbitration. Thus, Philippine entities, including the Government itself, in contracts with foreign parties, invariably agreed to dispute settlement by arbitration in a foreign country under the rules of international arbitration institutions.

Due to the necessity of updating RA 876 and to make the Philippines more arbitration friendly insofar as resolution of international commercial disputes is concerned, a new arbitration law or Republic Act No. 9285 was approved on 2 April 2004. The "Alternative Dispute Resolution Law of 2004" or the "ADR Law" of the Philippines specifically recognizes the applicability of the New York Convention in the recognition and enforcement, in the Philippines, of foreign arbitral awards covered by said Convention.

UNCITRAL Model Law

The ADR Law provides that international commercial arbitration shall be governed by the Model Law on International Commercial Arbitration (the "Model Law") adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on 21 June 1985 in the interpretation of which, regard shall be had to its international origin and to the need for the uniformity in its interpretation.[9] In the Explanatory Note on the UNCITRAL MODEL LAW or the "UML", the UNCITRAL Secretariat described it as constituting a sound and promising basis for the desired harmonization and improvement of national laws on arbitration. The UML was designed to meet concerns due to the finding that domestic laws are often inappropriate for international cases. The Secretariat detailed the disparities in these national laws, noting that some are

7 *G.R. No. 136154, February 7, 2001, 351 SCRA 373.*

8 *National Union Fire Insurance Co. v. Stolt-Nielsen, Philippines, Inc., GR No. 87958, 26 April 1990, 184 SCRA 682 (1990),*

9 *Rep. Act No. 9285 (2004), hereinafter cited as the ADR Law, sec. 19*

outdated, others were intended for domestic arbitration primarily, if not exclusively, and a few equated arbitration with court litigation. The inadequacy of, and disparity between national laws cause difficulties in the resolution by arbitration of international disputes. Hence, the UML provides an international standard which is acceptable to parties from different States and legal systems.[10]

The ICC Court of Arbitration

The International Court of Arbitration of the International Chamber of Commerce or the ICC Court, in existence since 1923, is the leading private institution which administers international commercial arbitration cases. The function of the ICC Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with the ICC Rules of Arbitration. The Foreword to the ICC Rules of Arbitration published in October 2004 declared that national laws on arbitration have been modernized and international treaties on arbitration signed or adhered to around the globe. To the ICC, arbitration is the answer to the growing demand of parties (to disputes) for certainty and predictability, greater rapidity and flexibility as well as neutrality and efficacy in the resolution of international disputes.

The present ICC Rules of Arbitration came into effect on 1 January 1998. They are the result of an intensive, worldwide consultation process and constitute the first major revision of the Rules in more than 20 years. These Rules are designed to minimize delays and ambiguities. Even if arbitration practice continues to evolve, the basic features of the ICC Rules remain universal and flexible. And, while the ICC Rules have been especially designed for arbitrations in an international context, they may also be used for non-international cases.[11]

The Washington or ICSID Convention

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States came into force on 14 October 1966. The Washington Convention or the ICSID Convention as it is now known provides for the settlement of disputes between host states and foreign investors through the International Center for Settlement of Investment Disputes or ICSID. Its historical background is that, before the 60's, the World Bank as an institution and its President, in his personal capacity, have assisted in mediation or conciliation of investment disputes between host states and foreign investors. The creation of the ICSID was in part intended to relieve them of this burden. The World Bank's overriding consideration in creating ICSID, however, was the belief that an international institution specially designed to facilitate the

10 Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, par. 8.

11 International Court of Arbitration Rules of Arbitration and Rules of Conciliation English Foreword, p. 7, March 1999.

settlement of investment disputes between host states and foreign investors could help to promote increased flows of international investment. In the words of the Executive Directors of the Bank:

> *"The Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement".*[12]

As noted at the outset, the number of cases submitted to ICSID has increased dramatically in recent years. In his speech at the ICSID Roundtable, in April 2005, at Washington, D.C., IN CELEBRATION OF THE 40TH ANNIVERSARY OF THE ICSID CONVENTION, Mr. Roberto Danino, Secretary-General of ICSID, disclosed that 140 States have signed and ratified the Convention. The increase in the number of Member States is small compared to the increase in the number of cases brought to ICSID particularly in the last decade alone. Out of the 178 cases brought to ICSID since its establishment, 142 were filed since 1995 only. Ten years ago, there were only five cases before ICSID and the amounts in dispute added up to some US$15 million. In 2005, there are 90 cases before ICSID, and the claims exceed US$25 billion. The Philippines has not been spared from getting involved in ICSID arbitration. It is currently the respondent in two cases while two other Asean countries, Malaysia and Indonesia, have one case each with the ICSID.

OVERVIEW

(1) UML
(2) ICC RULES OF ARBITRATION
(3) ICSID CONVENTION AND ARBITRATION RULES

UML

As said, for international commercial arbitration, the Philippine ADR Law provides that the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law or the UNCITRAL MODEL LAW or UML shall govern.

The UML embodies rules of arbitration that are usually adopted in ad hoc proceedings. Hence, it applies to international commercial arbitration, subject to any agreement in force between the State (applying the UML) and any other State or States. All the

12 *Report of the Executive Directors On The Convention on the Settlement of Investment Disputes between States and Nationals of other States, Part III, p. 40.*

provisions of the UML except articles 8,[13] 9,[14] 35,[15] and 36[16] apply only if the place of arbitration is in the territory of the State applying it. The UML states that an arbitration is international if: (1) the parties to an arbitration agreement have at the time of the conclusion of that agreement their places of business in different States; (2) the place of arbitration, the place of contract performance, or place of the subject matter of the dispute is situated in a State other than the places of business of the parties; or, (3) the parties expressly agree that the subject matter is international or relates to more than one country.[17]

The UML does not define the term "commercial". Article 1 calls for "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. This is in keeping with the usage of UML in ad hoc arbitration proceedings. The footnote to the Article, however, illustrates what is commercial. The ADR Law adopted this footnote by defining "commercial arbitration" as an arbitration that covers matters arising from all relationships of a commercial nature, whether contractual or not.[18] More particularly, relationships of a commercial nature include, but are not limited to any trade transaction for the supply or exchange of goods or services; distribution agreements; construction works; commercial representation or agency; factoring; leasing; consulting; engineering; licensing; investment; financing; banking; insurance; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[19]

The UML, considering that it is often resorted to in ad hoc arbitration, has broad provisions giving the parties freedom to conduct the arbitration proceedings in any manner they stipulate. In order, however, to make uniform arbitration proceedings, wherever taking place, the UML has minimum provisions dealing with, among others, national law and domestic court intervention and their implications on the conduct of the arbitration proceedings as well as on the arbitral award. Some of these UML provisions which define the role of the national law and limit the extent of court intervention are the following:

- The UML does not affect any other law of the State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of the UML;[20]
- In matters governed by the UML, no court shall intervene except where so provided therein;[21]

13 *Arbitration agreement and substantive claim before court.*
14 *Arbitration agreement and interim measures by court.*
15 *Recognition and enforcement.*
16 *Grounds for refusing recognition or enforcement.*
17 *UML, Art. 1[3].*
18 *ADR Law, Sec. 3, [g].*
19 *Ibid., Sec. 21.*
20 *Ibid., Art. 1, par. 5.*
21 *Ibid., Art. 5.*

- Among the matters which a court or other authority may perform are in instances where there was a failure in the appointment of arbitrators,[22] challenge of an arbitrator,[23] failure or impossibility to act of an arbitrator,[24] review of a preliminary ruling by the arbitral tribunal on jurisdiction,[25] and setting aside of an award;[26]
- A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. Where such action is brought, the arbitral proceedings may be commenced or continued and an award may be made while the issue is pending before the court.[27]
- It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court, an interim measure of protection and for a court to grant such measure.[28]

Similar to other rules of arbitration, the UML prescribes the jurisdiction of an arbitral tribunal constituted in accordance with its provisions and the manner of determining this jurisdiction:

- The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.
- A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of the defense.
- A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter is raised during the arbitral proceedings.
- The arbitral tribunal may rule on a plea regarding jurisdiction, either as a preliminary question or in the award on the merits.[29]
- Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary subject to security where appropriate.[30]

Almost all rules of arbitration, whether for ad hoc, institutionalized or specialized arbitration proceedings, contain post-award remedies and recourse against an award. The UML is no exception in that:

22 *Ibid., Arts. 11(3) and (4).*
23 *Ibid., Art. 13(3).*
24 *Ibid., Art. 14.*
25 *Ibid., Art. 16(3).*
26 *Ibid., Art. 34(2).*
27 *Ibid., Art. 8.*
28 *Ibid., Art. 9.*
29 *Ibid., Art. 16.*
30 *Ibid., Art. 17.*

- A party with notice to the other may request the arbitral tribunal to correct any errors in computation, clerical or typographical errors or errors of any similar nature in the award;[31]
- Unless there was a previous agreement to the contrary, either party may request the arbitral tribunal to make an additional award as to claims omitted from the award; [32] and
- A party may ask a court to set aside an award only for the grounds specified in Article 34, par. 2 such as lack of capacity of the parties to conclude an arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal and conduct of arbitral proceedings is contrary to parties' effective agreement or failing that, the UML; non-arbitrability of subject matter of dispute; and, violation of public policy including serious departures from fundamental notions of procedural justice.

As to recognition and enforcement of awards, the UML provides that:

- An arbitral award shall be recognized as binding and upon application in writing to the competent court shall be enforced; and,
- Recognition or enforcement of an arbitral award may be refused only for the specified grounds in Article 36 (which grounds are the same as those above for recourse against an award).

ICC Rules of Arbitration

As mentioned, institutionalized arbitration is conducted through organized bodies such as courts of arbitration, trade associations, and arbitration centers and institutes, each prescribing its own procedure. Foremost among these is the ICC Court of Arbitration. The preeminent institutional rules naturally would be the ICC Rules of Arbitration. Before going into the specific provisions of said Rules, a word about rules of arbitral institutions must be said. Firstly, as in rules for ad hoc arbitration, they do not detail all elements of arbitration proceedings. Instead, these rules cover only essential matters such as submission of the dispute, the appointment of arbitrators, rendition of the award, and payment of costs and fees. Secondly, in the absence of specific provisions, the arbitral tribunal or arbitrator(s) may decide on such other matters in the course of the conduct of the proceedings. Thirdly, institutional rules apply without

31 *Ibid., Art. 33.*
32 *Id.*

distinction regardless of the nature of the dispute, number or gravity of the issues, or the degree of complexity of the whole process. In the end, the conduct and result of the arbitration procedure vary from case to case.

Article 1, par 1 of the ICC Rules of Arbitration simply states that the function of the ICC Court is to provide for the settlement by arbitration of business disputes of an international character. The ICC Rules of Arbitration, however, may apply also to business disputes not of an international character. [33]

Among the pertinent features of the ICC Rules of Arbitration are:

- Article 6 on Effect of the Arbitration Agreement, if the respondent does not file an answer or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the ICC Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement may exist. In such a case, any decision as to jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.
- Article 6 further provides that unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.
- The decisions of the ICC Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and the reasons for such decisions shall not be communicated. [34]
- Article 23 on Conservatory and Interim Measures provides in part that the parties may apply to any competent judicial authority for interim or conservatory measures.
- Article 27 on Scrutiny of the Award by the Court provides that before signing any award, the arbitral tribunal shall submit it in draft form to the ICC Court which may modify as to form and without affecting the arbitral tribunal's liberty of decision may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the court as to its form.

33 *ICC Rules of Arbitration, Article 1, par. 1.*

34 *Ibid., Article 7, par. 4.*

- Article 28 on Notification, Deposit and Enforceability of the Award states that every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.
- Article 29 on Correction and Interpretation of the Award, the Arbitral Tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an Award or a party may apply for the correction of an error or for the interpretation of an Award. If the Arbitral Tribunal decides to correct or interpret the Award, it shall submit its decision in draft form to the ICC Court.

ICSID Convention and Arbitration Rules

Specialized arbitration involves particular kinds of disputes. As described in the Introduction, the best example of a specialized kind of international commercial arbitration is investment arbitration under the ICSID pursuant to the ICSID Convention and Arbitration Rules.

The ICSID Convention provides that the jurisdiction of ICSID shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated by that State) and a national of another contracting State, which the parties to the dispute consent in writing to submit to ICSID.[35]

"National of another Contracting State" includes (1) any natural person who had the nationality of a Contracting State other than the State party on the date on which the parties submitted such dispute to arbitration as well as on the date on which the request was registered but does not include any person who on either date had the nationality of the State party; (2) any juridical person which had the nationality of a Contracting State other than the State party on the date on which the parties submitted such dispute to arbitration; and, (3) any juridical person which had the nationality of the Contracting State party on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State.[36]

Any Contracting State may, at the time of ratification of the Convention or at any time thereafter, notify ICSID of the class or classes of disputes which it would or would not consider submitting to its jurisdiction. ICSID has the responsibility of notifying all Contracting States thereof.[37]

35 *ICSID Convention, Article 25 par. 1.*
36 *Ibid., Article 25, par. 2.*
37 *Ibid., Article 25, par. 4.*

Article 26 of the ICSID Convention is likewise significant. It provides that consent of the parties to arbitration shall, unless otherwise stated, be deemed consent to ICSID arbitration to the exclusion of any other remedy. A Contracting State may, however, require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention.

Further, in Article 27, no Contracting State shall give diplomatic protection[38] or bring an international claim respecting a dispute between one of its nationals and another Contracting State which they have submitted to ICSID unless the latter State has failed to abide by and comply with the award rendered.

The ICSID Arbitration Rules cover the period of time from the dispatch of the notice of registration of a request for arbitration until an award is rendered and all challenges possible to it under the Convention have been exhausted. The salient features of the ICSID Arbitration Rules insofar as pertinent to the discussion are the following:

- Any objection to the jurisdiction of ICSID shall be filed as early as possible with the ICSID Secretary-General. The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or an ancillary claim is within ICSID jurisdiction and within its own competence. The Tribunal may deal with the objection as a preliminary question or join it to the merits. If it decides that the dispute is not within the jurisdiction of ICSID or not within its own competence, the Tribunal shall render an award to that effect.[39]
- Within 45 days after an award is rendered, either party may request a supplementary decision on, or rectification of, the award. If the request is received by the Secretary General more than the 45 days, he shall not register the request.[40]
- An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General. An application for revision must be made within 90 days after discovery and in any event within 3 years from rendition of the award or any subsequent decision or correction.
- An application for annulment of an award or any subsequent decision or correction must be made with 120 days from rendition of award and in any event within 3 years from rendition of the award, subsequent decision or correction, on any of the following grounds:

38 *Diplomatic protection does not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute. (Ibid., Article 27, par.2)*

39 *ICSID Arbitration Rules, Rule 41.*

40 *Ibid., Rule 49 pars. 1 and 5.*

- the Tribunal was not properly constituted;
- the Tribunal has manifestly exceeded its powers;
- there has been a serious departure from a fundamental rule of procedure;
- the award has failed to state the reasons which it is based; or,
- in case of corruption on the part of a member of the Tribunal.[41]

Upon registration by the Secretary-General of an application for annulment, he shall request the Chairman of the Administrative Council to appoint an ad hoc Committee. Moreover, the other rules that may apply at this stage of the ICSID proceedings are:

- Rule 54 allows provisional stay of enforcement of award when a party applying for the interpretation, revision or annulment requests it; and
- Rule 55 on Resubmission of Dispute after an Annulment states that if the ad hoc Committee annuls part or all of an award, either party may request the resubmission of the dispute to a new Tribunal. If the original award was annulled only in part, the new Tribunal shall not reconsider any portion of the award no so annulled. It may however stay the enforcement of the unannulled portion of the award until the date its own award is rendered.

41 *Ibid., Art. 50.*

Indonesia's Cross-Border Statutes to Curb Money Laundering Criminal Activities

By Agus Brotosusilo

Background

It was not until February 11, 2005 when the Financial Action Task Force (FATF) announced at the Paris plenary session that Indonesia was removed from the Non-Cooperative Countries and Territories (NCCT) list. Formerly, the country was categorized as a "safe-haven" for money laundering criminal activities. Since June 1, 2001 the country had been classified as a non-cooperative country (NCCTs) by the Financial Action Task Force (FATF). In 17 April, 2002 the country promulgated Law Number 15, 2002 concerning the Crime of Money Laundering (UU-TPPU).[1] But the Law was not considered as compliant yet with the international standard to curb money laundering. Even though the country amended the Law on Money Laundering by Law Number 25, 2003, the amendment did not alter the status of a non-cooperative country by the Financial Action Task Force (FATF).[2]

Definitions

Law No. 15, as amended, defines the crime of money laundering as an act of placing, transferring, disbursing, spending, donating, contributing, entrusting, taking out of the country, exchanging or other such acts related to, assets known or reasonably suspected by a person to constitute the proceeds of crime, for the purpose of hiding or disguising the origins of assets as if such assets shall be legitimate.[3]

Furthermore, the law defines the proceeds of crime shall be Assets derived from the offence of:

a. Corruption;
b. Bribery;
c. Smuggling of goods;
d. Smuggling of workers;
e. Smuggling of immigrants;
f. Banking offences;
g. Capital market offences;

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1 *State Gazette of the Republic of Indonesia Year 2002 Number 30, Supplement to State Gazette Number 4191*

2 *PPATK: Question & Answer, 2005, p. 5.*

3 *Law Number 15, 2002 concerning the Crime of Money Laundering, as amended by the Law Number 25, 2003*

h. Insurance offences;
i. Narcotics offences;
j. Psychotropic substance offences;
k. Trade in people;
l. Illegal trading in arms;
m. Kidnapping;
n. Terrorism;
o. Theft;
p. Embezzlement;
q. Fraud;
r. Counterfeiting of currencies;
s. Gambling;
t. Prostitution;
u. Taxation offences;
v. Forestry offences;
w. Environmental offences;
x. Maritime offences; or
y. Other offences for which the penalty that may be imposed is a sentence of 4 years imprisonment or more; committed in the territory of The Republic of Indonesia or outside the territory of The Republic of Indonesia and such crime is also a crime according to Indonesian law; and
z. Assets employed directly or indirectly for terrorist activities.[4]

Authority

Law Number 15, year 2002 which was revised by Law Number 25, year 2003 (UU-TPPU), provided for the establishment of PPATK as Indonesian Financial Transaction Reports and Analysis Center (IFTRAC). The Law positioned PPATK as the focal point in the anti-money laundering regime in Indonesia. PPATK is an institution with the mission of preventing and eradicate money laundering in Indonesia. The Law stipulated that the Center for Financial Transactions Reporting and Analysis hereinafter referred to as the PPATK shall be an independent agency established in the context of prevention and eradication of the crime of money laundering.[5] Furthermore, the Presidential Decree Number 81, 2003 concerning the Working Procedure of the Power of the Center for Financial Transactions Reporting and Analysis in Article 1: (2) elaborates the meaning of PPATK as an independent agency and that the agency shall be responsible to the President.

4 *Article 2, Law Number 15 year 2002 which was revised by Law Number 25 year 2003.*
5 *Article 1: (10).*

Functions and Duties of PPATK

Article 26 of Law Number 15, 2002 as amended by Law Number 25 year 2003, stipulates that in the course of implementing its functions PPATK has the following duties:

a. Collect, maintain, analyze and evaluate information obtained by the PPATK in accordance with this Law;
b. Monitor records in the exempt registry prepared by Providers of Financial Services;
c. Prepare guidelines for procedures for reporting of suspicious financial transactions;
d. Provide advice and assistance to relevant authorities concerning information obtained by the PPATK in accordance with the provisions of this Law;
e. Issue guidelines and publications to Providers of Financial Services concerning their obligations as set forth this Law or in other prevailing laws and regulations, and assist in detecting suspicious customer behavior;
f. Give recommendations to the Government concerning measures for the prevention and eradication of money laundering criminal acts;
g. Report the results of analysis of financial transactions indicating the existence of the crime of money laundering to the Police and to the Public Prosecutor's Office;
h. Prepare and provide reports regarding the results of analysis of financial transactions and other activities once every 6 (six) months to the President, the Peoples' Representative Assembly, and to agencies authorized to conduct supervision of Providers of Financial Services; and
i. Provide information to the public concerning its institutional performance, to the extent that such disclosure is not contrary to the provisions of this Law.

The Power of PPATK

Article 27 Law Number 15, 2002 as amended by Law Number 25, 2003, stipulates that in performing its tasks, the PPATK has the following powers:

a. To request and receive reports from Providers of Financial Services;
b. Request information concerning the progress of investigation or prosecution of money laundering criminal acts reported the investigator or public prosecutor;
c. Conduct audits of Providers of Services in respect of their compliance with the provisions of this Law and guidelines for reporting financial transactions;
d. Grant exemptions from the reporting obligation for financial transactions using cash referred to in Article 13 paragraph (1) sub-paragraph (b) of the Law, Number 15, 2002 as amended by Law Number 25, 2003.

In conducting audits as referred to in Article 27, sub-paragraph c, the PPATK should

first coordinate with agencies' Supervising Providers of Financial Services. Furthermore, the Law stipulates that in the exercise of the powers referred to in this paragraph, the provisions of other laws related to bank secrecy and the secrecy of other financial transactions shall not apply to the PPATK.

The Law also provides that the provisions on the procedures for implementing the powers of PPATK shall be further stipulated by Presidential Decree.

Implementing Laws

In order to support the efficiency of duties and to implement the authority of the Center for Financial Transactions Reporting and Analysis as referred to in Article 26 and Article 27 of Law Number 15 Year 2002 concerning the Money Laundering Criminal Acts as amended by Law Number 25 Year 2003, the Government of Indonesia stipulated Presidential Decree Number 81, 2003 concerning the Working Procedure of the Power of the Center for Financial Transactions Reporting and Analysis, and Presidential Decree Number 82, 2003 concerning Procedure for Implementing Powers of the Center for Financial Transactions Reporting and Analysis.

According to this Decree, the duties and the function of the PPATK is exactly the same as articles 26 and 27 of the Law Number 15, 2002 as amended by Law Number 25, year 2003. Furthermore, the Decree elaborated that in order to perform its powers to request for and to receive reports on suspicious financial transactions and cash transactions, the PPATK shall:

a. Request for and receive reports on suspicious financial transactions and cash transactions;
b. Request for additional information in the event that reports submitted by Providers of Financial Services are incomplete, disbelieved for its truth, or need further clarification as required;
c. Request for other information in relation to suspicious financial transactions from Providers of financial services, reporting parties or other providers of financial services;
d. Stipulate procedures for reporting suspicious financial transactions and cash transactions for Providers of financial services. [6]

In order to perform its powers to request information concerning the progress of investigation or prosecution of money laundering and other criminal acts reported to the investigator or public prosecutor, the PPATK shall:

a. Request for information from the investigator or public prosecutor on progress of investigation or prosecution of money laundering crimes;

6 *Article 3, Presidential Decree Number 82, 2003 concerning Procedure for Implementing Powers of the Center for Financial Transactions Reporting and Analysis.*

b. Request for additional information on the progress of investigation and prosecution of money laundering crimes reported to the investigator or public prosecutor as needed;
c. Request for information as referred to in paragraphs (a) and (b) on a case-by-case or collectively.[7]

In order to perform its powers to conduct audits of Providers of Services in respect of their compliance with the provisions of this Law and guidelines for reporting financial transactions, the PPATK shall:

a. Audit for certain time as needed;
b. Request for and oblige Providers of financial services to provide document, data, record and information owned and or controlled by Providers of financial services;
c. Enter into the area, land, building or other properties owned or controlled by Providers of Financial Services.[8]

The Decree also stipulated that in conducting audit as referred to in paragraph (a), the PPATK shall first coordinate first with the authorized agencies to conduct supervision over Providers of Financial Services.[9] Audit on the Providers of Financial Services shall be conducted together with these authorized agencies,[10] and the procedures for auditing Providers of Financial Services shall be indicated in a decision of the Head of the PPATK.[11]

In order to perform its powers to grant exemptions from the reporting obligation for financial transactions using cash referred to in Article 13 paragraph (1) sub-paragraph b of the Decree, the PPATK shall:

a. Approve or disapprove request for the exemption of cash transactions reporting obligations proposed by Providers of Financial Services;
b. Examine list and administration of exempt cash transactions database made by Providers of Financial Services.[12]

The Decree provides that the Providers of financial services shall propose a request of the exemption of cash transactions reporting obligations in writing to the PPATK.[13] Procedures for requesting for the exemption of cash transactions reporting obligations

7 *Article 4, Presidential Decree Number 82, 2003 concerning Procedure for Implementing Powers of the Center for Financial Transactions Reporting and Analysis.*
8 *Article 5: (1). Presidential Decree Number 82, 2003 concerning Procedure for Implementing Powers of the Center for Financial Transactions Reporting and Analysis.*
9 *Ibid., Article 5: (2).*
10 *Ibid., Article 5: (3).*
11 *Ibid., Article 5: (4).*
12 *Ibid., Article 6.*
13 *Ibid., Article 6.*

shall be indicated in a decision of Head of the PPATK.[14] The Decree also mandated The PPATK to issue general guidelines on "Know Your Customer Principles" as guidelines for authorized institutions to conduct supervision over Providers of Financial Services.[15]

Protection of Reporting Parties and Witnesses

In the context of the implementation of examination process of criminal acts of money laundering, in accordance with Law Number 15, Year 2002 regarding Criminal Acts of Money Laundering as amended by Law Number 25, Year 2003, Reporting Parties and Witnesses need to obtain special protection from the State against any threats endangering themselves, the safety of their life and/or properties including their family from any party whatsoever.[16]

It is expected that by providing such special protection, Reporting Parties and Witnesses will feel that their safety is guaranteed enabling them to provide accurate information for the appropriate implementation of the judicial process in criminal acts of money laundering. Hence, it is expected that Reporting Parties and Witnesses will be able to participate actively in endeavors to prevent and eradicate criminal acts of money laundering.[17]

This Government Regulation also provides for the form and procedure for special protection granted to Reporting Parties and Witnesses including the protection for personal safety and/or the safety of their families against physical or mental threats, protection of their properties, keeping confidential and disguising the identity of Reporting Parties and Witnesses, and/or giving testimony without being confronted with the suspect or defendant during case examination level.[18]

In addition to the above and in the context of preventing and eradicating Criminal Acts of Money Laundering, special protection for Witnesses with regard to mutual assistance cooperation agreement in criminal cases with other States is also provided.

The regulation provides that Special Protection is a form of protection provided by the State to secure Reporting Parties or Witnesses against any possible threats[19] endangering such persons, their life, and/or their properties including their family. It specified that Reporting Parties is anyone who:

14 *Ibid., Article 6.*
15 *Ibid., Article 7.*
16 *General elucidation, Regulation of the Republic of Indonesia, Number 57 year 2003 concerning the Procedure for Special Protection of Reporting Parties and Witnesses in Criminal Acts of Money Laundering.*
17 *Ibid.*
18 *Ibid.*
19 *Ibid., Article 1.*

a. Due to their obligations under laws and regulations reports Suspicious Financial Transaction or Cash Financial Transaction as intended in the Law to the PPATK; or
b. Voluntarily reports to investigators alleged criminal acts of money laundering as intended in the Law.[20]

Furthermore, the Regulation determined that witnesses are persons capable of providing information regarding a criminal case of money laundering that they hear by themselves, see by themselves and experience by themselves, for the purpose of investigation, prosecution, and court hearing.[21]

The Regulation also determined that special protection must be provided for every Reporting Party or Witness in a case of criminal acts of money laundering, either prior to, during or following a case examination proceeding, by the Police of the Republic of Indonesia.[22] Reporting Parties and Witnesses shall not be charged for the special protection provided for them.[23]

Special protection as intended in Article 2 and Article 3 of the Regulation shall be provided in the following forms:

a. Protection of personal safety and/or the safety of the relevant Reporting Party's and Witness' family against physical or mental threats;
b. Protection of the Reporting Party's and Witness' property;
c. Keeping confidential and disguise the identity of the Reporting Party and Witness concerned; and/or
d. Giving testimony without being confronted with the suspect or defendant at any case examination level.

Cross-Border Statute, International Cooperation, and Law Enforcement

The Law Number 15 year 2002 which was revised by Law Number 25 year 2003 is a cross-border statute. The preamble of the Law stated that:

a. Whereas crime resulting in large amounts of Assets is increasing, both crime committed within the territory of The Republic of Indonesia as well as crime committed outside the State's borders; ...

20 *Ibid., Article 1.*
21 *Ibid., Article 1.*
22 *Ibid., Article 2.*
23 *Ibid., Article 4.*

b. Whereas money laundering is not only a national crime but also a transnational crime, therefore it has to be eradicated, among other things by engaging in regional or international cooperation through bilateral or multilateral forums;

Article 2 of the law stipulates that the proceeds of crime shall be Assets derived from the offence committed in the territory of The Republic of Indonesia or outside the territory of The Republic of Indonesia and such crime is also a crime according to Indonesian law.

Article 25: (3) of the Law stated that in the prevention and eradication of the crime of money laundering, the PPATK can engage in cooperation with relevant parties, both national as well as international.

Article 44B of the Law stated that in the event of developments in international conventions or international recommendations in the field of prevention and eradication of the crime of money laundering, the PPATK can, in accordance with this law, implement such provisions, in a manner consistent with law and regulation.

Furthermore, the general elucidation of the Law Number 15, year 2002 which was revised by Law Number 25, year 2003 stated that various crimes committed both by individuals as well as corporations within the territory of a country or across the borders of another country are increasing. Such crimes include among other things the criminal acts of corruption, bribery, smuggling, smuggling of workers, smuggling of immigrants, banking, illegal trafficking in narcotics and psychotropic substances, slavery, the illegal trade in women and children, illegal trading in arms, kidnapping, terrorism, theft, embezzlement, fraud and various white collar crimes. Attempts to hide or conceal the origins of assets derived from these criminal acts as intended in this Law are known as money laundering.

There are several treaty or international agreements that can be utilized to enforce this Cross-Border Statute regional as well as international, among others are:

- The Law Number 1, Year 1999 concerning A Treaty Between The Republic of Indonesia and Australia on Mutual Assistance in Criminal Matters; and

- The Law Number 1, Year 2001 concerning An Agreement Between The Republic of Indonesia and the Government of Hongkong for the Surrender of Fugitive Offenders.

The nature of these Laws is quite different. The Law Number 1, Year 1999 concerning A Treaty Between The Republic of Indonesia and Australia on Mutual Assistance in Criminal Matters is an agreement between two countries. But The Law Number 1 Year 2001 concerning An Agreement Between The Republic of Indonesia and the

Government of Hongkong for the Surrender of Fugitive Offenders is an agreement between Indonesia, a country, and Hongkong, which is not a country, but as a part of a country, hence, the People's Republic of China. The title of this agreement is not an "Extradition Agreement," but an "Agreement for the Surrender of Fugitive Offenders." Article 22 of the agreement stipulated that if there is an unresolved dispute regarding the interpretation or implementation of the agreement, the solution shall be conducted by consultation or negotiation between government of Indonesia and the sovereign government which is responsible for Hongkong foreign affairs, which is the government of the People Republic of China.

The Indonesian Foreign Minister confirmed that Indonesian Government has been working closely with various other governments in the region, and with the financial services industry, in order to frustrate and expose any attempt to use the country as a conduit for money laundering and financing of terrorism.[24] Indonesia has established cooperation in legal matters with a number of countries, particularly on extradition and mutual legal assistance in criminal matters. It has signed bilateral extradition agreements with Malaysia, the Philippines, Thailand, Australia, the Republic of Korea, and the People's Republic of China.[25]

In August 3, 2005 a new regional centre for joint law enforcement efforts between Indonesia and Australia was opened in Indonesia by Australian Justice Minister, Chris Ellison. The centre includes classrooms and conference facilities for training anti-money laundering officers. The Australian Government is contributing more than AUS$38 million over five years to the development of the facility.[26]

USAID is providing $3.2 million through FCPP (Financial Crime Prevention Project) implemented by Booz Allen Hamilton over two years to assist Indonesia to create a modern legal and institutional framework to detect and prosecute financial crimes, and to facilitate cooperation among the interested ministries and agencies responsible for financial crime prevention. USAID Grantee, FSVC (Financial Sector Services Corps), is also playing a role working with Indonesia Central Bank and commercial banks on Know-Your-Customer principles; and in training Indonesia's Attorney General on anti-money laundering (AML) prosecutions. USAID's efforts are assisting the Government to fight financial crime and corruption, which will promote financial sector safety and soundness and lead to increased investment, growth and job creation.[27]

24 *Statements by Indonesian Foreign Minister in The Conference on Combating Money Laundering and Terrorist Financing, Nusa Dua, Bali, 17 December 2002.*

25 *Ibid.*

26 *Hammersley, John, "United Kingdom: A Month in Money Laundering - August 2005," 19 September, 2005.*

27 *USAID-INDONESIA.*

Suspicious Transaction and Cash Transaction Reports

For compliance with international standards, the Law Number 15 Year 2002 concerning the Money Laundering Criminal Acts was amended by Law Number 25, Year 2003. Despite the amendment, the Financial Action Task Force (FATF) has not helped restore the status of Indonesia as a non-cooperative country NCCTs). The FATF was in opinion that the status of the country does not only depend upon the compliance of the Law with the international standard, but also to build upon the implementation of the Law. [28]

The FATK clarified several weaknesses of the PPATK which, among others include the loophole in regulations on the monetary sector, i.e.:

- There is no provision concerning mandatory fit and proper test for non-bank insitutions;
- Impediments in the regulation concerning non-financial sectors;
- Lack of international cooperation; and
- Lack of human resources in an effort of to deter and to eradicate money laundering criminal activities. [29]

The worst observation is that Indonesia has no regulation which determined money laundering as a criminal offence.

Data in the early of 2004 shows that PPATK recorded 410 reports on Suspicious Transaction Report (STR) from 34 Financial Services Providers, all of which are in general banking. Among the reports, 291 STRs are the findings of Special Unit of Banking Investigation – Indonesian Central Bank. The analysis by PPATK concluded that 59 cases are designated as money laundering criminal activities. In accordance to the law, PPATK submitted its finding to the Indonesian Police Department and the Public Attorney. The Police Department has reported that five STR cases were submitted to the Prosecutor, two cases were dropped due to lack of criminal elements, and five cases were dropped due to procedural matters. This year, two cases are in trial stage. The recent PPATK data on Suspicious Transaction Reports and Cash Transaction Reports are as follows:

28 *PPATK: Question & Answer, 2005, p. 5.*

29 *Ibid,. p. 4.*

Suspicious Transaction Reports
and Cash Transaction Reports
As of 30 July 2005

1. Suspicious Transaction Reports (STR)

1.a. STR filed to PPATK

Reporting institutions	The number of reporting institutions	# of STR
Commercial bank	93 Banks, 1 Rural Bank	2.355
Non bank financial institutions		
Securities	4	5
Money changer	6	9
Pension fund	1	1
Financing company	3	6
Insurance	5	16
Sub total non bank financial institutions		37
Total STRs filed		2.392

*) All STRs are being analyzed, if meeting money laundering criteria, the results are disseminated to law enforcement agencies, as follows:

1.b. The number of cases disseminated to the law enforcement agencies (LEA)

LEA	Number of cases	Description	ML / Non ML
Police	304	Derived from analysis on 584 STR	227/84
Prosecutor	3	Derived from analysis on 11 STR	2/-
Total	307	Derived from analysis on 595 STR	227/84

2. Cash Transaction Reports (CTR)

The number of Financial Service Provider filing CTR	:	142*
The number of CTR (received through online and manual)	:	1.304.336 Reports

*) 112 commercial banks, 20 money changers, 8 rural banks, 2 insurance

Source: PPATK, 2005.

One of the STR cases in early 2004 involved The Jakarta Stock Exchange. The government anti money-laundering agency admitted on January 27, 2004 that "hot money" being laundered through the local stock market might have been a key driver behind the high-flying bourse in recent months. Yunus Husein, chairman of the Financial Transaction and Report Analysis Center (PPATK), said that a money-laundering probe was in full swing. [30]

Yunus' remarks should confirm earlier suggestions by a number of economists that "hot money:" had played a role in pushing the Jakarta Stock Composite Index to recent record highs, especially when taking into account that little had been done to improve the fundamentals of local companies. The Jakarta stock market -- despite suffering a setback this week due to heavy profit-taking and the bird flu outbreak -- has been on an upward bound roller-coaster ride over the last several months. The index is currently hovering at a level higher than it was before the 1997-98 economic crisis, reaching new record highs several times in recent weeks. [31]

PPATK also confirmed that it was investigating a report alleging that a high-profile political party figure had received part of the Rp 1.7 trillion embezzled from state-owned Bank Negara Indonesia (BNI) in a lending scam. Yunus did not provide the name or the party, but did predict that funds derived from money-laundering activities by or for political parties might increase during this year's national election campaigns. There seems to be a gaping window-of-opportunity for such machinations, particularly because there is no law or regulation that authorizes any institution to track the sources of funds for each political party. [32]

The most interesting STR case involves the account of 15 Police officials. It has been well-known that among the most corrupt public officials in Indonesia are the Custom Officials, [33] Tax Officials, [34] and Police Officers. [35] The Financial Transactions and Report Analysis Center (PPATK) submitted a report to the National Police in August on money laundering activities allegedly committed by 15 serving police officers, including some generals. The PPATK said that suspicious transactions had occurred in the bank accounts of the officers and that the amount of money involved was "huge", much higher than the salaries of even police generals. Neither the police nor the PPATK, Indonesia's anti-money laundering watchdog, have disclosed the names of the officers. [36]

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30 *The Jakarta Post, January 31, 2004.*

31 *Ibid.*

32 *Ibid.*

33 *LPEM, in cooperation with the World Bank: "Research on Custom Practice in Indonesia", 2005.*

34 *Rendi A. Witular: "Graft spirals out of control at tax office". The Jakarta Post, Friday, December 10, 2004.*

35 *See: Agus Brotosusilo, "International Trade Law Indicators, 2003: Indonesia." Indonesian Journal of International Law, Vol. 1., No. 2, January, 2004. See also: Seminar on Strategy to Curb Corruption in Indonesian Police Institution (Seminar Strategi Penanggulangan Korupsi di Tubuh Kepolisian RI), Conducted by Perguruan Tinggi Ilmu Kepolisian, Jakarta: Februari 12, 2004, Kompas Daily, February 13, 2004.*

36 *Witular, Rendi A. "Sutanto urges media not to exaggerate money laundering case," The Jakarta Post, September 22, 2005.*

At present, the National Police's internal affairs division is investigating the report. The public wondered whether the National Police will conduct the investigation properly, since the suspect is an active Police Officer. National Police Chief Gen. Sutanto has appealed to the mass media not to exaggerate reports of the alleged money laundering case in which the 15 police officers have been implicated. He said there was no need to continue with intensive coverage of the crime as the police were committed to investigating and resolving it. Sutanto said resolving the money laundering case was crucial to showing the international community that Indonesia was serious in supporting the global fight against money laundering. Analysts have requested that the government transfer the investigation of the money laundering case to the KPK (the Corruption Eradication Commission) in order to effectively track down the source of the money and to be more independent in handling the case.[37]

Meanwhile, the Chairman of the Corruption Eradication Commission (KPK), Taufiqurrahman Ruki said the agency was now in the process of tracking down the source of the funds in the bank accounts of the 15 police officers. The agency, however, is only willing to track down and investigate accounts belonging to high- and middle-ranking officers, while those owned by low-ranking officers will be handled by National Police Headquarters. Taufiqurrahman said that he would not try to cover up the case or to keep it out of court, although he was a former police officer and would likely face his former juniors in the police force. He also mentioned: "The public can be suspicious of me handling the case since I am a former police officer. But that is okay. I will try to prove that I am independent, and that the KPK has the courage to handle the case."[38]

Conclusion

Indonesia has successfully drafted and amended the Law concerning the Crime of Money Laundering but the country has been struggling to enforce the Law. As a result, the country mission to provide financial intelligence to law enforcement and provide inter-agency cooperation for preventing and eradicating money laundering, as well as supporting a sound domestic financial system as part of Indonesia's Anti Money Laundering Regime, has not been accomplished yet. In order to pursue this goal, it is a necessity for the country not only to improve its legal instruments, but also to strengthen the institutional as well as to structure the political support of the ruling power to curb the money laundering criminal activities.

37 *Ibid.*
38 *Ibid.*

Cross Border Statutes and Other Measures To Curb Money Laundering -- Malaysia

*By Rozita Abd. Ghani Rahayu Ahmad**

Introduction

Over the past 25 years, there has been growing concern over the threat posed by modern and sophisticated forms of transnational crime. This is in contrast with the 19th century when issues of criminal justice policy were thought of in almost exclusively national terms. More countries in the world are beginning to see the importance of enhancing co-operation and coordination in the fight against cross border criminal activities. This shows that reliance on unilateral domestic legislative and law enforcement measures is no longer sufficient. One of the factors that has contributed to the growth of cross-border criminal activity is the technological revolution. While technological developments have brought economic benefits and led to growth in world trade, they have also provided criminals with new opportunities and wider geographical horizons to carry out money laundering activities. For example, mass communications have facilitated contacts with criminal associates in other continents whilst modern banking has facilitated international criminal transactions and give criminals access to new channels that enables them to launder huge illicit profits.

Money laundering can have severe macroeconomic consequences on a country. It cause unpredictable changes in money demand, pose risks to the soundness of financial institutions and financial systems, contaminate legal financial transactions, and increase the volatility of international capital flows and exchange rates due to unanticipated cross-border transfers. Money laundering can also have a dampening effect on foreign direct investment if a country's commercial and financial sectors are perceived to be under the control and influence of organized crime. The most obvious reason to establish anti-money laundering measures is to stop criminals from benefiting from money laundering, specifically:

a. to stop them from enjoying the benefits of their profits (this may act as a deterrent as well as a punishment);
b. to prevent them from reinvesting their funds in future criminal activities (that is to strip them of their working capital base); and

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c. to provide the criminal justice system with a means to detect and investigate criminal activities by providing an audit trail and an evidentiary link for prosecution purposes between criminal acts and major organisers.

In recognising the need for a consolidated and concerted effort in anti-money laundering, Malaysia has taken various measures, namely, the enactment of Anti-Money Laundering Act 2001 (AMLA) and development of counter-measures for sharing of information and law enforcement cooperation. The following conclusion was drawn by the Asia/Pacific Group on Money Laundering (APG) evaluators from the mutual exercise carried out in Malaysia in July 2001 -

"Malaysia has made significant progress in establishing an appropriate anti-money laundering regime in the last few years".

Statutes addressing cross border money laundering in Malaysia AMLA

The AMLA was gazetted on 5 July 2001 and came into force on 15 January 2002. The AMLA provides for the offence of money laundering in general, investigation, freezing, seizure and forfeiture of the proceeds of serious crimes, suspicious transaction reporting and record-keeping. The AMLA also provides for the establishment of a competent authority to be appointed by the Minister of Finance. In this regard, the Central Bank of Malaysia was appointed as the competent authority effective 15 January 2002. The Financial Intelligence Unit of the Central Bank of Malaysia is the secretariat to a coordinating committee consisting of several enforcement agencies which is responsible to administer and enforce the AMLA together. Currently, the AMLA sets out 176 money laundering predicate offences under 22 Acts of Parliament[1]. In curbing money laundering internationally, the AMLA provides the following provisions:

(a) **Section 4** – makes it an offence for any person to engage in, attempt to engage in or abets the commission of money laundering. "Money laundering" has been defined to mean the act of a person who engages in a transaction that involves proceeds of any unlawful activity. Meanwhile, "unlawful activity" has been defined to mean a serious offence, as specified in the Second Schedule, or a foreign serious offence. By virtue of this definition, if a person commits an offence in a foreign country as stated in a certificate issued by the government of that foreign country and such offence would have been a serious offence in Malaysia, the person could also be caught under section 4 if he launders money in Malaysia.

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1 *Predicate offences under the Second Schedule of the AMLA are provided in the following statutes: Anti-Corruption Act 1997, Banking and Financial Institutions Act 1989, Betting Act 1953, Child Act 2001, Common Gaming Houses Act 1953, Companies Act 1965, Copyright Act 1987, Customs Act 1967, Dangerous Drugs Act 1952, Dangerous Drugs (Forfeiture of Property) Act 1988, Development Financial Institutions Act 2002, Explosives Act 1957, Firearms (Increased Penalties) Act 1971, Futures Industry Act 1993, Insurance Act 1996, Internal Security Act 1960, Kidnapping Act 1961, Money-Changing Act 1998, Optical Discs Act 2000, Penal Code, Securities Industry Act 1983 and the Takaful Act 1984.*

(b) **Section 10** - allows the Central Bank of Malaysia to communicate financial intelligence to a corresponding authority of a foreign State pursuant to any existing arrangement between Malaysia and the foreign state. The Central Bank of Malaysia may enter into Memorandum of Understanding (MOU) with a corresponding authority in that foreign state on co-operation in the exchange of financial intelligence subject to the following conditions:

(i) the exchange of financial intelligence is limited to information obtained by the Central Bank of Malaysia under section 14 of the AMLA;

(ii) there exists a Government-to-Government arrangement between Malaysia and the foreign State under which the corresponding authority of the foreign state has agreed to communicate to Malaysia, upon Malaysia's request, information received by them that corresponds to any thing required to be disclosed to the Central Bank of Malaysia under section 14 of the AMLA;

(iii) the Central Bank of Malaysia is satisfied that the foreign corresponding authority has given appropriate undertakings-

(I) for protecting the confidentiality of any thing disclosed to it; and
(II) for controlling the use that will be made of it, including an undertaking that it will not be used as evidence in any proceedings.

Currently, Malaysia has signed MOUs for the sharing of financial intelligence with the Australian Transaction Reports and Analysis Centre (AUSTRAC) on 29 January 2003, the Indonesian Financial Transaction Reports and Analysis Centre (INTRAC) on 31 July 2003 and the Anti-Money Laundering Council, the Republic of Philippines on 4 August 2004.

(c) **Section 23** - requires any person leaving or entering Malaysia with an amount in cash, negotiable bearer instruments or both, exceeding such value as the competent authority may prescribe by order published in the Gazette, to declare to the competent authority such amount in such form as the competent authority may specify. Any person who contravenes subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both. Currently, this requirement is dependent on the enforcement of sections 24 and 25 of the Exchange Control Act 1953.

Under ECM 13, a subsidiary legislation issued under the Exchange Control Act 1953, a resident who carries ringgit notes exceeding RM1,000 on his person or in his baggage-

i. upon his arrival in Malaysia from any place outside Malaysia; or
ii. upon his leaving Malaysia for any destination outside Malaysia,

is required to seek the permission of the Controller of Foreign Exchange and to declare the actual amount in the Travellers' Declaration Form (TDF). The same requirement applies to any non-resident traveller but the declaration is made in the IMM 26

form. With respect to foreign currency, a resident is required to seek permission if the amount of foreign currency that he brings out of Malaysia exceeds RM10,000 equivalent and also to make a declaration in the TDF. There is no limit on the amount of foreign currency that a non-resident traveller carries into Malaysia but if the amount that he brings out exceeds the amount that he brings into the country, permission needs to be obtained. Declaration needs to be made by the non-resident in the IMM 26 form if the amount of foreign currency exceeds USD 2,500.

(d) **Section 29(3)** - empowers the Central Bank of Malaysia with any relevant enforcement agency in Malaysia to coordinate and cooperate with any law enforcement agency in and outside Malaysia in investigations of any serious offence, for example the laundering of proceeds from the "anti-terrorist" offence under the Penal Code and investigations of any foreign serious offence.

(e) **Section 82** - stipulates the circumstances where an act is an offence under the AMLA, i.e. where the act is committed on the high seas on board any ship or on any aircraft registered in Malaysia, by any citizen or any permanent resident on the high seas on board any ship or on any aircraft or by any citizen or any permanent resident in any place outside and beyond the limits of Malaysia may be dealt with as if it had been committed at any place within Malaysia. However, no charge as to any offence shall be inquired into in Malaysia unless a diplomatic officer of Malaysia, if there is one, in the territory in which the offence is alleged to have been committed certifies that, in his opinion, the charge ought to be brought in Malaysia and where there is no such diplomatic officer, the sanction of the Public Prosecutor shall be required.

Mutual Assistance in Criminal Matters Act 2002 (MACMA)

The MACMA which came into force on 1 May 2003 provides comprehensive international assistance in criminal matters including:

(a) providing and obtaining evidence and things;
(b) the making of arrangements for persons to give evidence, or to assist in criminal investigations;
(c) the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence;
(d) the restraining of dealing in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence;
(e) the execution of requests for search and seizure;
(f) the location and identification of witnesses and suspects;
(g) the service of process such as issuance of summons, warrant and order by any court or any judge;
(h) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission

of a serious offence or a foreign serious offence;

(i) the recovery of pecuniary penalties in respect of a serious offence or a foreign serious offence; and

(j) the examination of things and premises.

MACMA extends the scope of assistance and cooperation to any offence which, upon conviction, is liable to imprisonment for a term of one year and above, or the death penalty. The term "serious offence" under MACMA includes offences of money laundering and financing of terrorist. The MACMA does not limit other formal and informal cooperation with international organisations like INTERPOL. Although MACMA went into effect on 1 May 2003, according to sections 16 and 17, legal assistance to foreign countries may be given as long as there is a treaty or other agreement between Malaysia and the requesting foreign country in principle. Even if there is no treaty or agreement, similar assistance may be given to any foreign country by the special direction of the Minister. However, extradition is not covered under MACMA but is dealt with under the Extradition Act 1992.

Extradition Act 1992

The Extradition Act 1992 aims to deny asylum to a fugitive criminal. By mutual agreement, Malaysia has entered into an arrangement with Hong Kong, Indonesia, Thailand and United States to extradite fugitives accused or convicted of extraditable offences.

Other Measures to Curb Money Laundering

(i) Domestic cooperation

The National Coordination Committee to Counter Money Laundering (NCC) is an inter-agency committee specially set up to counter money laundering at the national level. The NCC was established in April 2000 to ensure adequate co-operation and information sharing among the different government agencies. It enables its members to be informed of any new or developing technologies of money laundering techniques. The NCC's relationship with the Asian/Pacific Group on Money Laundering (APG) also provides an international channelling of information to the enforcement agencies, supervisory and regulatory authorities in Malaysia of which some are members of the NCC. The NCC consists of 13 different government agencies, that is, the Central Bank of Malaysia, Ministry of Finance, Attorney-General's Chambers, Ministry of Foreign Affairs, Ministry of Home Affairs, Royal Malaysian Police, Anti Corruption Agency, National Drug Agency, Royal Malaysian Customs, LOFSA, Securities Commission, Companies Commission of Malaysia and Inland Revenue Board. The NCC has adopted a set of Terms of Reference to guide its activities. The NCC's objectives are as follows:

- Develop national policy on measures to counter money laundering.
- Coordinate national policies with regional and international initiatives.
- Agree on action plan for the countering of money laundering in Malaysia.

- Ensure Malaysia complies with its APG membership requirements and paragraph 15 of the UN Political Declaration and Action Plan Against Money Laundering, that is to have anti-money laundering legislation in place by year 2003.
- Develop and ensure proper implementation of measures to counter money laundering based on internationally accepted standards, i.e. 40 Recommendations of the Financial Action Task Force.
- Identify and remedy any overlap or discrepancy between the existing and proposed measures to counter money laundering.
- Monitor the effectiveness of measures that have been implemented.
- Liaise with foreign governments and international organisations or bodies on matters relating to money laundering which includes terrorism.

Each NCC member agency is responsible for inter alia research into matters relating to money-laundering, sharing of information and reporting on progress. Each NCC member agency nominates a person to act as the central contact point for all communications between the NCC member agencies and the NCC to keep abreast of any developments in the country relating to money laundering efforts. Initiatives may be taken by the member agency concerned depending on the question. In addition to meeting as the need arises, the NCC meets every quarter to discuss the implementation of the AMLA.

(ii) International Cooperation

(a) Egmont Group

The FIU in the Central Bank of Malaysia has been admitted as a member of the Egmont Group of Financial Intelligence Units at its Plenary Meeting in July 2003. The Egmont Group is an informal international grouping which has emerged in a specific anti-money laundering context. Malaysia's membership in the Egmont Group would pave the way for international co-operation in term of sharing of financial intelligence amongst corresponding authorities.

(b) Asian/Pacific Group on Money Laundering (APG) :

Malaysia became a member of the APG on 31 May 2000 and was the co-chair, together with Australia, until its term ended in June 2002. The APG conducted mutual evaluation exercises on Malaysia as well as its offshore financial centre in Labuan on 9-12 July 2001 and 2-6 April 2001 respectively. The reports of these evaluation exercises have been very positive and have commended Malaysia's efforts to counter money laundering.

Exchange of Information and Technical Assistance

Malaysia has entered into a few international agreements in relation to combat money laundering as follows:

(a) Malaysia, Indonesia and the Philippines signed a Trilateral Agreement on Information Exchange and Establishment of Communication Procedures on 7 May 2002 to strengthen co-operation in addressing cross-border incidents and transnational crimes. Through the treaty, the intelligence agencies of the three countries would be able to work more cohesively in the fight against terrorism. The treaty is open to participation by other ASEAN nations and acts as a signal for their involvement in efforts to combat terrorist activities. To date Cambodia, Thailand and Brunei have acceded to the Agreement. Malaysia has signed a Joint Declaration of Cooperation to Combat International Terrorism with the United States on 14 May 2002, which, among others, allows for the disclosure of intelligence and terrorist financing information, documents or data.

(b) ASEAN-US Joint Declaration on Cooperation to Combat International Terrorism was signed on 1 August 2002. A Memorandum of Understanding on Cooperation to Combat International Terrorism was also signed on 2 August 2002 with Australia. Malaysia has signed a Treaty on Mutual Legal Assistance in Criminal Matters with 7 ASEAN countries, namely, Brunei, Cambodia, Indonesia, Lao PDR, the Philippines, Singapore and Vietnam on 29 November 2004. Two other ASEAN countries, Thailand and Myanmar, are still in the process of considering signing the treaty. Among others, the Treaty will facilitate cross-border co-operation in gathering financial evidence for court proceedings.

Training Initiatives

Generally, Malaysia will participate in the training initiatives by organisations such as the IMF and ADB and will continue to upgrade the knowledge and skills required in financial investigations. Special emphasis is placed on continuous training of law enforcement officers and private sector personnel involved in implementing the AML/CFT initiatives. For example, the following training courses/workshops were conducted in the year 2005:

- Financial Investigation Training, 24 January–4 February 2005, Kuala Lumpur, organised by the ASEM Anti-Money Laundering Project in collaboration with the UNODC, Bangkok.
- Mutual Legal Assistance (MLA) training for Malaysia, 15–17 February, 2005, Kuala Lumpur, organised by the ASEM Anti-Money Laundering Project in collaboration with the UNODC, Bangkok.
- Prosecutor Training for Malaysia, 11–17 April 2005, Kuala Lumpur, organised by the ASEM Anti-Money Laundering Project in collaboration with the UNODC, Bangkok.
- Regional Judicial Officers Training, 24 – 29 April 2005, Kuala Lumpur, organised by the ASEM Anti-Money Laundering Project in collaboration with the UNODC, Bangkok.

The Central Bank of Malaysia is currently working in collaboration with UNODC to implement the Anti-Money Laundering Computer Based Training (AMLCBT) programme for the relevant agencies in Malaysia. The AMLCBT programme is an e-learning training initiative to ensure consistent training and greater outreach to the relevant sectors involved in the fight against money laundering and terrorism financing.

Cross-Border Statutes and Other Measures to Curb Money Laundering in Singapore

*By Lee Seiu Kin, SC**

1. INTRODUCTION

"Money laundering" is the process whereby the proceeds of criminal activities are "laundered" or "cleaned" via a series of transactions through the financial system with the aim of concealing the true source of the proceeds. The logic is simple enough – and ironic. The primary objective of a criminal organisation – money, or its accumulation – also represents the weakest link in its operations. A successful criminal organisation is, by definition, one that generates large surpluses of cash, but this in turn tends to raise suspicion and attract the attention of the authorities. It also leaves a "money trail" of incriminating evidence onto which investigators can latch and trace against the perpetrators of the predicate or underlying crime. "Dirty money" beyond his immediate needs is therefore of little use to the criminal unless further steps are taken to "clean" it.

Money laundering is a massive global phenomenon. It is by and large a reflection of the value of the underground criminal economy. Due to the clandestine nature of such activities, however, it is often difficult to estimate the actual sums involved. According to the Financial Action Task Force ("the FATF"), money laundering globally ranged between 2 – 5 % of the world's GDP. That is US $ 590 billion and US $ 1.5 trillion using 1996 statistics[1].

It is not difficult at all to appreciate the disastrous effects of money laundering. At its most basic level, there are immediate law and order issues for a society. The illegal proceeds are, after all, the fruits of underlying organised criminal activities – drug trafficking, fraud, smuggling, corruption, prostitution, gambling, extortion and the like. Next, as the ill-gotten proceeds are channeled into the financial system, other problems arise. For example, bank officials have to be bribed to turn a blind eye to

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I am indebted to my colleagues, Senior State Counsel Ms Jennifer Marie, Deputy Senior State Counsel Mr Mathew Joseph, and State Counsel Mr Hay Hung Chun for their invaluable assistance in preparing this paper. Mistakes are, of course, all mine.

1 *See generally FATF Website at: http://www.fatf-gafi.org/*

the transaction and, as these nefarious activities move further up the chain, other incidental crimes have to be committed to cover the trail. This in turn generates a secondary layer of offences distinct from the initial predicate offences and therefore adds to the volume of criminal activity.

At its highest level, since money laundering activities by their very nature are hard to estimate, it complicates proper economic management due to lack of accurate data [2]. There are also other negative macroeconomic implications. As accumulated balances of laundered assets are likely to be larger than the annual flow, it increases the potential for destabilization either domestically or across borders and could be used to corner markets or even small economies. Other adverse consequences include interest and exchange rate volatility which in turn affect the movement of funds. Multiply the above with increasing globalisation and the problem is indeed alarming.

In response to these serious threats posed by money laundering and the attendant activities, several initiatives have been taken at the international stage. Two of the most significant international instruments in the fight against money laundering are the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 ("the 1988 Vienna Convention")[3] and the United Nations Convention Against Transnational Organized Crime 2000 ("the Palermo Convention")[4].

The 1988 Vienna Convention contains comprehensive anti-money laundering (AML) measures against drug trafficking. But what is more significant is that it is the first international instrument to deal with the issue of the proceeds of crime and to require States to criminalise money laundering and to take other measures to curb it. It can be seen as a prototype of the typical AML legislation that we see around today.

The Palermo Convention deals with transnational organised crime in general and some of the major activities engaged by such groups include money laundering, corruption and the obstruction of investigations or prosecutions. To supplement the Convention, three Protocols also tackle specific areas of transnational organised crime that are of particular concern to U.N. Member States - the Trafficking in Persons, especially Women and Children Protocol, the Smuggling of Migrants Protocol and the Trafficking in Firearms Protocol.

No discussion on money laundering is ever complete without mentioning the global efforts against combating the financing of terrorism (CFT). The 1999 United Nations International Convention for the Suppression of the Financing of Terrorism[5] requires

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2 *Macroeconomic Implications of Money Laundering, IMF Working Paper 96/66 (Washington: International Monetary Fund).*

3 *Text may be found at http://www.unodc.org/pdf/convention_1988_en.pdf*

4 *"The United Nations Convention against Transnational Organized Crime and its Protocols", UN Office on Drugs and Crime - http://www.unodc.org/unodc/en/crime_cicp_convention.html*

5 *http://untreaty.un.org/English/Terrorism/Conv12.pdf*

States to take steps to prevent and criminalise the financing of terrorists. It provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. After 11 September 2001, these efforts have been further reinforced and supplemented by UN Security Council Resolutions 1373 [6] and 1390 [7].

Singapore has ratified and enacted legislations to comply with its obligations under the 1988 Vienna Convention and the 1999 United Nations Convention for the Suppression of the Financing of Terrorism. It has also put in place measures to comply with UN Security Council Resolution 1373 and other relevant resolutions in that area. Singapore has also signed the Palermo Convention and we are currently studying it with a view to ratification.

The main features of AML/CFT regime adopted in Singapore in the light of these international instruments and developments are as follows:

2. THE CORRUPTION, DRUG TRAFFICKING AND OTHER SERIOUS CRIMES (CONFISCATION OF BENEFITS) ACT

The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA)[8] is the primary instrument for criminalising the laundering of benefits derived from corruption, drug trafficking and other serious crimes, as well as to allow for the investigation and confiscation of such benefits. Before the CDSA was passed, the money laundering regime was governed primarily by 2 separate Acts - the Corruption (Confiscation of Benefits) Act and the Drug Trafficking (Confiscation of Benefits) Act.

The Corruption (Confiscation of Benefits) Act was enacted and came into operation on 10 July 1989 to provide for a more effective mechanism in the confiscation and recovery of corruption benefits, in particular, in relation to unexplained benefits and benefits of persons who die or abscond while under investigation. In the case of the Drug Trafficking (Confiscation of Benefits) Act, which came into operation on 30 November 1993, it denies drug traffickers the benefits of their crime and also makes the laundering of benefits of drug trafficking an offence.

In 1999, the Singapore Parliament amended the Drug Trafficking (Confiscation of Benefits) Act by amalgamating it with the Corruption (Confiscation of Benefits) Act and extended the asset confiscation and AML provisions to cover other serious non-drug trafficking offences. This amended Act was re-named as the present CDSA. These amendments recognise the fact that transnational crime is not restricted to drugs or proceeds of drug trafficking.

6 *http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement*
7 *http://daccessdds.un.org/doc/UNDOC/GEN/N02/216/02/PDF/N0221602.pdf?OpenElement*
8 *Cap.65A, 2000 Rev Ed. See http://statutes.agc.gov.sg/*

2.1. Features of the CDSA

The basic themes of the CDSA are: to find or identify the illegal proceeds; to freeze it; and to forfeit it. This would take out the profit from the crime by denying the criminal his ill gotten gains. I will now look at the more salient features of the CDSA.

i) The Predicate Offences

The CDSA covers two main categories of predicate offences - "drug trafficking offence" and "serious offence". A "drug trafficking offence" means one of the offences set out in the First Schedule to the CDSA. These include manufacturing, production, or importation of a controlled drug or cultivation of cannabis, opium or coca plants as defined in the Misuse of Drugs Act and also the offence of money laundering as defined in sections 43 and 46 of the CDSA. A "serious offence" is one set out in the Second Schedule of the CDSA. The Second Schedule sets out a list of 184 offences[9] in other penal statutes. It also includes the offences of money laundering defined in sections 44 and 47 of CDSA.

An attempt to commit or an abetment to commit a "drug trafficking offence" or a "serious offence" is in itself a predicate offence By providing for "foreign drug trafficking offence" and "foreign serious offence", the CDSA also makes it clear that predicate offence committed overseas are caught by its provisions. The CDSA therefore has cross-border implications.

ii) Conviction-based confiscation

Confiscation under the CDSA is conviction-based, i.e. confiscation orders can only be made where a defendant has already been convicted of a predicate offence listed in the CDSA, i.e., a "drug trafficking offence" or a "serious offence". Where a defendant is convicted of a predicate offence, the court shall on the application of the Public Prosecutor, make a confiscation order against the defendant in respect of benefits derived by him from drug trafficking or criminal conduct, if the court is satisfied that such benefits have been so derived. [10]

Although a confiscation order can only be made if there is a conviction, the CDSA provides that a person "shall be taken to be convicted" if he "absconds" under certain conditions. These conditions are that investigations must have commenced and that the person dies before proceedings were instituted or, if proceeding has been instituted, before conviction, or that the person cannot be found, apprehended or extradited 6 months after the start of investigation. [11] In such a situation, a confiscation

9 *As of 9 September 2005.*
10 *CDSA, sections. 4 and 5.*
11 *CDSA, section 26.*

order may still be made if the court is satisfied on the evidence adduced before it that such evidence, if unrebutted would warrant a conviction for the predicate offence.

iii) Property covered under confiscation order

The confiscation order applies in respect of the benefits derived by the defendant (a) from "drug trafficking" where the defendant has been convicted of a drug trafficking offence, or (b) from "criminal conduct" where the defendant has been convicted of a serious offence. "Drug trafficking" and "criminal conduct" have been defined to cover conduct constituting the predicate offences (including the foreign equivalents) or the dealing with, assistance or arrangement to deal with, the benefits of such offences whether carried out in Singapore or elsewhere. The confiscation order therefore also apply to any property, whether it is situated in Singapore or elsewhere and again demonstrates the cross-border effects intended by the CDSA.

iv) Presumptions of benefiting from crime

If a defendant holds, or has at any time held, any property or any interest therein disproportionate to his known sources of income, and which he cannot explain to the satisfaction of the court, then he shall, until the contrary is proved, be presumed to have derived benefits from drug trafficking or criminal conduct. This effectively reverses the burden of proof and places the onus on the defendant to prove that the asset was acquired legally. As in other criminal provisions where the defendant has the onus of proving the existence of a fact, the standard to which he needs to prove is on a balance of probabilities[12]. This is a lower threshold than the prosecution's standard which is proof beyond reasonable doubt.

v) Third Party interests

The CDSA recognises the rights of third parties which may be affected by a confiscation order[13]. Where an application is made for a confiscation order, a person who asserts an interest in the property may apply to the court before the confiscation order is made for an order declaring the nature, extent and value of his interest.
In the case where a confiscation order has already been made, a person may still apply for an order declaring the nature, extent and value of his interest. However, a person who has knowledge of the application for confiscation order or appears at the hearing of the application, shall not be permitted to make an application except with leave of the court.

12 *CDSA, section 51, also expressly provides for this for the avoidance of doubt.*

13 *CDSA, section 13, also such third party rights are recognised in other instances, for example where there is a production order. A person ordered to produce any material to any authorised officer may seek a variation of the order, CDSA, section 32.*

vi) Sums ordered to be confiscated enforceable as fines

Section 14 of the CDSA provides that the amount ordered by a court to be paid under a confiscation order shall have effect as if the amount were a fine (and therefore recoverable as such). Where a defendant defaults in the payment of the amount, he shall be sentenced to serve default sentences in the usual course. The length of the default sentences would depend on the amount ordered to be paid. This may range from a term of not more than 2 years' imprisonment for an amount not exceeding S$20,000, to a term of not more than 10 years' imprisonment where the amount exceeds S$100,000.

vii) Obligations of "financial institutions"

The CDSA defines "financial institution" widely to include both natural and non-natural persons. It means a bank, a merchant bank, a finance company, the holder of a capital markets services licence under the Securities and Futures Act 2001, a licensed financial adviser under the Financial Advisers Act 2001, a company or society registered under the Insurance Act (Cap. 142) as a direct insurer carrying on life business, an insurance intermediary licensed under any written law relating to insurance intermediaries if the intermediary arranges contracts of insurance in respect of life business, and such other persons or class of persons as the Minister may by order prescribe. These obligations are as follows:

- **Duty to keep records**

Section 37 read with section 36 requires a financial institution to keep proper records of certain financial transaction documents[14] for a 6-year period which will ensure that the "money trail" would be available during investigations.

- **Duty to disclose**

There is an obligation to make what is more commonly known in most jurisdictions as a "suspicious transaction report" (STR), which is a key source of intelligence for law enforcement authorities tackling money laundering.

Any person who fails to make a STR when he becomes aware or suspects that the transaction is tainted is guilty of an offence[15]. Such duty to disclosure shall not be treated as a breach of any restriction upon the disclosure imposed by law, contract or rules of professional conduct and the informant shall not be liable for any loss arising out of the disclosure or any act or omission in consequence of the disclosure[16].

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14 *These include documents relating to a person's opening or closing of an account, the operation of an account, a deposit box, telegraphic or electronic transfer of funds, transmission of funds between Singapore and a foreign country or between foreign countries, loan application or records of customer identification, see CDSA, section 36(1).*

15 *CDSA, section 39 (2) - liable on conviction to a fine not exceeding $10,000.*

16 *CDSA, section 39(6).*

viii) Specific offences of money laundering

The CDSA also creates offences of money laundering, both in relation to predicate offences from which a person obtains the proceeds, and also where a person deals or agrees to deal with tainted money. The Act also makes it an offence for a person to acquire tainted money and to tip off anyone who is the subject of investigation.

- **Assisting another to retain benefits**

Sections 43 and 44 make it an offence for a person to enter into an arrangement, knowing or having reasonable grounds to believe that the arrangement would facilitate retention or control of benefits of drug trafficking or criminal conduct. The punishment is a fine not exceeding S$200,000 or imprisonment for a term not exceeding 7 years or both.

- **Concealing or transferring benefits**

Sections 46 and 47 make it an offence if a person conceals or disguises, or converts or transfers out of jurisdiction any property which is wholly or partially, directly or indirectly, his (or another person's property which he knows or has reason to believe are) benefits of drug trafficking or criminal conduct. The punishment is a fine not exceeding S$200,000 or imprisonment for a term not exceeding 7 years or both.

- **Acquiring benefits**

Sections 46(3) and 47(3) make it an offence for any person to acquire property with no or inadequate consideration from another person when he knows or has reasonable grounds to believe that the property represents that other person's benefits of drug trafficking or criminal conduct. The punishment is a fine not exceeding S$200,000 or imprisonment for a term not exceeding 7 years or both.

- **Tipping off**

Section 48 makes it an offence for a person, if he knows or has reasonable grounds to suspect that an investigation in connection with the CDSA is underway, or a disclosure has been made to an authorised officer under the CDSA, and he discloses this to any other person which is likely to prejudice that investigation or proposed investigation. This offence of tipping off is an extension of the offence of prejudicing investigations under section 49. Both are punishable with a fine not exceeding S$30,000 or imprisonment for a term not exceeding 3 years or both.

Finally, Part VII of the CDSA contains other miscellaneous provisions relating to areas such as the burden of proof, compensation, modes of trial for offences, composition of offences, powers of arrest and other miscellaneous offences like obstructing or prejudicing investigations.

3. COMBATING THE FINANCING OF TERRORISM (CFT)

Singapore's CFT framework is made up of 3 legislations. The U.N. (Anti-Terrorism Measures) Regulations 2001 came into operation on 13 November 2001 under the

United Nations Act to give effect, inter alia, to U.N. Security Council Resolutions 1373 and 1390. The Monetary Authority of Singapore (Anti-Terrorism Measures) Regulations 2002 came into operation on 30 September 2002 under the Monetary Authority of Singapore Act. Its purpose was to give effect to Resolutions 1373 and 1390 specifically in relation to financial institutions. The Terrorism (Suppression of Financing) Act[17] ("TSOFA") came into operation on 29 January 2003. The TSOFA gives effect to the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism.

The main difference between these CFT legislations and the CDSA is that the latter deals with proceeds of criminal acts while the former deal with funds that may have been obtained legitimately; however such funds are destined for use by terrorists or for the purpose of terrorism. In this regard, the CFT legislations deal with, among other things, the provision or collection of funds knowing or having reasonable grounds to believe that they will be used to commit terrorist acts, dealing with property controlled directly or indirectly by terrorists, entering into or facilitating or providing financial services to terrorists, terrorist entities or terrorist controlled persons.

The TSOFA contains provisions for search warrants, restraint orders and confiscation, mutual legal assistance and extradition, and universal jurisdiction for some of the offences specific to the TSOFA .[18]

4. MUTUAL LEGAL ASSISTANCE AND EXTRADITION

As noted in the brief discussion above on the CDSA, some of its provisions actually have extra-territorial effect. One example is in the defining of predicate offences to include an equivalent foreign offence committed overseas. This would require investigators in Singapore to gather evidence outside of jurisdiction. Further, a Singapore court order may have to be enforced outside of jurisdiction or an offender may have to be extradited to Singapore for prosecution. Co-operation of another country and among countries at these various stages of the investigation and prosecution is therefore necessary.

The Mutual Assistance in Criminal Matters Act[19] (MACMA) was enacted to facilitate the provision and obtaining of international assistance in criminal matters between Singapore and places outside Singapore. These include the provision and obtaining of evidence, arrangements for persons to give evidence or assist in criminal investigations, the recovery, forfeiture or confiscation of property in respect of offences, the restraining of dealings in property, or the freezing of assets, the execution of requests for search and seizure, the location and identification of witnesses and suspects, and the service of documents.

17 *Cap. 325, 2003 Rev Ed. See http://statutes.agc.gov.sg/*

18 *The procedure in applying for these are slightly different from those in the CDSA.*

19 *Cap. 190A, 2001 Rev Ed. See http://statutes.agc.gov.sg/*

Requests under MACMA are made to the Attorney-General. Requesting states fall under two categories: "foreign country" and a "prescribed foreign country". The latter refers to states with which Singapore has a treaty, Memorandum of Understanding (MOU) or other agreement to provide assistance in criminal matters[20]. MACMA also does not prevent the rendering of assistance through INTERPOL. In any event, requests in all cases are not acceded to as a matter of course. MACMA provides a check list against which a request will not be entertained, for example, where there is a lack of dual criminality or where there is breach of a term in the treaty, MOU or other agreement.

Although the scope and types of assistance that can be rendered is wide, MACMA is not to be used for extradition purposes. Extradition matters are governed by the provisions in the Extradition Act (Cap.103). There is a need to establish dual criminality before a person can be extradited from Singapore and the offence has to fall within the list of offences described in the First Schedule.

5. OTHER MEASURES

Apart from legislation, other AML measures have also been adopted with the emphasis on vigilance and surveillance, education, effective enforcement and strengthening the financial system.

a. Soft-law, Best Practices and Evaluations

International groupings such as the FATF and other FATF-like regional organisations play an influential and significant role in combating money laundering. Since September 1991, Singapore had been an active member of FATF which was set up at the 1989 G-7 Summit meeting in Paris to examine and deal with the problems posed by money laundering.

By setting standards for national AML/CFT programs, mutual and self-evaluation of national AML/CFT measures that meet those standards, identifying and studying money laundering methods and trends, and in subjecting jurisdictions with inadequate AML/CFT measures to special attention and scrutiny under the Non-cooperative Country of Territory (NCCT) scheme, FATF had successfully promoted awareness in combating money laundering through this soft-law and international best practices approach.

Today, the FATF's 40+9 [21] Recommendations or "best practices" are acknowledged international benchmarks in AML/CFT and the awareness generated has resulted in the formation of other regional FATF-like organisations, including the Asia-Pacific

20 *Currently, the states are Hong Kong SAR, Malaysia, the UK and the USA. Under section 32 of the TSOFA, there is no need for any treaty.*

21 *Until October 2004, it was 40+8. The present 9th Special Recommendation focuses on the use of cash couriers in terrorism financing.*

Group on Money Laundering Group (APG) in 1997, of which Singapore is a founding member and in which it continues to play an active role.

Apart from the FATF evaluations, the Financial Sector Assessment Program[22] (FSAP), a joint IMF and World Bank effort first introduced in May 1999 also aims to increase the effectiveness of efforts to promote the soundness of financial systems in member countries. The FSAP also adopts the FATF's 40+8 Recommendations as part of its evaluation process and in its latest report published in April 2004, it noted that Singapore's regulatory systems and supervisory practices exhibited a high degree of observance of international standards and code and that it had in place a sound and comprehensive legal, institutional, policy and supervisory framework for anti-money laundering and combating financing of terrorists.

Evaluations of such nature also afford invaluable opportunities for inter-agency groupings from the relevant ministries to learn more about what the other is doing, the issues they face and the improvements that can be made. This results in further enhancement to the efficiency and effectiveness of the money laundering regime already in place.

b. Dedicated Enforcement Agency

Given the complex and multidimensional nature of money laundering transactions, it is essential to have specialist officers with advanced training from a dedicated agency to investigate such offences.

In Singapore, this responsibility falls on the Financial Investigation Division (FID) of the Commercial Affairs Department (CAD) - which is the white-collar and economic crime investigation agency in Singapore. Investigators in the CAD are highly qualifiec being required to possess at least a basic degree in Law, Accountancy, Business Administration or Economics.

The FID comprises three other sub-units – the Financial Investigation Branch (FIB), the Proceeds of Crime Unit (PCU) and the Suspicious Transaction Reporting Office (STRO), each having a specialised area of responsibility. FIB investigates money laundering and other offences under the CDSA as well as offences under the TSOFA. PCU identifies and seizes proceeds of crime, managing such assets until they are restituted or confiscated under the CDSA. STRO receives and analyses suspicious transaction reports and provides financial intelligence information for the detection of money laundering, terrorism financing and other criminal offences.

22 *http://www.imf.org/external/np/fsap/fsap.asp*

The STRO is also a member of the Egmont Group [23] of Financial Intelligence Units (FIUs), an international grouping of FIUs established in 1995 to share information and provide assistance between jurisdictions. To date, the STRO has signed close to 10 MOUs to exchange information with and to render assistance to their counterparts in other jurisdictions, including those from some of the most important financial centres in the world. It is currently in advanced stages of negotiations to sign a MOU with a counterpart from a major European jurisdiction.

c. Education and training

The CAD's FID maintains an active outreach program and conducts regular dialogue and feedback sessions with the financial, business and professional sectors. It has published an introductory booklet on the AML/CFT regime in Singapore entitled "Anti-Money Laundering & Counter-Terrorism Financing" which is now in its second edition. [24] Apart from that, it also publishes a regular newsletter, "Reports from STRO", which showcases sanitised suspicious transaction reports and cases to highlight valuable learning points in spotting suspicious transactions and making such reports.

The FID also plays an active role in the training and education of law enforcement officers both in Singapore and the region. It has been regularly invited to speak in various seminars and workshops regionally and internationally. Some of its engagements within the past year include the Workshop on Capacity Building in Combating Terrorism organised by the Commonwealth Secretariat in May 2004 in Singapore, the FIU Officials on AML and CFT Measures Workshop organised by the IMF in Singapore in July 2004, and the Egmont Training Seminar in Bangkok in October 2004.

More recently, the FID conducted training sessions for the inaugural 10-day Basic Training Course on Investigation in Anti-Drug Money Laundering for ASEAN Law Enforcement Officers held in Singapore between 21 February – 4 March 2005. In May 2005, an officer from the People's Republic of China was on attachment training to the STRO under the ASEM Anti-Money Laundering Project of the United Nations Office on Drugs and Crime (UNODC).

d. Strengthening the financial system

The Monetary Authority of Singapore (MAS) is the de facto central bank in Singapore. Given that money laundering is an activity which seeks to "clean" proceeds of crime through the financial sectors, it is therefore essential to have measures in place to safeguard against the adverse effects of money laundering activities on the financial system.

23 *http://www.egmontgroup.org/*
24 *http://www.cad.gov.sg/pub/doc/cad_amlctf_book.pdf*

In its supervisory role, the MAS on 11 November 2002 issued a series of Notices and Guidelines [25] to the banking as well as the non-banking financial sectors - for example life insurers, financial advisers, money lenders and remitters - on the basic principles and policies essential to combating money laundering in each of their respective sectors. Through these Notices and Guidelines, the MAS emphasises the importance of basic but often overlooked principles such as know-your-customer (KYC) and customer identification/due diligence requirements and ensures that the financial sectors are well-equipped to detect and report and thus prevent money laundering activities.

The MAS also carries out regular off-site reviews and on-site inspections of financial institutions to monitor compliance with AML/ CFT measures. It is also the agency responsible for enforcing the Monetary Authority of Singapore (Anti-Terrorism Measures) Regulations 2002.

On 3 January 2005, the MAS issued a Consultation Paper on the Draft Notice on Prevention of Money Laundering and Countering the Financing of Terrorism. This is meant as an update to MAS Notice 626 on AML measures in general. Among other things, the revised Notice has been expanded to cover both terrorist financing as well as money laundering and stipulates a more exhaustive regime of customer due diligence (CDD) measures that banks are required to perform. It also sets out more comprehensively the timing for completion of CDD measures, and the consequential steps to be taken should CDD measures cannot be satisfactorily performed.

6. CONCLUSION

I have attempted to give a brief overview of the efforts taken by Singapore to curb money laundering. I believe the legislation in place in Singapore share common themes with legislation from other jurisdictions which have adopted the various relevant UN Conventions and international best practices. However, legislation is just one part of the effort. A multi-pronged, holistic approach made up of other measures such as effective enforcement, international co-operation, continuing vigilance and education clearly play an equally important role in the fight against money laundering.

25 *http://www.mas.gov.sg/masmcm/bin/pt1Anti_Money_Laundering_and_Countering_The_Financing_of_ Terrorism.htm*

Anti-Terrorist Control Measures In Ports and Harbors: The Philippine Experience

*By Domingo G. Castillo**

I. INTRODUCTION

The terrorist attack on the World Trade Center on 11 September 2001 has transformed our society in more ways than any of us could have ever imagined.[1] At the forefront of this transformation is the maritime industry, which, perhaps, is experiencing more radical change than any other industry or group.[2] This holds true as regards the Philippines, considering that it has been identified as among the countries increasingly under the threat of maritime terrorism.[3] In response, the Philippines has been trying to pursue anti-terrorist control measures that would protect its ports and harbors against covertly hostile attacks. Before Philippine anti-terrorist control measures can be discussed, a brief overview on terrorism must first be told. Precisely, what is terrorism?

A. The illegality of terrorism, in general, under International Law

Terrorism is one international crime [4] breaching international peace and security.[5] Interestingly, the arsenal available to today's terrorist is expanding, allowing greater sophistication in the ability to carry out devastating acts.[6] Using fear as their tool, terrorists have demonstrated their ability to sow violence and destruction[7] and bring large communities to a standstill.[8] In this regard, the United Nations (U.N.) strictly obliges States to refrain from organizing, instigating, assisting or participating in terrorist acts in another State.[9] States are also obliged to take measures on both

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1 *Robert G. Clyne, Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries, 77 TULANE LAW REV. 1183 (June 2003).*

2 *Id.*

3 *Philippines seen increasingly under threat from maritime terrorism, available at <http:// quickstart.clari.net/qs_se/webnews/wed/ao/Qphilippines-apec-attacks.RBWM_DS8.html> (last visited 26 December 2003).*

4 *ILC Report of the International Law Commission on the Work of its 28th Session, II Y.B.I.L.C. 67 (1976). See Ross Schreiber, Ascertaining Opinio Juris of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on the U.N. Process, 16 B.U. INT'L L. J. 309, 325 (1998) [hereinafter Ascertaining Opinio Juris].*

5 *Legal Regulation of Use of Force, 96 AM .J. INT'L L. 237, 244 (2002) ("At the United Nations, the Security Council unanimously adopted on September 12 a resolution condemning the horrifying terrorist attacks, which the Council regarded, like any act of international terrorism, as a threat to international peace and security."). See M. Cherif Bassiouni, Media Coverage of Terrorism, 32 J. OF COMM. 128, 128-9 (1982). See generally Mary Robinson, "Protecting Human Rights: The U.S., the U.N., and the World," UN High Commissioner Lecture at the JFK Library, Boston (6 Jan. 2002); Press Release, Terrorism Require Response Founded on Inclusion, Fairness, Legitimacy, General Assembly Told As Debate Continues, 56th General 15th Plenary Meeting (2001).*

6 *See Barry Kellman, Bridging the International Trade of Catastrophic Weapons, 43 AM. U. L. REV. 755, 755 (1994).*

the national and international levels to prevent terrorism.[10] In view of this, the U.N. Security Council has played an active role in pursuing terrorists.[11] To illustrate, Libya received sanctions from the Security Council in 1992 [12] for refusing to cooperate in surrendering terrorists, allegedly enjoying safe haven within Libyan territory, who hijacked Pan American Flight 103. [13]

States have also entered into various international[14] and regional[15] conventions to outlaw acts of terrorism, directly attaching liability to individuals who have threatened civilians with death or severe injury.[16] While recognizing the legitimacy of the struggle for national liberation,[17] the international community refused to condone these methods of pursuing political objectives as being contrary to the right to life, liberty, and security. [18] For many States, no goal or cause is so noble that it could justify all possible means,[19] specifically violence.[20] Any doubts as to the illegality of terrorist acts have been put to rest by the September 11 terrorist attack on the World Trade Center. [21] It provoked the Security Council to call on all States to work together urgently to bring to justice the perpetrators, organizers, and sponsors of terrorist attacks and stressed that those responsible for aiding, supporting, or harboring the perpetrators, organizers, and sponsors of these acts would be held accountable.[22]

B. The Definition of Terrorism

Discussions of terrorism begin by stating that a universally accepted definition of the term still eludes scholars and government officials.[23] A survey uncovered 109 different definitions; [24] the compilation of which would readily comprise a book.[25] Despite debate

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7 *Vienna Declaration and Programme of Action, Part I., para. 17, UN Doc. A/CONF.157/24 (1993).*

8 *Michael Reismann, In Defense of World Public Order, 95 AM.J. INT'L L. 833, 834 (2001).*

9 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the U.N. Charter, Annex to G.A. Resolution 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc.A/8028 (1970).*

10 *G.A. Res. 3034, U.N. GAOR, 27th Sess. Supp.No. 30, at 1, UN Doc. A/RES/3034 (1973); G.A. Res. 31/102, U.N. GAOR, 31st Sess., Agenda Item 113, at 1, U.N. Doc.A/RES/102 (1976); G.A. Resolution 32/147; U.N. GAOR, 32nd Sess., Agenda 118, at 1, U.N. Doc.A/RES/147 (1978); G.A. Res. 34/145, U.N. GAOR, 34th Sess., Agenda Item 112, ¶ 3, at 2, U.N. Doc.A/RES/145 (1980); G.A. Res. 36/109, U.N. GAOR, 36th Sess., Agenda Item 114, at 2, U.N. Doc.A/RES/36/109 (1981).*

11 *See Letter dated 7 October 2001 from the Permanent Representative of The United States of Amercia to the United Nations Addressed to the President of the Security Council, U.N. Doc.S/2001/946 (7 Oct. 2001).*

12 *S.C. Res. 748, U.N. SCOR, 47th Sess., U.N. Doc.S/23992 (1992).*

13 *D.J. HARRIS, CASES AND MATERIALS IN PUBLIC INTERNATIONAL LAW 1041 (1998).*

14 *Abramovsky, Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft: The Hague Convention, 13 COLUM. J. TRANSNAT'L L. 398-399 (1974). See New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents, 28 U.S.T. 1975, TIAS No. 7570 (1973); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 U.S.T. 564 (1971); Convention to Prevent and Punish Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion that are of International Significance 27 U.S.T. 3949 (1971); International Convention Against the Taking of Hostages, G.A Res. 146, U.N. GAOR, 34th Sess., Supp. No. 39 (1979); European Convention on the Suppression of Terrorism, reprinted in 15 I.L.M. 1272 (1977).*

15 *European Council, European Convention on the Suppression of Terrorism, Europ. T.S. No. 90, reprinted in 15 I.L.M. 1272 (1976); Organization of African Unity, Draft Convention of the Organization of African Unity on the Prevention and Combating of Terrorism, CAB/LEG/24.14/Vol.I/Rev.3 (1999); Arab Convention for the Suppression of Terrorism, Adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice at Cairo, Egypt (April 1998), available at http://www.lasmediaservice.htm (last visited 14 July 2002); Member States of the South Asian Association for Regional Cooperation, Regional Convention on Suppression of Terrorism, U.N. GAOR 6th Comm., 44 th Sess., U.N. Doc. A/51/136(1989).*

16 *Wil Verwey, The International Hostages Convention and National Liberation Movements, 75 AM. J. INT'L L. 69, 70 (1981).*

over its definition, core characteristics of the term are generally agreed upon: the use of threat and/or violence, the existence of a political motive, the selection of targets who are representative of a target category (usually civilians), the aim of terrorizing, the goal of modifying behavior, the use of extreme or unusual methods, and the use of terrorism as an act of communication.[26] These elements have been recently codified by the General Assembly in its definition of terrorism in a Resolution adopted without a vote, to wit:

> *Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious, or other nature, that may be invoked to justify them.* [27]

This definition was carefully arrived at after a thorough examination of numerous multilateral treaties and domestic legislation. It finds support in Article 24 of the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind,[28] which was derived from the 1937 Convention for the Prevention and Punishment of Terrorism,[29] which, in turn, defines acts of international terrorism as "acts against another state directed at persons or property and of such nature as to create a state of terror in the minds of public figures, groups of persons, or the general public."[30] The element of political objective must be present; otherwise any sudden and violent attack against civilians would merely constitute any other domestic crime, i.e., murder, arson or malicious damage to property. As regards maritime terrorism, the political objective takes the form of inducing a government or population to take a particular course of action with respect to their country's policies or programs.[31]

It is thus undeniable that international law now strictly condemns, as criminal, all acts, methods and practices of terrorism, wherever and whenever committed,[32] regardless of the nationality of the terrorist, the place where the act of terrorism is committed, and the manner by which it is inflicted.[33]

As of 15 December 2003, the 12th Philippine Congress has not yet passed a bill on terrorism. However, the Legislative-Executive Development Advisory Council has listed the legislative bills on terrorism, House Bill No. 5923 and Senate Bill No. 2540, as

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17 *Declarations of Egypt, Tanzania, Guinea, Libyan Arab Jamahiraya, Nigeria and Lesotho, U.N. Doc. A/32/39, at 39, 35 (1981).*

18 *Declaration of Chile, Mexico, Egypt, Guinea, and Iran, UN Doc.A/32/39, at 17, 21, 26, 38, 39 and 40 (1981).*

19 *Declaration of the United States, U.N. Doc. A/32/39, at 53 (1981).*

20 *See Jimenez v. Aristeguieta, 311 F. 2nd 547 (5th Cir., 1962), cert. den., 375 U.S. 48 (1963).*

21 *See Responding to Terrorism: Crime, Punishment and War, 115 HARV. L. REV. 1217, 1218 (2002).*

22 *S.C. Res. 1368, U.N. Doc.S/RES/1368 (2001); S.C. Res. 1373, U.N. Doc.S/RES/1373 (2001).*

23 *A. Odasuo Alali & Kenoye Kelvin Eke, Introduction: Critical Issues in Media Coverage of Terrorism, in MEDIA COVERAGE OF TERRORISM: METHODS OF DIFFUSION 3 (Alali & Kenoye eds., 1991); Sharryn J. Aiken, Manufacturing 'Terrorists': Refugees, National Security and Canadian Law - Part 1, in REFUGE: CANADA'S PERIODICAL ON REFUGEES, 65 (3 Dec. 2000)*

24 *Ray Takeyh, Two Cheers from the Islamic World, FOREIGN POL'Y 70-1 (Jan-Feb 2002).*

25 *See Shaukat Qadir, The Concept of International Terrorism: An Interim Study of South Asia, in ROUND TABLE 333, 333-9 (2001).*

26 *Rachel Monaghan, Single-Issue Terrorism: A Neglected Phenomenon, STUDIES IN CONFLICT AND TERRORISM 256 (Oct.-Dec. 2000)*

priority bills. These two bills are pending their second reading. Although a domestic law has yet to be passed by Congress, the Philippines adheres to a similar definition of terrorism since the treaties on terrorism to which it is a party may be considered as equal to statutes,[34] having been concurred in by the Philippine Senate. Further, the Constitution, itself, states that the Philippines adopts the generally accepted principles of international law as part of the law of the land.[35] Even up to the most recent treaty, the trilateral agreement with Malaysia and Indonesia of May 2002, the Philippine adopts a definition containing the core elements of terrorism as previously mentioned.[36]

Not surprisingly, terrorists have not spared maritime navigation from acts of terror-generating violence, plainly evincing that measures against threats to maritime safety and security must also be given adequate attention.

II. TERRORISM IN MARITIME NAVIGATION

A. Advent of Threats to Maritime security

In the maritime context, there have been several documented incidents of terrorism, particularly during the past twenty years.[37] The *Achille Lauro* incident [38] is the best known of maritime terrorist incidents, and perhaps, the only type of incident that most people associate with the term.[39] This incident took place in 1985, when the cruise

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27 *Measures to Eliminate Terrorism, G.A. Resolution 51/210, 88th Plenary Mtg., Item I.2, U.N. Doc. A/52/210 (1996).*

28 *ILC Draft Code of Crimes Against the Peace and Security of Mankind, U.N. Doc. A/46/10/238, reprinted in 1 CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW Appendix 1 (1986).*

29 *Art. 1 (2) 19 LEAGUE OF NATIONS O.J. 23 (1938). However, this Convention did not take effect.*

30 *CHRISTOPHER BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF HUMAN LIBERTY 310-311 (1992) [hereinafter BLAKESLEY]. It includes bombings, kidnappings, assassinations, hijackings, violations of diplomatic immunity, the holding of hostages, and so on. Terrorism may reflect a variety of motivations - national liberation, irredentism, and succession ., ideological goals of the left and right...; Latin American drug cartels against rival parties, incumbent governments, police forces, MNC's capitalism and socialism; fundamentalist and/or revolutionary religious rage against implacable enemies...*

31 *Carlos Salinas, Improving Maritime Security in the APEC Region: A Perspective from the Federation of ASEAN Shipowners' Association (FASA), Speech at the 3rd APEC Transportation Ministerial Meeting, Lima, Peru, 5-6 May 2002. [hereinafter Salinas Speech]*

32 *G.A. Res. 40/61, U.N. GAOR, 40th Sess., Agenda Item 129, at 3, U.N. Doc.A/RES/40/61 (1981); G.A. Res. 42/159, U.N. GAOR, 42nd Sess., Agenda Item 126, at 1, U.N. Doc.A/RES/42/159 (1987).*

33 *Ascertaining Opinio Juris, supra note 4, at 326.*

34 *Abbas v. Comelec, G.R. No. 8965, November 10, 1989. The Supreme Court stated, "Assuming for the sake of argument that the Tripoli Agreement is a binding treaty or international agreement, it would then constitute part of the law of the land. But as internal law it would not be superior to Rep. Act No. 6734, an enactment of the Congress of the Philippines, rather it would be in the same class as the latter [J. SALONGA, PUBLIC INTERNATIONAL LAW 320 (4th ed., 1974), citing Head Money Cases, 112 U.S. 580 (1884) and Foster v. Nelson, 2 Pet. 253 (1829)]. Thus, if at all, Rep. Act No. 6734 would be amendatory of the Tripoli Agreement, being a subsequent law."*

35 *CONST. art. II, sec. 2.*

36 *Agreement on Information Exchange and Establishment of Communication Procedures, Phil.-Malay.-Indon. (7 May 2002) (on file with the Department of Interior and Local Government). The Agreement defines terrorism as "any act of violence or threat thereof perpetrated to carry within the respective territories of the Parties or in the border area of any of the Parties an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honour freedoms, security of rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a natural resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States."*

liner Achille Lauro was hijacked, and its crew and passengers held hostage for two days.[40] In the course of the hijacking, a disabled American passenger was killed and his body and wheelchair thrown into sea.[41] The seizure of this Italian vessel on the high seas led to the adoption of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.[42] Completed in 1988, the convention sought to eliminate threats of maritime violence.[43] This is evident from the convention's preamble that expressed deep concern about worldwide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings.[44] In this light, Article 3 of the Convention punishes:

Any person commits an offense if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
(c) destroys a ship or causes damage to a ship or its cargo which is likely to endanger the safe navigation of that ship; or
(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (a) through (f).[45]

Despite the adoption of a convention, the Achille Lauro incident was still followed by equally devastating events. For instance, in 1988, a day-excursion ship in Greece was suddenly bombed by certain people without a warning.[46] In 1989, terrorists in Chile

37 *Clyne, supra note 1, at 1186.*
38 *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gesftione Motonave Achille Lauro in Amministrazione Straordinaria, 795 F. Supp. 112 (S.D.N.Y. 1992).*
39 *Salinas Speech, supra note 31.*
40 *Achille Lauro, 795 F. Supp. 112 (1992).*
41 *Id.*
42 *Malvina Halberstam, Terrorism on the High Seas: The Achille Lauro, Piracy, and IMO Convention on Maritime Safety, 82 AM. J. INT'L L. 269, 291 (1988).*
43 *Convention for the Suppression of Unlawful Acts, Mar. 10, 1988, 27 I.L.M. 668 (1988) [hereinafter cited as Convention for the Suppression of Unlawful Acts], at 672-73.*
44 *Id. preamble.*
45 *Id. art 3.*
46 *U.S. Dep't of State, Patterns of Global Terrorism, 2001, at 87 (2002).*

injected grapes with cyanide resulting in the destruction of many shipments of grapes arriving in U.S. ports.[47]

Closer to home, eighteen (18) maritime terrorist attacks have occurred within the Asia Pacific Region just from 1993 to 2002 alone.[48] Even the Philippines was not spared from these atrocious attacks, in the famous ferry-bus bombing, an incident that involved a bus bomb detonating aboard a Philippine ferryboat.[49] But it cannot be denied that it was the September 11 attack on the World trade Center that drew the attention of the maritime nations, galvanizing them to act immediately.[50]

B. September 11 and its Effects on the Maritime Industry

Right after September 11, the search for Osama Bin Laden, the purported mastermind of the Al Qaeda terrorist network, began its course.[51] After American intelligence aides suggested that Mr. Bin Laden might try to escape via Al Qaeda vessels, American-led searches targeted the Arabian Sea and Persian Gulf, searching vessels for signs of hidden terrorists.[52] The urgency of the search increased after Norwegian intelligence officials reported a "phantom fleet" owned by Al Qaeda affiliates.[53] At the same time, British officials detained the M/V NISHA, a London-bound vessel, upon suspicion of terrorist cargo.[54] In response to the seizure, shipping unions asserted that the shipping industry was ripe for abuse by terrorists.[55]

Undeniably, the September 11 attack was very instructive in the sense that ordinary means of transportation could now be turned into lethal weapons of terror in the hands of determined terrorists.[56] True enough, on 20 October 2001, oil tankers carrying more than 650 tons of kerosene and diesel fuel were brought to fire in Sri Lanka.[57] More recently, in 2002, the French M/V LIMBURG oil tanker was attacked by terrorists and forcibly sunk off in Yemen.[58] In view of this, the ASEAN and APEC urgently tabled discussions on the crafting of measures that will deter violent attacks against and onboard ships in order to reduce risks to passengers, crew, and port personnel as well as to cargoes and vessels.[59]

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47 *New Mkt. Inv. Corp. v. Fireman's Fund Ins. Co., 774 F. Supp. 909, 912 (E.D. Pa. 1991).*

48 *Salinas Speech, supra note 31.*

49 *BBC News, Death Toll Rises in Philippines Blasts, Feb. 26, 2000, available at http://news.bbc.co.uk/1/hi/world/asia-pacific/656800.stm (last visited Dec. 12, 2003).*

50 *Salinas Speech, supra note 31.*

51 *Tina Garmon, International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th, TULANE MARITIME L. J. 273 (Winter 2002)*

52 *Id.*

53 *Id. See Martin Bright et al., Hunt for 20 Terror Ships, THE OBSERVER, Dec. 23, 2001, at 1.*

54 *Gamon, supra note 51, at 274.*

55 *Id.*

56 *See Salinas Speech, supra note 31.*

57 *BBC News, Tamil Tigers Claim Tanker Attack, available at <http://news.bbc.co.uk/1/hi/world/south_asia/1628218.stm> (last visited Dec. 15, 2003).*

58 *U.S. Dep't of State, Yemen: The Economic Cost of Terrorism, available at <http://www.state.gov/s/ct/rls/fs/2002/15028.htm> (last visited Dec. 20, 2003).*

59 *Salinas Speech, supra note 31.*

More importantly, the tragic events of September 11 incited the International Maritime Organization (IMO) to develop security measures.[60] In December 2002, a diplomatic conference was held in London where representatives from IMO State parties gathered and unanimously agreed to the development of new measures relating to the security of ships and of port facilities.[61] Taking effect in July 2004, these security measures contain numerous amendments to the 1974 Safety of Life at Sea Convention (SOLAS). Interestingly, Chapter XI of SOLAS has been divided into two parts and renamed "Special Measures to Enhance Maritime Safety and Security," with Chapter XI-1 on maritime safety and Chapter XI-2 on maritime security.[62]

The centerpiece of the SOLAS amendments,[63] however, is the introduction of the International Code for the Security of Ships and of Port Facilities (ISPS Code).[64] The Code contains both mandatory security requirements[65] and non-mandatory guidelines[66] regarding the provisions of Chapter XI-2.[67] In essence, the ISPS Code directs that vessels must meet security requirements on ship security plans, ship security officers, company security officers, and certain onboard equipment.[68] Port facility security requirements, including port facility security plans, port facility security officers and certain security equipment, are also mandated.[69] Both ships and port facilities have requirements regarding monitoring and communications.[70]

Unfortunately, the ISPS Code does not address cargo security.[71] The Philippines, however, has transcended the limitations of the ISPS Code and enforced, through the Bureau of Commerce,[72] anti-terrorist control measures even as regards cargo security.

III. THE PHILIPPINE MARITIME TERRORIST EXPERIENCE

A. Maritime industry background

Why does the Philippines bother to protect its ports and harbors?

Being an archipelago, the Philippines heavily depends on its ports and harbors for international and domestic trade and commerce. More imperatively, the contribution of this sub-sector to the Philippine economy cannot be underestimated. To emphasize, in 2002, the water transport industry reversed its downward trend of negative one

60 *ISPS CODE, INTERNATIONAL CODE FOR THE SECURITY OF SHIPS AND OF PORT FACILITIES 3 (2003). (hereinafter ISPS CODE)*
61 *Id.*
62 *Clyne, supra note 1, at 1204.*
63 *Id.*
64 *For the text of the Convention, see ISPS CODE, supra note 60, at 3.*
65 *Id. at 6. This refers to Part A of the ISPS Code.*
66 *Id. at 37. This refers to Part B of the ISPS Code.*
67 *Clyne, supra note 1, at 1205.*
68 *ISPS CODE, supra note 60, at 9-18.*
69 *Id. at 18-23.*
70 *Clyne, supra note 1, at 1205.*
71 *Id. at 1206.*
72 *See Infra notes 141-153 & accompanying texts.*

percent to a substantial growth of 4.3 percent.[73] From January to December 2002, ports all over the Philippine archipelago displayed renewed strength as business activities regained vigor.[74] Contrary to the minimal contraction suffered in 2001, the combined cargo throughput handled by all ports nationwide rebounded in 2002 to reach 149.46 million metric tons posting an increment of 1.09 percent.[75]

With respect to passenger traffic in 2002, total passenger count was tallied at 49.12 million heads, showing that 12.51 percent or 5.46 million more passengers were serviced this year compared to 2001.[76] However, foreign passengers registered a downtrend of 5.75 percent, which could be attributed in part to the negative travel advisories placed on our the country resulting from the turmoil that occurred in the southern part of the country during the year.[77]

B. Threat of Terrorism to Philippine Ports and Harbors

As previously mentioned, the Philippines has been identified as among countries increasingly under threat from maritime terrorist attacks.[78] As a matter of fact, a wharf in the southern Philippine city of Davao was bombed earlier this year, creating the fear that similar attacks on vessels visiting the country will likewise be launched.[79] The International Maritime Bureau (IMB) has also identified Manila as among 26 city ports and anchorages vulnerable to such attacks.[80] The report also said that at least 16 sailors were killed in the Philippines, Indonesia and Bangladesh this year, nearly three times the number from the same period last year.[81] The number of injuries sustained by sailors also rose from 21 to 52, while incidents of crewmembers taken hostage nearly doubled to 193.[82] It has been said also that the waters between the Philippines and Indonesia have been the scenes of piracy in recent years.[83]

Allowing terrorist acts to continually threaten maritime safety and security within Philippine waters will adversely affect the positive performance, in general, of Philippine ports. In addition, it will inevitably discourage foreigners from coming to the Philippines arising from more negative foreign travel bans. At present, how does the Philippines address the situation?

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73 *Philippine Port Performance, available at <www.ppa.gov.ph> (last visited 6 December 2003).*
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Coast Guard sees high terror threat in RP seas, available at <http://www.inq7.net/brk/2003/sep/09/brkpol_3-1.htm> (last visited 29 December 2003).*
79 *See Philippines seen increasingly under threat from maritime terrorism, available at <http://quickstart.clari.net/qs_se/webnews/wed/ao/Qphilippines-apec-attacks.RBWM_DS8.html> (last visited 28 December 2003).*
80 *Id.*
81 *Coast Guard sees high terror, supra note 78.*
82 *Id.*
83 *Id.*

C. Anti-Terrorist Control Measures in the Philippines

In her efforts to forge a regional ASEAN approach to combating terror, Philippine President Gloria Macapagal-Arroyo has become one of the more vigilant leaders in the fight against terror.[84] In fact, she has recently called for renewed vigilance against terrorism due to an aborted coup that derailed her administration's war on terrorism.[85] This activism against terrorism is likewise evident in the maritime industry.

To reiterate, however, no Philippine law directly penalizes terrorism, although piracy is expressly punishable under the Revised Penal Code.[86] Apart from the numerous conventions to which the Philippines is a party, it is also a party to the ISPS Code which suffices to compel its existing executive agencies to pursue and implement enforcement measures against maritime terrorism. At present, the more active executive agencies in the fight against terrorism in ports and harbors include the Philippine Maritime Industry Authority (MARINA), Philippine Ports Authority (PPA), and the Philippine Bureau of Customs (BOC).

1. Action Programs by the Philippine Maritime Industry (MARINA) Board

The Maritime Industry Authority was created to accelerate the integrated development of the maritime industry of the Philippines.[87] One of the objectives of the law creating the MARINA is to provide for the economical, safe, adequate and efficient shipment of raw materials, products, commodities and people.[88] Its powers include providing for effective supervision, regulation and rationalization of the organizational management, ownership and operation of all water transport utilities, and other maritime enterprises.[89] MARINA is vested with the power to develop and formulate policies and programs toward the promotion and development of the maritime industry and for the national security objectives of the country.[90] It is likewise empowered to enforce laws governing water transportation, and to prescribe and enforce rules and regulations, including penalties for violations thereof.[91] Consequently, these functions task the MARINA to act as the proper agency to formulate programs for the implementation of the ISPS, particularly with respect to Ship Security Requirements. Immediately after the Philippines signed the ISPS Code, the MARINA Board has issued many circulars to conform to the provisions of the ISPS Code on Ship Security.

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84 *Joint Statement between the U.S. and the Philippines, available at <http://usembassy.state.gov/posts/rp1/wwwh1gma.html> (last accessed 31 December 2003).*

85 *GMA calls for renewed war on terror, illegal drugs, available at <http://www.manilatimes.net/national/2003/aug/10/top_stories/20030810top2.html> (last accessed 31 December 2003).*

86 *REV. PENAL CODE, arts. 122-123.*

87 *Pres. Decree No. 474, Maritime Industry Decree (1974) (as amended by Executive Order No. 125, Reorganization Act of the Ministry of Transportation and Communications (1987)).*

88 *Id. sec. 2(b).*

89 *Id. sec. 2, para. 2 (c).*

90 *Executive Order No. 125, sec. 14 (a).*

91 *Executive Order No. 125-A, sec. 3 (f) (1987) (amending Ex. Order No. 125).*

a. Accreditation of Training Centers

On 8 May 2003, the MARINA Board issued Memorandum Circular No. 185[92] in conformity with the new Chapter XI-2 of the SOLAS, as amended, and the ISPS Code. The circular, which took effect on 23 May 2003, provides for the rules on the accreditation of maritime training centers/entities that shall offer courses for ship Security Officers (SSO) and Company Security Officers (CSO) as required by International Code for the security of ships and of port facilities.[93] This is to ensure that SSOs and CSOs appointed by ships acquire the minimum competencies and knowledge as to properly undertake the tasks required by the ISPS Code.[94] Under M.C. 185, only MARINA-accredited training centers/entities shall be allowed to offer/ conduct training courses on maritime security as required under the ISPS Code.[95]

b. Enforcement of Maritime Ship Security Measures

1. Memorandum Circular No. 193[96]

This Circular was also issued in conformity with Chapter XI-2 of SOLAS, as amended, and the ISPS Code. It provides for the rules on the implementation of maritime security in the Philippines.[97] The Circular covers: (1) all companies operating/managing Philippine-registered ships engaged in international voyages; (2) all Philippine-registered ships engaged in international voyages;[98] (3) all Philippine-registered ships primarily engaged in domestic trade but temporarily allowed by the Administration to undertake international voyages.[99] However, the circular does not apply to warships, naval auxiliaries or other ships owned or operated by the Government of the Philippines and used only on government non-commercial service.[100]

Companies are primarily responsible for the implementation of M.C. 193.[101] Companies and ships covered by the Circular shall by 01 July 2004 comply with the requirements of Chapter XI-2 on the Enhancement of Maritime Security of SOLAS, 1974, as amended and the ISPS Code. The more salient features of the Circular includ the following: Ship Security Plan, Ship Security Assessment, Security Officers and International Ship Security Certificate.

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92 *Memorandum Circular No. 185, Rules on the Accreditation of Training Center/Entities which shall offer Courses on Maritime Security (2003).*

93 *Id. preamble.*

94 *Id. sec. 1.2.*

95 *Id. sec. 3.1.*

96 *Memorandum Circular No. 193, Rules on the Implementation of Maritime Security Measures for Philippine-registered Ships Engaged in International Voyages (2003).*

97 *Id. preamble.*

98 *Id. sec. 2.2. It includes:*
1. passenger ships including high-speed passenger crafts regardless of size;
2. cargo ships, including high-speed crafts, of 500 gross tonnage or more; and
3. mobile offshore drilling units.

99 *Id. sec. 2.*

100 *Id. sec. 2.4.*

101 *Id. sec. 4.4.*

i. Ship Security Plan

All ships covered by the Circular must carry on board a Ship Security Plan (SSP) duly approved by the MARINA or by a recognized security organization (RSO) acting on its behalf.[102] An SSP is a plan developed to ensure the application of measures on board the ship designed to protect persons on board, cargo, cargo transport units, ships stress or the ships from the risks of a security incident.[103] The SSP shall be developed on the basis of a ship security assessment which shall form part of the submission to the Administration when approval of the SSP is being sought.[104] The SSP shall, address, at the minimum, the following:

1. measures designed to prevent weapons, dangerous substances and devices intended for use against persons, ships or ports and the carriage of which is not authorized from being taken on board the ship;
2. identification of the restricted areas and measures for the prevention of unauthorized access to them;
3. measures for the prevention of unauthorized access to the ship;
4. procedures for responding to security threats or breaches of security including provisions for maintaining critical operations of the ship or ship/port interface;
5. procedures for responding to any security instructions which the Administration or a Contracting Government may give at security level 3;
6. procedures for evacuation in case of security threats or breaches of security;
7. duties of shipboard personnel assigned security responsibilities and of other shipboard personnel on security aspects;
8. procedures for auditing the security activities;
9. procedures for training, drills and exercises associated with the plan;
10. procedures for interfacing with port facility security activities;
11. procedures for the periodic review of the plan and for updating;
12. procedures for report security incidents;
13. identification of the ship security officer;
14. identification of the company security officer including with 24-hour contact details;
15. procedures to ensure the inspection, testing, calibration, and maintenance of any security equipment provided on board, if any;
16. frequency for testing or calibration any security equipment provided on board, if any;
17. identification of the locations where the ship security alert system activation points are provided; and

102 *Id. sec. 4.2.*
103 *Id. sec. 3.11.*
104 *Id. sec. 8.1.1.*

18. procedures, instructions and guidance on the use of the ship security alert system, including the testing, activation, deactivation and resetting and to limit false alerts.[105]

Any amendment to the SSP shall likewise be based on a ship security assessment which shall form part of the submission to the Administration or the RSO acting on behalf of the Administration.[106] Changes to an approved SSP or to any security equipment specified in the approved plan shall not be implemented, unless the relevant amendments to the plan are approved by the Administration.[107]

ii. Ship Security Assessment

The Circular likewise directs each ship to have a Ship Security Assessment (SSA) carried out.[108] The Company may take guidance under Part B of the ISPS Code when conducting the SSA.[109] The SSA shall be carried out by persons with appropriate skills to evaluate the security of a ship, taking into account the Guidance given in Part B of the ISPS Code.[110]

iii. Designation of certain officers

Companies operating ships must designate a Company Security Officer (CSO)[111] and a Ship Security Officer (SSO)[112] on each ship covered by the Circular. The company shall ensure that the CSO, the master and the SSO are given the necessary support to fulfill their duties and responsibilities in accordance with Chapter XI-2 of SOLAS, as amended, Part A of the ISPS Code and Circular 193.[113]

iv. Necessity for an International Ship Security Certificate

Ships are likewise mandated to have on board an International Ship Security Certificate (ISSC).[114] This is issued by the MARINA after an initial verification of its security system and any associated security equipment.[115] Such certificate is subject to renewal verification; an intermediate verification between the second and third anniversary date of the ISSC; and additional verifications as may be required by the Administration.[116]

To ensure compliance with the Circular, it provides for sanctions and penalties for any violation of its provisions.[117]

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105 Id. sec. 8.1.7.
106 Id. sec. 8.2.1.
107 Id. sec. 8.2.2.
108 Id. sec. 7.1.
109 Id.
110 Id. sec. 7.2.
111 Id. sec. 9.1.
112 Id. sec. 10.1.
113 Id. sec. 4.5.
114 Id. sec. 4.3.
115 Id. secs. & 12.1.1.1 & 12.2.1.
116 Id. sec. 12.1.
117 id. sec. 13.

2. Memorandum Circular No. 194 [118]

The Circular intends to provide specific guidelines on the implementation of security measures in accordance with SOLAS, 1974, as amended, specifically Regulation V/19 concerning Carriage Requirement for Shipborne Navigational Systems and Equipment for Automatic Identification System; Regulation XI-1/3 on Ship Identification Number; and, Regulation XI-2/6 on the provision of Ship Security Alert System.[119] Accordingly, it purports to enhance maritime safety and security onboard Philippine-registered ships.[120] The Circular covers: (1) all Philippine-registered ships engaged in international voyages; and (2) Philippine-registered ships primarily documented for domestic trade but temporarily allowed by the Administration to undertake international voyages. [121]

i. Ship Security Alert System

All ships covered by the Circular shall be provided with a ship security alert system in accordance with a time schedule.[122] The ship security alert system, when activated shall:

[122] *Id.* sec. 4.a.1. The time of compliance is as follows:

CONSTRUCTION DATE	DATE OF IMPLEMENTATION
1. ship constructed on or after 1 July 2004	Upon construction
2. ships on international voyages constructed before 1 July 2004	
a. passenger ships/including high speed craft irrespective of size	Not later than the First Survey of the radio installation after 1 July 2004
b. oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed crafts of 500 gt and upwards	Not later than the First survey of the radio installation after 1 July 2004
c. other cargo ships of 500 gt and upwards and mobile offshore drilling units	Not later than the First survey of the radio installation after 1 July 2006

[123] *Id.* sec. 4.a.2.
[124] *Id.* sec. 4.a.3.

1. initiate and transmit a ship-to-shore security alert to a competent authority designated by the Administration and to the company operating the ship, identifying the ship, its location and indicating that the security of the ship is under threat or it has been compromised;
2. not send the ship security alert to any other ships;
3. not raise any alarm on-board the ship; and
4. continue the ship security alert until deactivated and/or reset. [123]

The ship security alert system must be capable of being activated from the navigation bridge and in at least one other location; and conform to performance standards not inferior to those adopted by the IMO. [124]

118 *Memorandum Circular No., Rules on the Provision/Installation of Ship Security Equipment (2003).*
119 *Id. sec. 1.1.*
120 *id. sec. 1.2.*
121 *Id. sec. 2.*
122 *Id. sec. 4.a.1.*
123 *Id. sec. 4.a.2.*
124 *Id. sec. 4.a.3.*

[125] *Id.* sec. 4.b.1. The time of compliance is as follows:

Construction Date	Type	Size	Date of Implementation
Ships constructed On or after 01 July 2002	Passenger ships	irrespective of size	Upon construction
	Cargo ships	300 gt and upwards	
	Passenger ships	Irrespective of size	Not later than 01 July 2003
	Tankers	300 gt and upwards	Not later than the first survey for safety equipment on or after 01 July 2003
Ships constructed Before 01 July 2002	Other ships	50,000 gt and upwards	Not later than 01 July 2004
		300 gt upwards but less than 50,000 gt	Not later than the first safety equipment survey* after 01 July 2004 or by 31 December 2004 which ever occurs earlier.

[126] *Id.* sec. 4.b.2.

[127] *Id.* sec. 4.c. The time of compliance is as follows:

CONSTRUCTION DATE	DATE OF IMPLEMENTATION
1. Ships constructed on or after 1 July 2004 • Passengers ships of 100 gt and upwards • Cargo ships of 300 gt and upwards	Upon construction
2. Ships constructed before 1 July 2004 • Passenger ships of 100 gt and upwards •Cargo ships of 300 gt and upwards	Not later than the first drydocking of of ship after 01 July 2004

ii. Automatic Identification System

All ships covered by the Circular shall be fitted with an automatic identification system (AIS), also in accordance with a time schedule.[125] The AIS shall:

1. provide automatically to appropriately equipped shore stations, other ships and aircraft information, including the ship's identity, type, position, course, speed, navigational status and other safety-related information;
2. receive automatically safety related information from similarly fitted ships;
3. monitor and track ships; and,
4. exchange data with shore-based facilities.[126]

iii. Ship Identification Number (SIN)

Ships covered by the Circular shall have the ship's identification number permanently marked, again according to a time schedule.[127] It must be placed: (1) in a visible place either on the stern of the ship or on either side of the hull, amidships port and

125 *Id. sec. 4.b.1.*
126 *Id. sec. 4.b.2.*
127 *Id. sec. 4.c.*

starboard, above the deepest assigned load line or either side of the superstructure, port and starboard or on the front of the superstructure or in the case of passenger ships, on a horizontal surface visible from the air; and (2) in an easily accessible place either on one of the end transverse bulkheads of the machinery spaces, as defined in regulation II-2/3.30, or on one of the hatchways, or, in the case of tankers, in the pump-room or, in the case of ship's with ro-ro spaces, as defined in regulation II-2/3.41, on one of the end transverse bulkheads of the ro-ro spaces. [128]

Similar to M.C. 193, M.C. 194 provides for sanctions and penalties for violations of its provisions. [129]

2. Simulation Exercises and Bomb Threat Awareness by the Philippine Ports Authority (PPA)

The Philippine Ports Authority was created[130] to facilitate the implementation of an integrated program for the planning, development, financing, operation and maintenance of ports or port districts for the entire country.[131] It was given police authority within the ports administered by it as may be necessary to carry out its powers and functions and attain its purposes and objectives, without prejudice to the exercise of the functions of the Bureau of Customs and other law enforcement bodies within the area.[132] As such, the PPA is mandated to provide security to cargoes, port equipment, structure, facilities, personnel and documents, provided, however, that in ports of entry, physical security to import and export cargoes shall be exercised jointly with the Bureau of Customs. [133] It regulates the entry to, exit from, and movement within the port, of persons and vehicles, as well as movement within the port of watercraft.[134] Most importantly, it maintains peace and order inside the port, in coordination with local police authorities.[135]

In addition, the PPA has a Port Police Department which acts as the law enforcement division of the Authority. While the MARINA is in charge of ensuring Ship Security under the ISPS, the PPA, through its Port Police Department, is the proper agency to implement the ISPS in terms of Port Facilities Security.

After the September 11 attack, National Security Advisor Roilo Golez advised the PPA of the conduct of simulation exercises against terrorist attacks.[136] With this advisory and in view of the need to enhance and strengthen contingency measures in the

128 *Id. sec. 4.c.1.*
129 *Id. sec. 5.*
130 *Pres. Decree No. 505 (1974) (as amended by Pres. Decree No. 857 (1975)).*
131 *Pres. Decree No. 857, sec. 2.*
132 *Executive Order No. 513, sec. 2 (1978).*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Roilo Golez, National Security Advisor Letter Advisory (27 March 2003).*

advent of terrorist acts,[137] the PPA directed all port district managers to undertake security programs that would among others:

1. Organize/update/activate contingency plans/measures to counter bomb threats/acts of terrorism;
2. Conduct simulation exercises to further test level of preparedness in response to anticipated scenarios;
3. Cause conduct of lectures for concerned PPA employees and port stakeholders on security awareness, contingency plans and simulation exercises relative to the defense of installations in ports, which will also include the following:

    a. Three-tiered defense system;
    b. Weapons of Mass Destruction/Bomb Threat Awareness;
    c. Incident Management (Prevention, Detection, Explosion, Rescue and Evacuation, Medical Interventions).[138]

The implementation of the security programs is to be coordinated with concerned Philippine National Police Units.[139] The District Managers are likewise mandated to submit reports of simulation exercise output after completion of the activity.[140]

3. Control Measures by the Philippine Bureau of Customs

The Philippine Bureau of Customs, through its Intelligence and Enforcement Group (IEG), has also initiated certain anti-terrorist programs with respect to cargo brought into, and out of, the Philippines through its ports and harbors.[141] Among the more important and concrete action programs include:

a. Acquisition of Container X-ray Machines [142]

Under Customs Administrative Order No. 1-2002, the Bureau of Customs provided for the use of Container X-ray machines as an alternative to physical examination. Although not yet completed due to lack of funds, the acquisition of the X-Ray machines is on its finalization stage. The machines are expected to facilitate the examination of shipments at the seaport. They are designed to detect the presence of firearms, drugs and weapons of mass destruction concealed in the container.

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137 *Internal Memorandum on Simulation Exercise and Bomb Threat Awareness/Management (9 April 2003).*

138 *Id.*

139 *Id.*

140 *Id.*

141 *THE PHILIPPINE BUREAU OF CUSTOMS ANTI-TERRORIST PROGRAM (undated manuscript) (on file with the Intelligence and Enforcement Group of the Bureau of Customs). This manuscript is cited with the permission of the Deputy Commissioner of the Intelligence and Enforcement Group.*

142 *Customs Administrative Order No. 1 (2002).*

b. Revival of vehicle Tracking System (VTS) [143]

VTS was initially used in 1997 to cover transfer of cargoes from the Ports of Manila (POM) and the Manila International Container Port (MICP) to Calamba, Subic and Clark. Its revival is intended to extend its coverage to include all transfers from MICP and POM to bonded warehouses and all export cargoes starting from Customs Bonded Warehouses and PEZA zones up to the seaport to increase security of exports. The system monitors vehicles containing goods through real-time access to vital information on the location and condition of the shipment. To achieve this, the Bureau through an internet/cellular technology can access the movement and location of vehicles.

c. Use of Custom's seal[144]

In addition to the shipping lines' seal, the Bureau has mandated the use of Custom's seal in containerized export cargoes. This helps ensure that the goods inspected are intact and not tampered or substituted with other goods. It is expected to be a deterrent factor for terrorists who would want to misuse export cargoes.

d. Review and Update of Selectivity System [145]

Under this system, import cargoes are routed to three channels depending on risk assessments. A Selectivity Task Force was created to oversee the system. It periodically generates inputs for Selectivity Criteria using data coming from the data warehouse, post-entry audits, examination returns, findings from Alert Orders and Warrant Seizure and Detention (WSDs) issued, industry sector and other sources.

Depending on the assessment, the goods will pass through specific lanes. A Red Lane subjects the shipment to 100% examination. A Yellow Lane subjects the shipment to document check only. A Green Lane releases the shipment without any intervention.

e. Creation of the Department of Finance Importer's Classification and Monitoring Board [146]

This was created primarily to sanitize and review the list of accredited importers with a view to eliminate fictitious and fly by night importers previously given accreditation. It serves as a support scheme to the BOC selectivity system through its database of importers. Further, it provides indicators of the importer's reputation and propensity to comply or violate relevant laws, rules and regulations.

143 *BUREAU OF CUSTOMS ANTI-TERRORIST PROGRAM, supra note 141.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*

f. Use of Automated Customs Operating System (ACOS) [147]

Intelligence officers are provided with terminals that are linked to the ACOS. The ACOS allows an on-line scanning of the Import Entries in 13 major ports such as the POM, MICP, NAIA, Clark, Subic, San Fernando, Batangas, Cebu, Davao, Dadiangas, Mactan and Legaspi. The access to Import Entries is limited to "Read Only Level." Hence, they cannot be overridden by the access.

On top of all these, the monitoring of smuggling activities in all ports has been intensified. [148] The Philippines' geographic configuration, with its long and irregular coastlines and several isolated islands, provide easy access to smuggling syndicates. [149] To address this problem, the different law enforcement agencies of the government have entered into a Memorandum of Understanding to promote mutual cooperation and assistance. [150] A continuing education program on global terrorism has also been designed for IEG personnel and operatives. [151] Task forces, in coordination with concerned agencies, have also been created. [152] Shipments consigned to bonded warehouses and duty free shops are also closely monitored. [153]

Based on reports, however, illegal smugglers have slowly shifted their operations away from major ports of entry into the out ports – those outside the reach of the MARINA, the Philippine Ports Authority and the Bureau of Customs. This is the present challenge to the Philippine government. The Philippine Coastguard has also started implementing their own anti-terrorist programs aimed at patrolling out ports. They are not however ready to divulge their programs because of their highly confidential nature.

IV. CONCLUSION

The Philippines has adopted anti-terrorist control measures aimed at removing terrorist threats to maritime safety and security in ports and harbors. With three agencies vigilant and more active than ever, headed by a President who is ready to fight terrorists at all costs, the Philippines is definitely serious about keeping its ports and harbors free from these atrocious incidents. Admittedly, the effectivity of Philippine anti-terrorist control measures in ports and harbors has not yet been fully evaluated because of their relatively nascent stage. However, Philippine maritime authorities are optimistic that their educated planning and strict implementation will yield positive results.

148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.*

Testing the limits of GATT Art. XX(b): Toxic Waste Trade, Japan's Economic Partnership Agreements, and the WTO

*By Ma. Tanya Lat**

Statement of Topic

If a country imposes an import ban on toxic and hazardous waste pursuant to the Basel Convention, and such import ban is challenged by an exporting country on the ground that such import ban violates Art. XI of the GATT, will Art. XX(b) of the GATT be available as a defense? This paper discusses the issue of toxic waste trade and the legal contradictions that arise when the Basel Convention and the GATT 1994 are pitted against each other, and attempts to predict how the WTO Dispute Settlement Body might rule if a dispute of this nature is brought before the WTO. Ultimately, the aim of this paper is to emphasize the importance of harmonizing environmental commitments under MEAs with trade commitments under the WTO and regional trade agreements, in order to prevent legal ambiguities that require recourse to international dispute settlement or arbitration.

Introduction

The conflict between trade and environment has been a sticky issue between environmentalists and proponents of the multilateral trading system of the World Trade Organization (WTO). WTO proponents have argued that environmental measures should not unduly restrict trade among countries. Environmentalists in turn have pointed out that this philosophy has effectively made free trade the overriding priority for countries, trumping environmental concerns in the process.[1] This conflict between trade and environment is nowhere more apparent than in the area of toxic waste trade, where the paradigm and regulatory system of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (more simply known as the "Basel Convention")[2] are diametrically at odds with those of the WTO.

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1 *For general references on the trade-environment debate, see, e.g., DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE (1994); Steve Charnovitz, Free Trade, Fair Trade, Green Trade: Defogging the Debate, 27 CORNELL INTL. L.J. 459 (1994) (symposium); and RECONCILING ENVIRONMENT AND TRADE (Edith Brown Weiss & John H. Jackson eds., 2001).*

2 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention].*

This conflict may be coming to a head: a new generation of regional trade agreements exemplified by the recently concluded economic partnership agreements (EPAs) between Japan and members of the Association of Southeast Asian Nations (ASEAN) builds on the free trade framework of the WTO, subtly embedding toxic waste trade into these agreements, together with the exceptions contained in Art. XX of the General Agreement on Tariffs and Trade (GATT). In case trade and environment collide, as they inevitably will, which will prevail?

This paper aims to predict how the WTO Dispute Settlement Body (DSB) might decide – based on prior WTO jurisprudence and methodology of treaty interpretation - in the event that a dispute involving toxic waste trade and Art. XX(b) of the GATT is brought before it for resolution. Part I of this paper will discuss the issue of toxic waste trade and the legal framework of the Basel Convention that has evolved to regulate such trade and to discipline countries into taking responsibility for their own wastes by controlling them within their borders. It will also discuss how this legal framework is inherently at odds with that of the WTO. Part II will then discuss how the Japanese EPAs subtly embed toxic waste trade as well as provisions of the WTO Agreements into such EPAs and create inherent ambiguities that may require recourse to dispute settlement proceedings for resolution. Part III will discuss the availability of Art. XX(b) of the GATT as a possible justification for countries wishing to prevent toxic waste trade by imposing an import ban, and attempt to predict how an arbitral tribunal or the WTO DSB might possibly rule on the issue, based on prior WTO jurisprudence.[3] Part IV will draw conclusions from prior WTO jurisprudence and recommend how future EPAs and similar agreements should be better drafted to prevent such disputes from taking place.

I. Toxic waste trade

"I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to the fact that ... underpopulated countries in Africa are vastly under-polluted."

– Mr. Lawrence Summers, then Chief Economist of the World Bank, in an internal World Bank memo issued in December 1991

A little over a year ago, the Probo Koala, an oil and cargo tanker that had come from Europe, unloaded some 18,857 cubic feet of toxic waste in the Ivory Coast in West Africa. This toxic brew – a "dark, glistening mess reeking of sulfur and rotten eggs" consisting of cleaning chemicals and gasoline and crude oil slop – was dumped in various locations around the capital of Abidjan, including areas near vegetable fields,

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3 *At first glance, the WTO Agreement on Sanitary and Phytosanitary Measures (the "SPS Agreement") may appear to offer a supporting defense to GATT Art. XX(b), allowing countries to impose sanitary and phytosanitary measures designed to protect human, animal, and plant life or health. The SPS Agreement, however, pertains specifically to additives, contaminants, toxins, or disease-causing organisms in food, beverages, or feedstuffs, and not to industrial and consumer products that are deemed as waste. The SPS Agreement will thus not be discussed as it is beyond the scope of this paper.*

fisheries, and water reservoirs. It was the worst environmental disaster in African history – seven people dead and more than 9,000 hospitalized – and led to the downfall of the Ivory Coast national government.[4]

It was a disaster that did not need to happen. When the Probo Koala initially docked in Amsterdam and attempted to unload its toxic cargo there, Amsterdam port authorities advised the crew to avail of the special waste disposal facilities in Rotterdam. However, the London-based arm of multi-billion dollar Dutch Oil trading company Trafigura, which had chartered the vessel, decided that the cost of $500,000 for properly disposing of the waste was simply too much, and ordered the crew on its way.[5] After being rejected at various ports of call in Europe, the Probo Koala eventually dumped its deadly cargo in the Ivory Coast, where a local company received the waste for "disposal."

The idea of throwing one's waste in other's backyard is morally reprehensible, especially when the one receiving the waste happens to be the poorer of the two. And yet, leading economists have actually expounded the virtues of exporting waste to poorer countries. In a controversial internal World Bank memo issued in 1991, then World Bank Chief Economist Lawrence H. Summers said that "the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable" and that the World Bank "should face up to that." Such economic logic argues that "the measurements of the costs of health impairing pollution depends on the foregone earnings from increased morbidity and mortality" and therefore, "a given amount of health impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages." It is also argued that "the demand for a clean environment for aesthetic and health reasons is likely to have very high income elasticity", with health concerns over increases in the likelihood of cancer to be "much higher in a country where people survive to get cancer" than in a country where people don't. The economic logic also argues that there is such a thing as "world welfare enhancing trade in air pollution and waste."[6]

The Summers memo is shocking not so much for its callousness as it is for its candor. From the strictly economic and business point of view, toxic waste trade is indeed cost-effective and extremely lucrative: exporters and importers alike turn a tidy profit, while affected countries and communities are left to shoulder the cost of cleanup and treatment. The *Probo Koala* fiasco – a scenario that is secretly being repeated all over the world - illustrates what happens when "affluent western societies run out of places to dump their waste; when increasingly stringent environmental laws at home mean skyrocketing waste disposal costs; when criminal profiteers seek low-cost solutions."[7]

4 *Sebastian Knauer, Thilo Thielke, Gerald Traufetter, Profits for Europe, Industrial Slop for Africa, Spiegel Online International, 18 September 2006. Available at http://www.spiegel.de/international/spiegel/0,1518,437842,00.html, last visited on January 8, 2008.*

5 *Id.*

6 *World Bank Internal Memo dated December 12, 1991. The text of the memo is available at http://www.ban.org/whistle/summers.html (last visited on 08 January 2008).*

7 *Knauer, et al., supra note 4.*

Much trade is illegal and thus official statistics are likely to be off the mark. However, according to the Organization for Economic Cooperation and Development (OECD), on average, a cargo of hazardous waste "crosses a national frontier more than once every 5 minutes, 24 hours a day, 365 days a year," with an estimated 2.2 million tons of toxic waste crossing borders each year.[8]

Moreover, current trends in toxic waste trade indicate that such trade is being masked as the exportation of "valuable goods": large amounts of discarded computers, mobile phones, second-hard cars and old appliances – all of which contain hazardous and highly toxic substances – are being shipped to developing countries under the guise of "recycling" or trade in used goods.[9] It is a trend that is only likely to increase over time.[10]

Stemming the toxic waste tide: the Basel Convention

Scenarios similar to those of the Probo Koala were actually prevalent in the 1980s and even threatened to reach epidemic proportions.[11] Tighter environmental regulations in industrialized countries led to skyrocketing costs of waste disposal, forcing "toxic traders" to resort to the cheaper solution of exporting to poorer countries.[12] Misadventures of "toxic ships" sailing from port to port trying to offload their deadly cargo, and discoveries of barrels of industrial waste being dumped on Caribbean and African beaches, made front-page headlines around the world and caused considerable alarm among the global community.[13]

In response, the international community agreed to regulate the transboundary movement of toxic and hazardous waste, and thus adopted the Basel Convention in March 1989.[14] The Basel Convention operates on a number of fundamental principles. First, it treats wastes as "bads" - as opposed to "goods" - which pose a threat to human health and to the environment and thus should not be traded.[15] Second, it advocates prevention: the best way to deal with waste is by minimizing it at its source, and by treating and disposing of it in the State where it was generated.[16] Third, it imposes

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8 *DOUGLAS LONG, INTERNATIONAL LOGISTICS: GLOBAL SUPPLY CHAIN MANAGEMENT, 399 (2003).*

9 *Electronic waste or e-waste, also sometimes known as post-consumer waste, generally refers to end-of-life consumer electronics such as televisions, computers, mobile phones, and the like.*

10 *The international environmental organization Greenpeace has warned of a new and emerging "toxic waste colonialism" that has been creeping over the past decade. Recent cases in Africa would indicate as much: (1) in Egypt, bales of sorted plastic remnants collected under German's Green Dot household recycling program ended up in the Egyptian desert; (2) in Nigeria, a businessman agreed to be paid $100/month to store thousands of containers of Italian toxic waste on his property; and (3) the government of Benin signed an agreement with France whereby it would get an advance cash payment of $1.6 million and 30 years of development aid in exchange for accepting France's hazardous waste, including radioactive waste. Knauer, et al., supra note 4.*

11 *UNEP, Minimizing Hazardous Wastes: A Simplified Guide to the Basel Convention (September 2002), UNEP/SBC, Geneva, Switzerland, http://www.basel.int/convention/about.html, last visited January 8, 2008.*

12 *Id.*

13 *Id.*

14 *Basel Convention, supra note 2. The Basel Convention entered into force on May 5, 1992. As of the time of this writing, 170 countries are parties to the Convention.*

15 *Basel Convention, supra note 2, preamble.*

16 *Basel Convention, supra note 2, art. 4.*

the responsibility on highly industrialized, waste-generating countries to exercise restraint in generating and managing their wastes, and obligates them to not export their wastes to other countries except for purposes of recycling, and only with the prior informed consent of the importing country.[17] Fourth, the Convention recognizes that countries have a "sovereign right" to ban the import, entry, and disposal of foreign hazardous wastes and other wastes in their territory.[18] And fifth, the Convention prohibits trade between parties to the Convention and non-parties.[19]

The major limitation of the Basel Convention, however, is the fact that it allows the import/export of toxic wastes to developing countries for purposes of recycling, a loophole that highly-industrialized countries have been quick to exploit. Over time, it became apparent that many countries were circumventing the Basel Convention by designating toxic waste exports as "recyclables." It likewise became apparent that recycling operations in developing countries were either 'sham recycling' or very polluting."[20] Developing countries thus pushed for the closure of this loophole through the Basel Ban Amendment, which absolutely bans the export of all hazardous wastes from what are known as "Annex VII countries" (i.e., Basel Convention parties that are members of the European Union, OECD, Lichtenstein) to non-Annex VII countries (i.e., all other parties to the Basel Convention).[21] The Ban Amendment thus places the burden on the highly industrialized countries to prevent toxic waste exports, instead of on developing countries to resist imports. As of this writing, however, it appears that the Ban Amendment has yet to take effect.[22]

Since the adoption of the Basel Convention, other multilateral environmental agreements (MEAs) such as the Stockholm Convention on Persistent Organic Pollutants[23] and the Montreal Protocol on Substances that Deplete the Ozone

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17 *Basel Convention, supra note 2, art. 4, 6.*

18 *Basel Convention, supra note 2, preamble.*

19 *Basel Convention, supra note 2, art. 4A.*

20 *Jim Puckett, When Trade is Toxic: The WTO Threat to Public and Planetary Health. http://www.ban.org (last visited January 8, 2008).*

21 *The Basel Ban Amendment is technically known as "Decision III/1 and Annex VII," which was passed by a consensus of the 82 parties present at the Third Meeting of the Conference of the Parties of the Basel Convention (COP-3) on September 22, 1995. The decision established a new Article 4A and Annex VII to the Basel Convention. The text of the Basel Ban Amendment is available at http://www.basel.int/pub/baselban.html (last visited January 7, 2008).*

22 *As of this writing, 63 states have already ratified the Basel Ban. [Country status details are available at the website of the Basel Convention Secretariat, http://www.basel.int/pub/baselban.html (last visited January 7, 2008).] For the Basel Ban Amendment to enter into force, 62 country ratifications are needed, representing 3/4ths of the 82 parties present at the Third Meeting of the Conference of the Parties (COP-3). Despite the 63 ratifications, however, there is currently a controversy as to when the Ban Amendment shall enter into force. For more details, see the discussion of the Basel Action Network at http://www.ban.org/Deposit_Box.html (last visited January 7, 2008).*

23 *Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, UNEP/POPS/CONF/4, (entered into force 17 May 2004) [hereinafter Stockholm Convention]. The Stockholm Convention is an international treaty designed to end the production and use of persistent organic pollutants (POPs), which are some of the world's most poisonous chemicals. The Stockholm Convention severely restricts export and import of POPs and POPs wastes, and states how the international community must take appropriate measures to dispose of such POPs wastes in such a way that the POPs pollutant content is "destroyed or irreversibly transformed" so that it no longer possesses the characteristics of a POP. The Stockholm Convention was adopted in 2001 and came into force on 17 May 2004. As of this writing, 147 nations have ratified the Convention.*

Layer[24] have been enacted to regulate the production and movement of persistent organic pollutants [25] and ozone-depleting substances, respectively. These MEAs complement the Basel Convention and adopt a similar regulatory framework of requiring parties to restrict their exports and imports and take responsibility for controlling production and consumption within their borders.

Conflict between the Basel Convention and the WTO Agreements

The Basel Convention and other complementary MEAs operate along a framework whose fundamental principles are inherently at odds with those of the multilateral trading system.

(1) "Bads" v. "goods"

The Basel Convention deems waste products as "bads" which are unfit to be the subject of commerce and trade. In contrast, waste products such as clinical waste, municipal waste, sewage sludge, and waste pharmaceuticals, among others, are included in the Harmonized Commodity Description and Coding System ("HS System"), which is the uniform system used for classifying merchandise in international trade and is an integral part of the WTO Agreements. Not only are these products included, they are also deemed "goods."

(2) Restraint on trade v. free trade

The Basel Convention imposes the responsibility on highly industrialized, waste-generating countries to exercise restraint in generating and managing their wastes, and obligates them to not export their wastes to other countries except under certain conditions. [26] Possible recipient countries, on the other hand, have a "sovereign right" to ban the import and entry of wastes into their territory. [27]

In contrast, the WTO Agreements require countries to facilitate free trade by removing both tariff and non-tariff barriers to trade. Moreover, GATT Article XI:1 requires member countries to not employ prohibitions or restrictions other than duties, taxes, or other charges on the importation of any product from another member country or on the exportation or sale for export of any product destined

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24 *The Montreal Protocol is a landmark international agreement that is aimed at protecting the stratospheric ozone layer. The Protocol requires each country that is party to the agreement to reduce its production and consumption of ozone-depleting substances (ODS) following the time frame stated in the Protocol, with the ultimate goal of eliminating ODS globally. The Protocol also requires all Parties to ban exports and imports of controlled substances from and to non-Parties. The Montreal Protocol was signed in 1987 and entered into force in 1989. As of this writing, 191 countries are parties to the Montreal Protocol.*

25 *"Persistent organic pollutants are a class of chemicals and pesticides that persist for many years in the environment, are transported great distances from their point of release, bio-accumulate (thus threatening humans and animals at the top of the food chain), and cause a range of health effects." UNEP, supra note 11.*

26 *These general obligations are laid down in the preamble and Article 4 of the Basel Convention. Article 4.9(b) of the Convention states, however, that the export of wastes may be allowed if such wastes are "required as a raw material for recycling or recovery industries" in the importing state. In such instances, the exporting state shall inform the importing state of the proposed waste export, and the importing state must give its consent in writing and confirm the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question. (Art. 6.3, Basel Convention)*

27 *Preamble, Article 4.1(a), Basel Convention, supra note 2.*

for the territory of another member country. In effect, export and import bans on industrial goods are prohibited. Moreover, the requirement that exporters first obtain the prior informed consent of the importing country may possibly be deemed a quantitative restriction and a non-tariff barrier to trade.[28]

(3) Self-sufficiency v. national treatment

The Basel Convention requires parties to the Convention to exercise self-sufficiency in hazardous waste management, primarily by minimizing waste at its source, and to treat and dispose of it within its borders. Import restrictions and bans are particularly important, as they help countries control the amount of waste within their borders and prevent them from reaching levels that are beyond the countries' capacity to manage and dispose of in an environmentally sound manner.

The principle of natural treatment, however, requires all WTO member countries to treat "like products" and "services" of member nations as favorably as they would treat their own domestic products and services. Thus, countries generally cannot deny market access to similar foreign products; neither can they deny equal access to domestic services.[29]

(4) Discriminative trade v. Most-favored-nation treatment

To ensure that highly industrialized countries do not export their waste to less-industrialized countries which do not have the capability to dispose of such waste, the original Basel Convention prohibits trade between parties to the Convention and non-parties, [30] while the Basel Ban Amendment goes further by prohibiting trade between Annex VII and non-Annex VII countries. This, in effect, allows discriminative trade among certain countries, directly contradicting the basic WTO principle of most-favored nation treatment, which prohibits WTO members from discriminating among other WTO members, and requires them to treat "like products" from other WTO Members equally.

Given these fundamental differences between the two regimes, there is a very strong possibility that a conflict will eventually arise directly pitting trade interests and environment concerns against each other, and forcing a choice as to which should prevail. Such a "showdown" is becoming more imminent with the emergence of new-generation trade agreements that facilitate toxic waste trade and thereby threaten to undermine if not overthrow the system established by the Basel Convention.

28 *Puckett, supra note 20.*

29 *One possibility is that waste exporters will demand equal access to recycling facilities in developing countries under GATS, and use that as a pretext for exporting waste abroad.*

30 *Art. 4.5, Basel Convention, supra note 2.*

II. Trade agreements: the new arena for toxic waste trade

Japan's Economic Partnership Agreements

Over the past seven years, Japan has been negotiating and enacting bilateral "new-age" economic partnerships with members of the Association of Southeast Asian Nations (ASEAN). In a bid to foster "closer economic relations between Japan and the ASEAN community, Japan has proposed a "hub-and-spokes" model of integration, whereby Japan and ASEAN enter into an overarching "comprehensive economic partnership," with the country-specific details of such partnership to be spelled out in bilateral "economic partnership agreements" (EPAs).[31]

These "economic partnership agreements" (EPAs) are 'WTO-plus' "mega-treaties" which build on the basic features and principles of the WTO agreements on goods and services, incorporate the "Singapore issues" (i.e., investment, government procurement, competition policy, and trade facilitation) as well as features of bilateral investment treaties, and then bundle them together with arrangements for "cooperation", i.e. provision of official development assistance (ODA). It is an ambitious move towards "deep integration," undertaken in a framework that is being attempted in Asia for the first time. The dynamics of such EPAs are yet unknown and beyond the scope of existing computable general equilibrium econometric (CGE) models.[32]

Because the implications of these EPAs are so vast and far-reaching but cannot be reasonably predicted, experts such as former WTO Appellate Body Chairman Florentino Feliciano have cautioned ASEAN governments to be more circumspect and cautious in negotiating and concluding NAFTA-type such as this.[33] Despite

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31 *See the Framework for Comprehensive Economic Partnership Between Japan and the Association of Southeast Asian Nations, which was signed on October 8, 2003 in Bali, Indonesia, available at http://www.mofa.go.jp/region/asia-paci/asean/ pmv0310/framework.html (last visited on January 8, 2008).*

32 *CGE models are only able to predict trade flows; they cannot predict the possible outcome of the interplay between trade and investment flows, much less the dynamics between trade, investment, and ODA flows.*

33 *In his testimony before the Special Committee on Globalization of the House of Representatives of the Philippine Congress on October 12, 2005, Mr. Feliciano stated:*

"x x x Sir, the JPEPA is an amalgam of two (2) distinct agreement. It is an amalgam of a BIT, a Bilateral Investment Treaty and a Bilateral Free Trade Agreement. So it is a combination of both. What that means, Sir, in my personal view, is that you must be twice as awake, twice as vigilant, make sure that you are able to examine very carefully the provisions of the agreement.

"Let me mention that this is the first so-called economic protection agreement combining a BIT with a Bilateral Free Trade Agreement that Japan is seeking to enter. All the other agreements with the ASEAN countries are BIT or are Bilateral Free Trade Agreements. But we are the first one and I think they are experimenting with us to see how we will react to a combined treaty. I say, the difficulties are twice as large, twice as formidable.

"The example I have in mind is the NAFTA. NAFTA is the North American Free Trade Agreement. That, Sir, is a combination of an investment agreement and a free trade agreement. There are only three (3) countries who are members of the NAFTA. That's the US, Canada and Mexico. And that agreement took ten (10) years to negotiate. It was signed on the 11th year. And the US did not sign it until it came out with a statute, an act of Congress, identifying the requirements of ... and the positions of the United States.

"So, if USec Aquino will forgive an unsolicited piece of advice, we should try to separate the two (2) because each one is already sufficiently difficult to deal with. Let's not make life too hard for ourselves. Let's do it one by one."

such warnings, however, Singapore [34], Malaysia [35], Thailand [36], the Philippines [37], and Indonesia[38] have signed their respective EPAs with Japan. Moreover, ASEAN is preparing to sign the ASEAN-Japan Comprehensive Economic Partnership (AJCEP) Agreement which will "lock in" these various EPAs by February 2008.[39]

The Japanese EPAs: vehicles for toxic waste trade

It is no secret that Japan has serious problems in dealing with its waste. With each one of its 127 million people producing an average of 1 kilogram of general waste everyday,[40] and generating at least 50 million tons of municipal waste annually, [41] Japan is among the largest waste-producing countries in the world.[42]

Japan is on environmentalists' watch lists, and for good reason: there have been numerous documented incidents wherein Japanese recycling plants have resorted to shipping their wastes abroad as a means of keeping their costs down. Japan's attempts to undermine the Basel Convention are likewise documented.

Environmentalists have thus expressed concern that the Japanese EPAs are another attempt to undermine the Basel Convention and legalize toxic waste trade, as well as create unwitting "toxic waste colonies" in Asia. A close examination of the EPAs shows that such fears are not unfounded.

(1) Waste products as "goods"

The most apparent and perhaps clearest indicator of the intent to engage in toxic waste trade can be seen in the chapter on trade in goods, particularly the section on rules of origin. The Japanese EPAs include the following products in their definition of the term "originating goods":

"(i) articles collected in the Party which can no longer perform their original purpose in the Party nor are capable of being restored or repaired and which are fit only for disposal or for the recovery of parts or raw materials;

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34 *Japan-Singapore Economic Agreement for a New Age Partnership, January 13, 2002, http://www.mofa.go.jp/policy/economy/fta/singapore.html [hereinafter, JSEPA].*

35 *Japan-Malaysia Economic Partnership Agreement, Japan-Malaysia, December 13, 2005, http://www.mofa.go.jp/policy/economy/fta/malaysia.html [hereinafter, JMEPA].*

36 *Japan-Thailand Economic Partnership Agreement, Japan-Thailand, October 2, 2007, http://www.mofa.go.jp/policy/economy/fta/thailand.html [hereinafter, JTEPA].*

37 *Japan-Philippines Economic Partnership Agreement, Japan-Philippines, September 9, 2006, http://www.mofa.go.jp/policy/economy/fta/philippines.html [hereinafter, JPEPA].*

38 *Japan-Indonesia Economic Partnership Agreement, Japan-Indonesia, August 20, 2007, http://www.mofa.go.jp/policy/economy/fta/indonesia.html [hereinafter, JIEPA].*

39 *The negotiations of the AJCEP were concluded during the 11th ASEAN-Japan Summit held in Manila, Philippines in November 2007, with the ASEAN governments issuing a joint statement on the conclusion of the AJCEP negotiations on November 21, 2007.*

40 *Statistics are available at the website of the Japanese Ministry of the Environment, http://www.env.go.jp/en/statistics/recycle/index.html (last visited on 08 January 2008).*

41 *Id.; also see the OECD statistical database, http://stats.oecd.org/wbos/viewhtml.aspx?queryname=321 &querytype=view&lang=en (last visited January 7, 2008).*

42 *Based on the latest reported OECD statistics, the top waste-generating countries are the U.S. (214,253,000 tons/year), Germany (52,627,000 tons/year), Japan (52,097,000 tons/year), Mexico (33,758,000 tons/year), and France (33,467,000 tons/year).*

"(j) scrap and waste derived from manufacturing or processing operations or from consumption in the Party and fit only for disposal or for the recovery of raw materials;

"(k) parts or raw materials recovered in the Party from articles which can no longer perform their original purpose nor are capable of being restored or repaired; and

"(l) goods obtained or produced in the Party exclusively from the goods referred to in subparagraphs (a) through (k) above."[43]

(2) Elimination of tariffs on waste products

Moreover, the EPAs expressly provide for the elimination of customs duties and other kinds of charges on substantially all trade,[44] in accordance with the countries' respective tariff schedules.[45] Such tariff elimination extends to specific waste products that are expressly prohibited by the Basel Convention from being traded. Such wastes include ash and residues containing arsenic, mercury, thallium or their mixtures;[46] ash and residues from the incineration of municipal waste;[47] waste pharmaceuticals;[48] municipal waste;[49] sewage sludge;[50] clinical waste;[51] waste organic solvents;[52] wastes containing organic constituents;[53] and wastes of metal pickling liquors, hydraulic fluids, brake fluids and anti-freeze fluids.[54] The tariff elimination on such waste products is to take place immediately upon entry into force of the EPAs for Malaysia and the Philippines. For Thailand and Indonesia, tariffs will be reduced in equal installments and shall be entirely eliminated within four years from the entry into force of their EPAs.

It must likewise be pointed out that the flow of electronic waste (e-waste) such as used appliances, vehicles, computers, and mobile phones is practically unrestricted, as the HS Code has no separate tariff classification for - and therefore makes no distinction between – brar.d-new and used electronic products.

(3) Elimination of non-tariff barriers

In addition to the obligation to eliminate tariff barriers, parties to the Japanese EPAs are also required to eliminate non-tariff measures on imports and exports which are inconsistent with their obligations under the WTO Agreement,[55] in an implied reference to GATT Art. XI.

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43 Art. 29.2, JPEPA, supra note 37; Art. 28.2, JMEPA, supra note 35; Art. 28.2, JTEPA, supra note 36; Art. 29.2, JIEPA, supra note 38.

44 This was done presumably to comply with GATT Art. XXIV which permits preferential treatment for members of regional trading arrangements and customs unions that comply with the provisions of such article.

45 Art. 18.1, 18.3, JPEPA, supra note 37 Art. 19.1, JMEPA, supra note 35; Art. 18.1, JTEPA, supra note 36; Art. 20.1, 20.3, JIEPA, supra note 38.

46 HS Code No. 2620.6000

47 HS Code No. 2621.1000

48 HS Code No. 3006.8010, 3006.8090

49 HS Code No. 3825.1000

50 HS Code No. 3825.2000

51 HS Code No. 3825.3010, 3825.3090

52 HS Code No. 3825.4100, 3825.4900

53 HS Code No. 3825.6100, 3825.6900

54 HS Code No. 3825.5000

55 Art. 21, JPEPA, supra note 37; Art. 22, JMEPA, supra note 35; Art. 21, JTEPA, supra note 36; Art. 23, JIEPA, supra note 38.

(4) Trade facilitation

The EPAs also mandate the parties to facilitate trade through the streamlining of customs procedures.[56] Such streamlining is to be achieved through harmonization of customs procedures, international cooperation among customs authorities,[57] the use of paperless trading,[58] and the reduction and simplification of customs procedures and documentation requirements.[59] One manner of simplifying import documentation is waiving the requirement for a certificate of origin for imported shipments whose aggregate customs value does not exceed two hundred US dollars ($200).[60] Since waste products generally have no more value in the country of origin, in all probability, this waiver will be maximized by exporters and importers alike.

(5) Absence of specific reservations and references to the Basel Convention

The Japanese EPAs expressly provide that tariff elimination on originating goods of the other party shall be "in accordance with the terms and conditions set out" in the tariff schedule negotiated between the parties.[61] None of the EPAs make explicit reference to the Basel Convention or to domestic environmental laws and policies that regulate and restrict trade in the waste products that have been targeted for tariff elimination, despite the clear applicability of the Convention and such laws.

(6) Possibility of amendment and repeal of laws

In addition, the JPEPA requires the Philippines and Japan to "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."[62] This creates a positive obligation on the part of the Philippines to review its domestic laws and policies, and opens the possibility that it may relax its environmental commitments to further trade objectives under the EPA, or to settle challenges made against such environmental measures.

A strategy for toxic waste trade

All of these elements taken together reveal a subtle yet cunning strategy for the legalization of toxic waste trade within the framework of closer economic partnership.

Although it can be validly argued that the parties to the EPA had no choice but to include waste products in their respective tariff schedules pursuant to their obligations as members of the World Customs Organization,[63] the same argument cannot be

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56 Art. 53.2(c), JPEPA, supra note 37; Art. 54.2(c), JMEPA, supra note 35; Art. 53.2(c), JTEPA, supra note 36; Art. 54.2(c), JIEPA, supra note 38.

57 Art. 55, JPEPA, supra note 37; Art. 56, JMEPA, supra note 35; Art. 55, JTEPA, supra note 36; Art. 55, JIEPA, supra note 38.

58 Chapter 5, JPEPA, supra note 37; Chapter 5, JTEPA, supra note 36. The JMEPA and JIEPA make no mention of paperless trading.

59 Art. 53.2(b), JPEPA, supra note 37; Art. 54.2(b), JMEPA, supra note 35; Art.53.2(b), JTEPA, supra note 36; Art. 54.2 (b), JIEPA, supra note 38.

60 Art. 40.2(a), JPEPA, supra note 37; Art. 39.2, JTEPA, supra note 36 Art. 40.2, JIEPA, supra note 38. The JMEPA provides for a higher aggregate customs value of $1,000.00. Art. 39.2(a), JMEPA, supra note 35.

61 Art. 18.1, JPEPA, supra note 37; Art. 18.1, JMEPA, supra note 35; Art. 18.1, JTEPA, supra note 36; Art. 20.1, JIEPA, supra note 38.

62 Art. 4, JPEPA, supra note 37. This provision is unique to the JPEPA and is not found in any of the other EPAs.

63 Japan, Malaysia, Thailand, Indonesia, and the Philippines are all members of the World Customs Organization.

invoked with respect to tariff elimination. Tariffs are an important factor in regulating and/or facilitating any kind of trade, and have in fact been a major deterrent in controlling toxic waste trade. Eliminating tariff rates on waste products creates the market environment conducive to waste trade in three ways: first, the zero-rating of such waste products operates as a very enticing incentive to exporters and importers to engage in the trade of such products. Secondly, such zero-rating creates a prima facie presumption that such importations are legal and therefore permitted. And thirdly, the zero-rating creates an obligation on the part of the importing country to allow importation at rates that cannot go any higher than those designated in the tariff schedule.

But what of the Basel Convention and all domestic laws and policies enacted to enforce the countries' obligations under such Convention?[64] As mentioned previously, none of the Japanese EPAs expressly refer to the Basel Convention or to domestic laws and policies relating to the entry and regulation of toxic and hazardous waste, whether as notes in the tariff schedules, or as reservations in the basic or implementing agreements of the EPAs. The absence of qualifications or reservations with respect to the import and export of toxic and hazardous waste necessarily implies that either no such qualifications or reservations exist, or if they do, that the parties have chosen to waive such qualifications and reservations. Either way, this omission, whether intentional or inadvertent, may preclude importing countries from invoking the Basel Convention and similar environmental commitments as a possible defense against the importation and entry of such wastes. As these commitments generally consist of measures to make industries internalize their environmental costs, they are by definition, potential non-tariff barriers.[65] Importing countries may thus find their attempts to invoke such environmental commitments opposed on that ground.

Trade facilitation likewise compounds the situation even further by creating regulatory problems for importing countries. The prohibition on export and import bans effectively shifts the regulatory burden from the exporting, waste-generating country (i.e., Japan) to the importing countries, which is tasked to monitor and police imports but may have problems with resources, not to mention poor customs regulation and enforcement at the border. This problem with customs enforcement is particularly serious for Indonesia and the Philippines, both of which are archipelagos and have difficulty patrolling their numerous maritime ports.

Environmentalists are concerned that in the event the governments of the importing countries prohibit the entry of Japanese toxic waste, the Japanese exporters and their importer counterparts may demand the entry of said toxic waste by suing the importing country either in local courts[66] or in international arbitral tribunals.

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64 *Japan, Malaysia, Thailand, Indonesia, and the Philippines are all parties to the Basel Convention. However, as of this writing, only Malaysia and Indonesia have ratified the Basel Ban Amendment.*

65 *Puckett, supra note 20.*

66 *Judicial remedies for the correction of actions taken by relevant authorities regarding matters covered by the JPEPA are provided for under the various EPAs: Art. 7, JPEPA, supra note 37; Art. 6, JMEPA, supra note 35; Art. 6, JTEPA, supra note 36; Art. 6, JIEPA, supra note 38.*

III. Availability of Art. XX(b) of the GATT 1994 as a possible justification for an import ban on toxic and hazardous wastes: how might an arbitral tribunal possibly rule on the issue?

Availability of GATT Art. XX(b) as a possible defense

Defendants of the EPAs have dismissed this analysis as being unduly alarmist, pointing out that GATT Art. XX(b) provides a sufficient defense for any import or export bans on toxic and hazardous waste that may be imposed in the future. Art. XX(b) of GATT 1994 provides:

> *"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human, animal or plant life or health."*

Defendants of the EPAs likewise assert that such import or export bans implemented pursuant to the Basel Convention and GATT Art. XX(b) defense will be upheld by arbitral tribunals. But is this assertion indeed valid?

Resorting to WTO jurisprudence for guidance

The EPAs provide that dispute settlement under such agreements shall be done either by consultation[67] or by arbitration.[68] However, WTO jurisprudence may have a significant bearing on how the arbitral tribunals will rule on the matter.

WTO jurisprudence would be relevant primarily because GATT Art. XX(b) has been expressly incorporated into the EPAs under the chapter in trade in goods.[69] Therefore, it necessarily follows that the accompanying WTO jurisprudence on Art. XX should be applicable as well. Such jurisprudence is likewise relevant inasmuch as the EPAs are intended not to supplant or undermine the WTO Agreements but to build on the WTO, as can be seen from the following provisions:

- "The Parties reaffirm their rights and obligations under the WTO Agreement or any other agreements to which both Parties are parties."[70]

67 *Such consultation shall be undertaken in the event of inconsistencies between the EPA and any agreements other than the WTO Agreement to which the countries are parties. Art. 11.4, JPEPA, supra note 37; Art. 11.3, JMEPA, supra note 35; Art. 12.3, JIEPA, supra note 38. Interestingly enough, the JTEPA does not make provisions for consultation in the event of inconsistencies between the JTEPA and non-WTO agreements.*

68 *Chapter 15, JPEPA, supra note 37; Chapter 13, JMEPA, supra note 35; Chapter 14, JTEPA, supra note 36; Chapter 14, JIEPA, supra note 38.*

69 *The EPAs generally provide that for the chapters pertaining to trade in goods, Art. XX and XXI of the GATT 1994 shall form part of the Agreement "mutatis mutandis." See Art. 23, JPEPA, supra note 37; Art. 10.1, JMEPA, supra note 35; Art. 10.1, JTEPA, supra note 36; Art. 11.1, JIEPA, supra note 38.*

70 *Art. 11.1, JPEPA, supra note 37; Art. 11.1, JMEPA, supra note 35; Art. 11.1, JTEPA, supra note 36; Art. 12.1, JIEPA, supra note 38.*

- "In the event of any inconsistency between this Agreement and the WTO Agreement, the WTO Agreement shall prevail to the extent of the inconsistency."[71]
- The preambles of the various EPAs state that the parties:
- Bear in mind "their rights and obligations under other international agreements to which they are parties, in particular those of the Marrakesh Agreement Establishing the World Trade Organization";[72]
- Recall "Article XXIV of the General Agreement on Tariffs and Trade 1994 and Article V of the General Agreement on Trade in Services";[73] and
- Reaffirm "the importance of the multilateral trading system embodied by the World Trade Organization."[74]

Requirements for a valid defense under GATT Art. XX(b)

General requirements

At the outset, it must be pointed out that in a case where GATT Art. XX(b) is invoked to justify a measure that derogates from WTO commitments, it is the party invoking the provision which has the burden of proof.

In order to prove that a measure is justified under GATT Art. XX(b), the WTO utilizes a two-step test. First, the invoking party must show that the measure falls within the scope of Art. XX(b) and is provisionally justified thereunder, and second, that the measure is applied in a manner that is consistent with the chapeau of Art. XX.

The Brazil-Retreaded Tires Case

There are several WTO cases that have been decided in relation to GATT Art. XX(b). However, the case that would be most relevant to the issue of toxic waste trade is the case of *Brazil-Retreaded Tires*.[75] Although the case does not invoke the Basel Convention or any particular MEA, it involves the question of whether a country can validly impose an import ban on a product that poses serious health and environmental repercussions once it has reached its end-life. Moreover, the Brazil-Retreaded Tires case is instructive in that it is the latest WTO decision on GATT Art. XX(b) and is thus indicative of the current thinking of the WTO DSB on the matter. The case is also instructive in view of the fact that Japan was a third party to the case, and made a written submission as well as an oral statement.

The *Brazil-Retreaded Tires* case involves various Brazilian measures relating to the importation of retreaded tires, particularly:[76]

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71 *Art. 11.2, JPEPA, supra note 37; Art. 11.2, JMEPA, supra note 35; Art. 11.2, JTEPA, supra note 36; Art. 12.2, JIEPA, supra note 38.*

72 *Preamble, JPEPA, supra note 37; preamble, JTEPA, supra note 36.*

73 *Preamble, JPEPA, supra note 37; preamble, JMEPA, supra note 35; preamble, JTEPA, supra note 36; preamble, JIEPA, supra note 38.*

74 *Preamble, JPEPA, supra note 35.*

75 *Panel Report, Brazil – Measures Affecting Imports of Retreaded Tires, WT/DS332/R, final report circulated 12 June 2007; Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tires, WT/DS332/AB/R, adopted 03 December 2007 [hereinafter, Brazil-Retreaded Tires].*

76 *Retreaded tires are used tires that have been reconditioned by stripping the worn tread for a used tire's casing and replacing it with new material. Under the HS Code, retreaded tires have a separate and distinct tariff classification from used tires and new tires.*

- An effective import ban on retreaded tires by virtue of Art. 40 of Portaria 14 of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce (SECEX), which prohibited the issuance of import licenses for retreaded tires;
- An import ban on used tires, which was sometimes applied against imports of retreaded tires;
- The imposition of fines on the importation of retreaded tires, as well as on the marketing, transportation and storage of imported (but not of domestic) retreaded tires;
- Restrictions by certain Brazilian states on the sale of imported retreaded tires; and
- Exemptions from the import ban for retreaded tires imported from MERCOSUR countries.[77]

The European Communities challenged these measures, saying that the measures amounted to an import ban that is expressly prohibited under GATT Art. XI:1. The EC also said that such measures violated the national treatment principle in that they discriminated between imported retreaded tires and domestic retreaded tires, as well as the most-favored-nation principle, as the import ban was lifted for MERCOSUR member states. The EC likewise contended that the real purpose of Brazil's import ban was not the protection of life and health but the protection of Brazil's domestic industry.[78]

In defense, Brazil invoked GATT Art. XX, saying that waste tires pose adverse environmental and health effects, and the import ban is necessary to prevent waste tire accumulation and disposal. Brazil pointed out that because retreaded tires have a considerably shorter lifespan than new tires and are regarded by consumers in developed countries as being less safe than new tires, the market for retreaded tires in developed countries is small and even getting smaller. Moreover, every exported retread is a disposal problem also to be exported. Brazil stated that it already has enough problems with disposal and does not want to import any more.[79]

Brazil also pointed out that waste tire accumulation threatens public health and the environment because accumulated waste tires fuel epidemics of mosquito-borne diseases, release toxic chemicals and heavy metals into the environment, and create fire hazards.[80] Because waste tire disposal presents health risks that cannot be eliminated, only non-generation of waste tires allows Brazil to achieve its chosen level of protection; hence, the import ban is necessary and justified under GATT Art. XX(b).[81]

77 *Panel Report, Brazil-Retreaded Tires, supra note 75, par. 2.1-16.*
78 *Id., at par. 4.19.*
79 *Id., at par. 4.6.*
80 *Id., at par. 4.12.*
81 *Id., at par. 4.13.*

Analysis of Brazil's defense under GATT Art. XX(b)

(1) Scope of Art. XX(b)

In analyzing whether Brazil's violation of GATT Art. XI:1 was justified under GATT Art. XX(b), the Panel first assessed whether the measure fell within the scope of Art. XX(b), asking the following: (1) Did a risk exist to human and animal or plant life or health? (2) If so, did the objective of the measure (in this case, the import ban) reduce such risk?

The Panel found that Brazil had demonstrated that "risks posed by mosquito-borne diseases such as dengue, yellow fever and malaria to human health and life exist in Brazil in relation to the accumulation as well as transportation of waste tyres."[82] Even though the Panel noted that it "may be that health risks associated with waste tyres can be significantly reduced with proper management of waste tyres," this "does not negate the reality that waste tyres get abandoned and accumulated and that risks associated with accumulated waste tyres exist in Brazil."[83] The Panel also concluded that Brazil had "demonstrated that the accumulation of waste tyres poses a risk of tyre fires and the associated health risks arising from such tyre fires."[84]

Having found such risks to exist, the Panel then proceeded to consider whether "the policy objective of the measure to address this risk, as declared by Brazil, falls under the range of policies covered by Article XX(b)." Brazil stated that "the policy objective behind the import ban is the protection of human life and health and environment and that it is designed to prevent the generation of additional amounts of waste tyres in Brazil and, by so doing, to reduce the incidence of cancer, dengue, yellow fever, respiratory diseases, reproductive problems, environmental contamination, and other risks associated with waste tyres." The Panel said that it was "not required to assess (the desirability of) the policy choice declared by Brazil to protect human, animal or plant life or health against certain risks, nor the level of protection that Brazil wishes to achieve." Having said that, the Panel concluded that "Brazil's declared policy of reducing exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres falls within the ranges of policies covered by Article XX(b)."[85]

(2) Necessity of the import ban

Having determined that, the Panel then proceeded to determine whether the import ban was "necessary" to promote Brazil's declared policy. To do this, it first weighed and balanced three factors: (a) the relative importance of the interests or values furthered by the import ban; (b) the trade-restrictiveness of the import ban; and (c) the "relationship of ends and means" or the contribution of the measure

82 *Id., at para. 7.56-71.*
83 *Id., at para. 7.56-71.*
84 *Id., at para. 7.71-82.*
85 *Id., at para. 7.102.*

to the objective."[86] After that, it compared the import ban and other possible alternatives proposed by the EC, to see whether such proposed alternatives were reasonably available.[87]

With respect to the first factor, the Panel declared that "WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation."[88] In this regard, it upheld Brazil's chosen level of protection, which was "the reduction of the risks of waste tyre accumulation to the maximum extent possible." The Panel concluded that "the objective of protecting human health and life against life-threatening diseases, such as dengue fever and malaria, is both final and important in the highest degree" and that "the objective of protection of animal and plant life and health should also be considered important."[89]

With respect to the second factor, the Panel declared that an import prohibition is the "heaviest 'weapon' in a Member's armoury of trade measure" and thus, "Brazil's measure is as trade-restrictive as can be" since it aims to halt completely the entry of retreaded tyres into Brazil.[90]

With respect to the third factor, the Panel assessed: "(a) whether the import ban can contribute to the reduction of the number of waste tyres generated in Brazil; and (b) whether the reduction of the number of waste tyres can in turn contribute to the reduction of the risks of human, animal and plant life and health arising from waste tyres."[91] In this regard, the Panel concluded that "the import ban was capable of contributing to the reduction of the overall amount of waste tyres generated in Brazil"[92] in view of its observations that: (a) an import ban could encourage domestic retreaders to retread more domestic tires, as the demand for such tyres would increase in the face of a ban on imported retreaded tyres,[93] and (b) Brazil had the production capacity to retreaded domestic used tyres, and that domestic used tyres are suitable for retreading and being retreaded.[94] The Panel also found it "reasonable to consider that a measure that contributes to the reduction of the amount of waste tyres in Brazil also will contribute to the reduction of the risks to human, animal and plant life and health arising from the accumulation of waste tyres in Brazil."[95]

On appeal, the European Communities contended that the Panel had erred by not undertaking a quantitative methodology in determining the contribution of

86 *Id., at paras. 7.108-7.148.*
87 *Id., at paras. 7.152-7.215.*
88 *Id., at para. 7.108.*
89 *Id., at paras. 7.108-112.*
90 *Id., at para. 7.114.*
91 *Id., at para. 7.122.*
92 *Id., at para. 7.142.*
93 *Id., at para. 7.131-134.*
94 *Id., at para. 7.135-142.*
95 *Id., at para. 7.147.*

Brazil's import ban to its objective. The Appellate Body upheld the Panel's qualitative methodology, pointing out that in EC-Asbestos, the Appellate Body emphasized that there is "no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health" and thus, risk may be evaluated in either qualitative or quantitative terms.[96] Moreover, the Appellate Body pointed out that as the trier of the facts, the Panel "should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it."[97] The Appellate Body observed that the Panel had undertaken its analysis in a "coherent sequence"[98] and had drawn conclusions from qualitative reasoning that was based on a set of hypotheses that were tested and supported by sufficient evidence.[99]

The Panel then proceeded to compare the import ban with "possible alternatives" put forward by the EC, saying that a measure cannot be considered "necessary" if a consistent or less-consistent measure is "reasonably available" and would "achieve the same end."[100] The EC identified "alternative measures to reduce the number of waste tyres accumulating in Brazil" such as education campaigns, the use of government procurement, measures to reduce the use of cars in Brazil, policies aimed a longer safe use of retreaded tires, and measures to prevent the constant and growing flow of used tyres into Brazil.[101] The EC also identified alternative measures to improve the management of waste tyres,[102] including controlled landfills, stockpiling, energy recovery, and material recycling. After a thorough analysis of these various alternatives, the Panel concluded that Brazil had demonstrated that none of these proposed alternatives could sufficiently achieve Brazil's desired level of protection, and thus could not be reasonably available alternatives to or substitutes for the import ban.[103] The Appellate Body agreed with the Panel's findings.[104]

In view of all of these findings, the Panel thus concluded that "Brazil's import ban on retreaded tyres can be considered 'necessary' within the meaning of Article XX(b)[105] and is thus provisionally justified under Article XX(b)." The Appellate Body upheld these findings,[106] even pointing out that the import ban is a "key element" in Brazil's "comprehensive strategy" to deal with waste tires, and is thus "likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tires."[107]

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96 *Appellate Body Report, Brazil-Retreaded Tires, supra note 75, para. 146, citing Appellate Body Report, EC-Asbestos, para. 167.*
97 *Appellate Body Report, Brazil-Retreaded Tires, supra note 75, para. 145.*
98 *Id., para. 148.*
99 *Id., para. 153.*
100 *Id., at para. 7.152.*
101 *Id., at para. 7.159-161.*
102 *Id.*
103 *Id., at para. 7.179-208.*
104 *Appellate Body Report, Brazil-Retreaded Tires, supra note 75, para. 174-175.*
105 *Panel Report, Brazil-Retreaded Tires, supra note 75, para. 7.215.*
106 *Appellate Body Report, Brazil-Retreaded Tires, supra note 75, para. 183.*
107 *Id., at para. 154-155.*

(3) Compliance with the Chapeau

Having found that Brazil's import ban was necessary and provisionally justified, the Panel then proceeded to determine whether the import ban complied with the Chapeau, i.e., whether (a) it was applied in a "reasonable, consistent and predictable manner," (b) it was not a means of "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, and (c) it was not a "disguised restriction on international trade."[108]

This was where Brazil's defense faltered. The Panel found that the exemption of MERCOSUR imports from the import ban on retreaded tires discriminated between MERCOSUR and non-MERCOSUR countries within the meaning of the chapeau of Article XX,[109] although not to an extent that would constitute a disguised restriction on international trade.[110] The Appellate Body reversed the Panel's findings on the ground that the MERCOSUR exemption resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination. The Appellate Body pointed out that the exemption, which resulted from a ruling issued by the MERCOSUR arbitral tribunal, is "not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the import ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree."[111]

(4) Conclusion

From the Brazil-Retreaded Tires case, it can be seen that despite the stringent requirements and rigorous procedure for determining whether a measure complies with the requirements of Article XX, the WTO DSB may uphold an import ban on a product that poses serious health and environmental risks at the end of its useful life. In this case, the WTO DSB reiterated the fundamental principle that WTO Members have the right to determine the level of protection that they consider appropriate in a given context.[112] Moreover, the WTO DSB pointed out that for a measure to be necessary, it does not have to be indispensable: it only needs to make a material (and not merely a marginal or insignificant) contribution to the health and environmental objectives being pursued. The Brazil-Retreaded Tires case shows that a measure as trade-restrictive as an import ban can be upheld on the basis of serious health risks, especially in the absence of reasonably available alternatives.[113]

For any country that hopes to follow Brazil's example, the factors that would be crucial to its success would be: (a) clarity as to its intent and policy objectives for pursuing such an import ban (which must necessarily be to protect human, animal, or plant life

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108 Id., at para. 7.217.

109 Id., at paras. 7.234-238.

110 Id., at para. 7.355.

111 Appellate Body Report, Brazil-Retreaded Tires, supra note 75, para. 228.

112 Appellate Body Report, Brazil-Retreaded Tires, supra note 75, para. 210.

113 Id.

and health); (b) consistency and even-handedness in the application of such a ban; and (c) a vigorous and consistent defense once the measure is challenged.

Recourse to public international law and MEAs

Other WTO decisions likewise give hope that the DSB may consider MEAs and other relevant treaties even if they are not expressly referred to in the WTO Agreement, an approach that has been referred to as the "extratextual principle."[114]

In the *US-Shrimp-Turtle case*, the Appellate Body introduced an evolutionary and expansive manner of interpreting the WTO Agreements that showed that trade rules can accommodate MEA measures. In this case, the Appellate Body required the WTO Agreements to be interpreted in light of "the contemporary concerns of the community of nations about the protection and conservation of the environment."[115] To determine what these concerns were, the Appellate Body went beyond the textual language of the WTO Agreements and searched for general principles that the international community had achieved widespread political acceptance on. The Appellate Body found these general principles in two treaties – the 1982 UN Convention on the Law of the Sea and the 1992 Convention on Biological Diversity – and two non-binding documents – Agenda 21, adopted by the UN Conference on Environment and Development in 1992, and a resolution adopted in conjunction with the signature of the Convention on the Conservation of Migratory Species of Wild Animals in 1979,[116] and referred to them accordingly in its ground-breaking decision.

In the *EC-Biotech case*, the DSB introduced the possibility of including other rules of international law [117] (i.e., other treaties which the WTO members involved in the dispute are also party to) as tools of treaty interpretation to ensure consistency and avoid conflicts among agreements.

Predisposition of the WTO DSB in a dispute involving the Japanese EPAs

Assumptions

What would be the most likely outcome of a dispute involving the imposition of an import ban within the context of the Japanese EPAs? In attempting to predict this outcome (given the absence of any ongoing controversy), it is necessary to make the following assumptions: (1) that ASEAN member countries will impose an outright import ban or similar measure on toxic and hazardous waste pursuant to their obligations under the Basel Convention and their rights under GATT Article XX(b), as incorporated in the EPAs; (2) Japan will oppose such import ban in much the same

114 *John H. Knox, The Judicial Resolution of Conflicts Between Trade and the Environment, 28 HARV. ENVTL. L. REV. 1 (2004)*

115 *Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, para. 129.*

116 *Knox, supra note 114.*

117 *Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006, para. 7.93.*

way that the EC opposed Brazil's import ban on retreaded tires, notwithstanding the fact that Japan is also a party to the Basel Convention; (3) Japan will resort to dispute settlement under the terms of the EPAs (i.e., through the constitution of an arbitral tribunal) instead of through the dispute settlement mechanism provided for under the Basel Convention; and (4) the arbitral tribunal to be constituted pursuant to the terms of the EPAs shall resort to WTO jurisprudence in arriving at its decision on the matter.

Principles of interpretation established by the WTO

The WTO jurisprudence reveals that the DSB has taken a generally progressive approach to the resolution of trade and environmental disputes, and gives hope that a happy middle ground can be reached to balance trade and environmental concerns.

However, it must not be forgotten that the DSB is primarily bound to follow the ordinary meaning of the text of the agreements as far as possible; it is only when the ordinary meaning is unclear that it is justified in looking beyond the text.[118] Article 3.2 of the Dispute Settlement Undertaking, in particular, requires the DSB to apply customary rules of interpretation of public international law, i.e., to examine the ordinary meaning of the words of the treaty, read in their context, and in the light of the object and purpose of the treaty involved.

Thus, the expansive and progressive interpretative approach used by the DSB in the *Brazil-Retreaded Tires*, *US-Shrimp-Turtle*, and *EC-Biotech* cases may not come into play if, at the strictly textual level, the provisions of the EPAs already indicate the clear intent of the parties.

Application of WTO principles of treaty interpretation to the Japanese EPAs

In the event that the ASEAN governments impose import bans and similar measures to prevent the entry of toxic and hazardous waste from Japan, Japanese exporters and their ASEAN counterpart importers may question those measures for being violative of the states' obligation under the EPAs to liberalize and facilitate trade between them. Although the ASEAN governments can invoke GATT Art. XX(b) and the Basel Convention as a defense, they will have the unenviable burden of having to justify the measure, as well as their intentions for undertaking such measure.

It is a general rule that the intention of the parties is to be determined according to what is expressed in the text of the treaty, in accordance with the ordinary meaning of such text, and in the light of the object and purpose of the treaty.[119] Such meaning

118 *Knox, supra note 114.*

119 *Art. 31.1, Vienna Convention on the Law of Treaties [hereinafter, VCLT]. This customary rule of interpretation of public international law has been repeatedly emphasized by the WTO DSB. See, for example, the Appellate Body Reports in United States – Gasoline, WT/DS2/AB/R, adopted May 20, 1996, p. 17; Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/AB/R, adopted February 13, 1998, para. 47; and European Communities – Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted June 22, 1998, para. 85.*

must emerge in the context of the treaty as a whole, including the preamble and annexes, and any agreement or instrument related to the treaty and drawn up in connection with its conclusion.[120] In interpreting the Japanese EPAs, therefore, one must look not just at the main text which is contained in the Basic Agreement, but also at the voluminous annexes and reservations which detail the specific obligations of the parties pursuant to specific provisions of the EPA. These include the tariff schedules which form an integral part of the chapter on trade in goods.

A number of ASEAN government officials have expressed the opinion that the provisions of the EPAs which include waste products in the enumeration of "originating goods", as well as the portion of the annex that gives a 0% tariff rating to various waste products, are mere surplusage that do not affect the parties' obligations under the Basel Convention. This opinion is likely to be challenged on the ground that under customary rules of treaty interpretation, all the provisions of a treaty are to be given effect to the fullest extent possible, and therefore, the parties would not have included such provisions if they did not intend to be bound by them. The tariff schedules form part of the context of the treaty which must necessarily be taken into account in interpreting the EPAs. Moreover, parties are expected to accord to each other the concessions expressly provided for in the tariff schedules, and deviating from such concessions would impinge upon the legitimate expectations of both exporters and importers who rely on the provisions of the EPAs in conducting their business.

Waste traders can likewise point out the glaring absence of specific references to the Basel Convention and other related MEAs and domestic environmental laws within the EPAs, and argue that this omission is indicative of the intent of the parties to not subject the EPAs to the provisions of the Basel Convention and prior laws. Waste traders can thus challenge the import bans and similar measures as constituting non-tariff barriers that are expressly prohibited under the EPAs. They can also invoke the later-in-time doctrine (*lex posterior derogat priori*), and argue that the EPAs supersede the Basel Convention.

All of these factors taken together cast considerable doubt as to whether the parties intended that the Basel Convention be deemed impliedly incorporated into the EPAs. At best, the arbitral tribunal deciding this dispute may choose to take an extratextual approach, as in the *US-Shrimp-Turtle case*, and attempt to reconcile the Basel Convention and the EPAs. At worst, however, the tribunal may construe these combined factors to mean that the ASEAN countries intended that the Basel Convention not apply to the provisions of the EPAs, and strike down the import ban accordingly.

120 Art. 31.2(a), VCLT, *supra* note 119.

IV. Recommendations and conclusion

The case of the Japanese EPAs is illustrative of the dangers of governments negotiating "with blinders", i.e. with a limited appreciation of the interconnectedness of provisions within a treaty, as well as with other treaties that may or may not directly deal with the same subject matter. In this case where trade and environmental interests seemingly collide, which should prevail? Is it possible for such seemingly contradictory interests to be harmonized? And who should be responsible for such harmonization?

The WTO DSB has emerged as the strongest dispute settlement mechanism in the world today, in contradistinction to the dispute settlement mechanism under the Basel Convention and other MEAs which has all but fallen into disuse. The WTO DSB would thus appear to be the most viable mechanism for resolving trade-environment disputes. The most recent rulings of the DSB on GATT Art. XX likewise indicate a progressive "greening" of WTO jurisprudence, a trend that will hopefully continue.

However, parties must not lose sight of the fact that the primary mandate of the DSB and other dispute settlement mechanisms created pursuant to trade agreements (e.g., arbitral tribunals) necessarily pertains to trade. Members of such tribunals may be perfectly competent to rule on issues relating to trade, but may not have the competence, nor the mandate to rule on environmental issues. Also, by the very nature of such tribunals, a "trade bias" is to be reasonably expected.

Moreover, to expect the DSB and other tribunals to compensate for the omissions, oversight, and mistakes of governments committed during the negotiation stage would open up the possibility of over-interpretation, even "judicial legislation" on the part of such tribunals. This is a practice that is almost universally frowned upon, regardless of whether it is committed by domestic courts or by international tribunals. Ambiguities should not be left to the discretion or the mercy of arbitral tribunals.

The solution, then, to reconciling conflicts between the Basel Convention and the Japanese EPAs - or other trade-environment conflicts for that matter - is to "simply preclude MEA measures for the purview of trade rules."[121] In the case of the Japanese EPAs, the expedient act of expressly excluding measures pursuant to the Basel Convention and other related MEAs and domestic laws from the general provisions of the EPAs would have eliminated any doubts as to whether the parties intended or did not intend the Basel Convention to trump the EPAs' trade provisions. This practice is not new: it is illustrated in Art. 104 of the North American Free Trade Agreement (NAFTA), which expressly states that the Basel Convention (together with two other MEAs) is exempt from NAFTA rules.

121 *Kevin R. Gray, Accommodating MEAs in Trade Agreements (International Environmental Governance Conference, March 15-16, 2004, Paris), available at http://www.unep.org/ dec/onlinemanual/Compliance/PreparingforNegotiations/ SynergiesAmongMEAs/AdditionalResource/tabid/566/Default.aspx (last visited January 8, 2008).*

Another solution in the case of the Japanese EPAs is to exclude toxic and hazardous waste products from the schedule of tariff elimination, an act which can be justified on the ground of health and public policy. The cost of doing business still acts as the possibly the greatest deterrent to toxic waste traders, and keeping tariffs high (and therefore keeping their business costs high) may serve as a considerable disincentive to engage in toxic waste trade.

In other words, national governments must make a more conscious effort at the national level to ensure consistency in the observance of their environmental commitments, and to ensure that such commitments are harmonized across MEAs and trade and investment agreements to which they are parties. This calls for a more careful, precise drafting of treaty provisions, so as to remove any doubt as to the intent of the parties when tribunals are asked to decide on such matters.

And while there is reason to celebrate the "greening" of the WTO DSB – which hopefully will spill over to arbitral tribunals which look to the WTO DSB for guidance – responsibility for harmonizing trade and environmental commitments is too important to be left to the discretion of tribunals. This responsibility must ultimately rest with the national governments, as they negotiate and craft their treaties. No amount of "judicial activism" can take the place of national governments acting decisively and prudently in the first instance.

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