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PASCN Discussion Paper No. 2000-06

**The Legal Characterization of the Asia-Pacific  
Economic Cooperation (APEC) and the  
Individual Action Plans in International Law**

*Sedfrey M. Candelaria*



The *PASCN Discussion Paper Series* constitutes studies that are preliminary and subject to further revisions and review. They are being circulated in a limited number of copies only for purposes of soliciting comments and suggestions for further refinements.

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Ateneo de Manila University

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July 2000

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## Abstract

The emergence of various economic groupings in different parts of the world has given rise to the accompanying issue of compliance by member States with their commitments under the respective charters or codes of conduct of their economic or trade regimes. A fundamental concern confronting these regimes is the need to design a system of effectively enforcing the obligations and commitments assumed by member States. Historically, the evolution of law in the realm of international economic transactions took a cautious route. While States have traditionally entered into bilateral agreements in the form of friendship, commerce and navigation treaties, the concept of multilateral economic engagements gained wide acceptance only after the Second World War through the establishment of the Bretton Woods institutions. This development indicated the softening stance of some States towards economic sovereignty. The recognition of economic sub-groupings under the recently adopted WTO Agreement further reinforced the openness of member States towards economic interdependence.

In the Asia Pacific, a significant number of “economies” had committed themselves towards greater cooperation. A study of the implications of this economic sub grouping both at the national and international levels is crucial, particularly in light of the existence of other multilateral economic agreements to which most governments of these “economies” are presently committed. Of more immediate concern is how a member of APEC is expected to carry out its commitment and Individual Action Plan. The present research proposal intends to focus on the juridical or legal significance of the APEC and the Individual Action Plans. A principal issue that will be addressed is whether APEC “commitments” may be susceptible of international legal obligations to which the law of treaties and principles of state responsibility may be applied. In relation to this, the research will inquire into the domestic law implication of commitments made under APEC and the Individual Action Plans.

## Executive Summary

This study begins with an inquiry into the basis of legal obligations under international law. It examines, in particular, the traditional sources of international law with concentration on treaties, custom and general principles of law. The writer then moves to another chapter to discuss how legal standards in international economic relations had evolved. It will become evident that States have adopted practices in the conduct of trade and economic relations even before the twentieth century which have found their way into the constituent instruments of multilateral institutions, such as, the General Agreement on Tariffs and Trade/World Trade Organization, International Monetary Fund and World Bank.

Non-treaty-based standards in economic law, however, have often been susceptible to the problem of being categorized as “soft law”. This is attributed to the fact that while many States are willing to undertake collective action in international economic relations, there is a tendency to be less concrete in the nature of the obligations that they are ready to assume as observed by writers.

The writer then turns to another chapter in order to test the legal characterization of APEC applying the standards of economic law. A textual review of the language and content of economic agreements in APEC is done in order to arrive at a deeper understanding of the intent of the State Parties. After having done this process, the writer comes to a conclusion that the commitments enunciated under the various APEC declarations are not treaties. However, this is not to say that these declarations have no legal effect whatsoever. The fact that State Parties to APEC have entered into mutual engagements confers an entitlement on each party to make representations to the others on the execution of these engagements.

In the penultimate chapter, the writer uses the Philippine Individual Action Plan as a case study to analyze the impact of APEC on domestic law. The writer discusses the constitutional policies and principles governing entry into economic agreements and applies these principles to our action plan. The writer is of the view that obligations undertaken by the Philippines under APEC are in the form of a presidential-executive agreement and a congressional-executive agreement. As an executive agreement, it may be suggested that these APEC commitments are really intended to implement the treaty obligations under the WTO.

# **The Legal Characterization of the Asia-Pacific Economic Cooperation (APEC) and the Individual Action Plans in International Law\***

Sedfrey M. Candelaria<sup>1</sup>

## **Chapter One: Introduction**

The rise of APEC as an aggrupation of “economies” in recent years gave birth to a new concept of organization in the field of economic relations. APEC brought together “member-economies” whose states are themselves existing members of WTO and other regional economic groupings. This necessarily entails the need to define and delineate possible overlapping of international obligations or commitments which may have been assumed by these member-States under the different trade regimes.

This research paper aims to inquire into the legal nature of APEC from the perspective of international law. The present writer will examine the legal obligations, if any, arising from APEC membership and the assumption of individual action plans, including the legal consequences of non-compliance with these obligations. In regard to the latter issue, the international law principle of state responsibility will be applied.

Chapter Two of the paper discusses the concept of legal obligations at the international level. A distinction will be made between binding legal obligations and moral obligations. Furthermore, the writer will emphasize the difference between obligations arising from municipal and international laws. A review of the basic sources of international law has been included for the purpose of providing the legal framework for analysis of the subject matter of inquiry.

Chapter Three is devoted to a synopsis of the development of rules pertaining to international economic relations, particularly the conduct of trade and commerce among nation-states. The question of the emergence of “soft law” in economic relations and the accompanying legal problems surrounding this concept will be discussed.

Chapter Four aims to apply the international legal standards and concepts set forth in the two preceding chapters to the characterization of APEC.

Chapter Five specifically uses the Philippine Individual Action Plan as a case study in order to analyze the impact of APEC on domestic law.

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The writer concludes that membership in APEC and assumption of individual action plans are not without legal consequences from the perspective of international law. However, the extent that “member economies” of APEC would be willing to take legal action for non-compliance with APEC commitments is uncertain in light of the fact that there exists no comprehensive dispute settlement structure within APEC itself. It is even uncertain whether “member-economies” would be inclined to treat problematic trade incidents as mere issues or actual legal cases. Their attitude toward these would be critical in realizing the goals of the aggrupation in the long run.

## Chapter Two: Legal Obligations and Sources of International Law

### A. Concept of Legal Obligations at the International Level

In a study by Professor D.M. McRae, he attempted to investigate the implications of the growth of international organizations for theories of obligation in international law.<sup>2</sup> Professor McRae addressed specifically the problem of a lack of “complete legal system” within the world community as observed by Professor Myres McDougal and his associates.<sup>3</sup> In order to appreciate the effectiveness, nonetheless, of any rule of international law, the answer to the fundamental question of why is an obligation under international law recognized, according to Professor McRae, “must proceed from the same source as answers to an enquiry into the basis of obligation in any other system of law.”<sup>4</sup>

Drawing from earlier analyses of what constitutes either a legal or moral obligation by Professors Hart and J.C. Smith, Professor McRae himself makes this distinction:

To say that a person has a legal rather than a moral obligation is to make a statement about the procedures for identifying the obligation and the circumstances in which the obligation arises. A person is said to have an obligation when the conduct in question is seen either by the person making the system or the person about whom the statement is made as something that should be done. Of course, the moral ‘should’ is used properly on many occasions that do not connote obligation, but a statement of obligation invariably contains such a prescription. If the prescription is justified by reference to its content, then the statement will be one about moral obligation. If, on the other hand, the justification is based not on content but on a formal structure of authority that contains formal means for identifying such statements of obligations, the obligation would be legal rather than moral. Thus, we say that a rule or prescription gives rise to a legal obligation if that rule or prescription can be shown to be authorized by, or to derive its

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<sup>2</sup> D.M. McRae, *Legal Obligations and International Organizations*, CAN. Y.B. INT’L. L. 87-105 (1973).

<sup>3</sup> *Id.* at 91.

<sup>4</sup> *Id.* at 93.

validity from, the established procedures or institutions of a legal order.<sup>5</sup> (Underscoring supplied)

This distinction, however, may have to take into account the characteristics of inter-state relations once applied to the world community. In this regard, Professor McDougal's approach has been viewed as more appropriate. Professor McRae states:

The notions of recognized or accepted authority and the manipulation of power to ensure acquiescence in the decisions emanating from that authority (thus ensuring, in part, its continued existence) provide the necessary basis for the kind of structure that can qualify obligation as legal rather than moral.<sup>6</sup>

Despite these differing approaches, Professor McRae is of the view that "enquiries into obligation involve the same considerations whether we are dealing with a national, international or any other form of legal order."<sup>7</sup>

## **B. Sources of International Law**

Article 38 (1) of the Statute of the International Court of Justice enumerates the following sources of international law:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

### **1. Treaties**

#### **a. Definition**

A treaty, according to the 1969 Vienna Convention on the Law of Treaties, is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."<sup>8</sup>

The term "treaty" is used as a generic term covering all forms of international agreement in writing concluded between States. Although the term "treaty" in once sense connotes only the single formal instrument, there also exists international agreements, such as, exchanges of notes, which are not a single formal instrument, and yet are certainly agreements to which the law of treaties applies. The question

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<sup>5</sup> *Id.* at 90.

<sup>6</sup> *Id.* at 93.

<sup>7</sup> *Id.* at 94.

<sup>8</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969); 63 AM. J. INT'L. L. 975 (1969).

whether, for the purpose of describing them, the expression “treaties” should be employed rather than “international agreements” is a question of terminology rather than of substance.<sup>9</sup>

## **b. Role as a Source of Law**

Treaties and conventions occupy the first rung in the enumeration of sources in Article 38 of the Statute of the International Court of Justice. Although no hierarchy was intended by Article 38, the priority given to treaties reflects an understanding of States and international lawyers alike, that the rights and duties of States are determined primarily by their agreement as expressed in treaties – just as in the case of individuals, their rights are specifically determined by any contract which is binding upon them.<sup>10</sup>

Two principles justify this position: *lex specialis derogat generali* or special rules prevail over general ones; and the intention of the parties in selecting certain rules to govern their relations rather than general international law.<sup>11</sup>

## **c. Categories of Treaties<sup>12</sup>**

### **General Multilateral Treaty**

A general multilateral treaty establishes certain rules of behavior and is of a fundamentally norm creating character, and as such, could be regarded as forming the basis of a general rule of law. It is open to all States or to all members of a regional group.

### **ii. Mechanism-Setting Treaty**

These treaties provide a regional or functional collaborative mechanism by which States can regulate or manage a particular sphere of activity. These treaties advocate certain purposes and principles, which are achieved through the decisions, recommendations or rules adopted by the administrative organs established. The international regimes created by treaties of this class are sometimes termed “international administrative law.”<sup>13</sup> An example of this is the General Agreement on Tariffs and Trade.

### **iii. Bilateral Treaties**

This category of treaties encompasses treaties entered into between two States and those among three or four States. They facilitate a mutual exchange of rights and obligations regarding particular subjects,<sup>14</sup> and their tone is contractual, rather than legislative.

<sup>9</sup> See Harvard Research in International Law, 29 AM. J. INT’L. L. SUPP. 686 (1935); Potter, *Treaties and*

*International Legislation*, 61 AM. J. INT’L. L. 1005 (1967).

<sup>10</sup> See 1 LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 86-87 (1970).

<sup>11</sup> HENKIN, ET. AL, INTERNATIONAL LAW 69 (1980) [hereinafter HENKIN].

<sup>12</sup> *Id.* at 70.

<sup>13</sup> *Id.* at 71.

<sup>14</sup> Examples include subjects, such as, extradition, air transport, trade, friendship, and alliance.

## 2. Custom

### a. Definition

Custom is defined by Article 38 as “evidence of a general practice accepted as law.” This definition has been criticized as inaccurate, because “it is the practice which is evidence of the emergence of a custom.”<sup>15</sup> What is needed is a general recognition that a particular practice is obligatory.<sup>16</sup> Notwithstanding its phrasing, the definition contains the two most important elements of custom: general practice by States and acceptance as law.<sup>17</sup>

### b. Elements of Custom

#### State practice

State practice encompasses any act, statement or behavior by a state from which its conscious attitude regarding its recognition of a customary rule can be inferred.<sup>18</sup>

There are two views on what constitutes state practice. One view limits state practice to physical acts.<sup>19</sup> This position finds support in Judge Read’s dissenting opinion in the *Anglo-Norwegian Fisheries Case* in which His Excellency writes that “[t]he only convincing evidence of state practice is to be found in seizures, where the coastal state asserts its sovereignty over trespassing foreign ships.”<sup>20</sup> On the other hand, the more popular view would consider both the acts and statements, or physical and verbal acts, of a State, as state practice.<sup>21</sup>

According to the International Law Commission, the forms of acts or statements that would constitute state practice include:

Treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisors, practice of international organizations.<sup>22</sup>

State practice, as a concept, may be broken down further into its three component elements: duration, uniformity, and generality.

<sup>15</sup> HENKIN, *supra*, note 10 at 37.

<sup>16</sup> BRIERLY, *THE LAW OF NATIONS* 61 (6<sup>th</sup> ed. 1963).

<sup>17</sup> COQUIA & DEFENSOR-SANTIAGO, *INTERNATIONAL LAW* 30 (1993) [hereinafter COQUIA – DEFENSOR-SANTIAGO].

<sup>18</sup> See VILLEGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 4 (1985) [hereinafter VILLEGER]; Akehurst, *Custom as a Source of International Law*, 47 B. Y.B. INT’L. L.1 at 53 [hereinafter Akehurst];

SORENSEN, *THE SOURCES OF INTERNATIONAL LAW* 85 (1965).

<sup>19</sup> D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 88 (1971).

<sup>20</sup> *Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway) 1951 I.C.J. Rep. 116 at 191 [hereinafter *Anglo-Norwegian Fisheries Case*].

<sup>21</sup> A number of publicists adhere to this view, among them being Messrs. M. Akehurst, R.R. Baxter, and M. Villeger.

<sup>22</sup> 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 368 (1950).

## ii. Duration

Provided that the consistency and generality of a practice are proved, no specific duration is required; the passage of time will of course be a part of the evidence of generality and consistency.<sup>23</sup> In the *North Sea Continental Shelf Cases*, the International Court of Justice clarified that no precise length of time need be shown to determine that a practice has emerged as custom. Duration is helpful only to prove that the other requirements of custom have been met.<sup>24</sup> The International Court does not emphasize the time element in its practice.<sup>25</sup> In short, duration is a function of generality and uniformity.

In fact, there have been cases where, because of the immediate and widespread acceptance of international law rules, “instant customary law” has developed. Common examples of these are certain rules relating to outer space, and, arguably, the environment.

## iii. Uniformity

The leading pronouncement of the Court with respect to uniformity appears in the judgement of the *Asylum* case, where it stated that “[t]he party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a constant and uniform usage practiced by the States in question ...”

It follows from this that one single act or statement made by a State will not give rise to customary rule but that the identical acts of statements must be repeated over time. This view is qualified by Akehurst, who reviews it within the context of the particular circumstances surrounding the *Asylum* case. In that case, Colombia sought to justify its grant of diplomatic asylum to Peruvian rebel leader Haya de la Torre by claiming that the exercise of diplomatic asylum is a custom. The Court disagreed with Colombia’s assertion, by noting the uncertainty, contradiction, fluctuation, and discrepancy in the exercise of this alleged custom. It concluded that “[i]t has not been possible to discern ... any constant and uniform usage, accepted as law.”<sup>26</sup> Thus, what is crucial in meeting the uniformity requirement is not repetition, but consistency in state practice.

However, the mere inconsistency in state practice is not a bar to the formation of a customary law. It is necessary to distinguish between the kind of inconsistencies. Major inconsistencies in state practice, seen in a large number of states going against the rule, prevents the formation of custom. But minor inconsistencies, seen in a small amount of states defying in the rule, will not prevent the formation of custom. Further,

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<sup>23</sup> I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5 (4<sup>th</sup> ed, 1990) [hereinafter BROWNLIE].

<sup>24</sup> *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) 1969 I.C.J. Rep. 4 at 42-43, par 73-74 [hereinafter *North Sea Continental Shelf Cases*].

<sup>25</sup> BROWNLIE, *supra*, note 22.

<sup>26</sup> *Asylum Case*, (Colombia v. Peru), 1950 I.C.J. Rep. 116 at 191, cited in M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 27 (5<sup>th</sup> ed, 1984).

when there is no practice that goes against an alleged custom, a small amount of practice would suffice to create a customary rule.<sup>27</sup>

Moreover, even if a customary rule has already been formed, there are situations in which such rule would not apply to particular states. This is the case of the *persistent objector*,<sup>28</sup> wherein a state may contract out of a custom in the process of formation.<sup>29</sup> Evidence of objection must be clear and there is a presumption of acceptance which must be rebutted,<sup>30</sup> which Villegger explains:

A persistently objecting state is not bound by the eventual customary rule if the state fulfills two conditions. First, the objections must have been maintained from the early stages of the rule onwards, up to its formation, and beyond ...Second, the objections must be maintained consistently, seeing that the position of other States which may have come to rely on the position of the objector, has to be protected.<sup>31</sup>

However, this rule is challenged by Professor Jonathan Charney as being merely of "temporary or strategic value." It is asserted that this rule cannot serve a permanent role, because "one does not really believe that States have the independence freely to grant or withhold their consent to the rules of customary international law."<sup>32</sup>

There is also the case of the *subsequent objector* or a state which dissents from a customary rule after its formation. It is doubtful whether a small group of States advocating a rule contrary to the custom can affect the status of the custom or can escape liability in case of the custom's breach. But if a substantially large number of States assert a new rule, "the momentum of increased defection, complemented by acquiescence, may result in a new rule."<sup>33</sup> But if the process of defection is slower and neither the old nor the new rule can boast of drawing the majority of adherents to its ranks, the consequence is a network of special relations based on opposability, acquiescence and historic title.<sup>34</sup>

#### iv. Generality

The term generality introduces a quantitative dimension to the elements of state practice. It means that there is a common and widespread practice among States.<sup>35</sup> By general, however, is not meant that the practice must be universal. Harris writes that the *North Sea Continental Shelf Cases* demonstrates the position that a practice need not be followed by all States for it to be the basis of a general custom;<sup>36</sup>

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<sup>27</sup> *Id* at 28.

<sup>28</sup> See generally Akehurst, *supra*, note 17; Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 B. Y.B. INT'L. L. 1 at 24 (1985) [hereinafter Charney].

<sup>29</sup> See *Anglo-Norwegian Fisheries case*, *supra*, note 19.

<sup>30</sup> BROWNIE, *supra*, note 22, at 10.

<sup>31</sup> VILLEGER, *supra*, note 17, at 16.

<sup>32</sup> Charney, *supra*, note 27.

<sup>33</sup> BROWNIE, *supra*, note 22, at 11.

<sup>34</sup> *Id*.

<sup>35</sup> VILLEGER, *supra*, note 17, at 13.

<sup>36</sup> D.J. HARRIS, *CASES AND MATERIALS IN INTERNATIONAL LAW* 41 (4<sup>th</sup> ed, 1991).

although, Villegger suggests that there must at least be a representation of all the major political and socio-economic systems.<sup>37</sup>

Akehurst defines a general custom as one that is “binding, not only on States whose practice created it, but also on States whose practice neither supports nor rejects the custom, and on new States which come into being after the custom has become well established.”<sup>38</sup> There are times, however, when a general custom does not apply to a group of States within a region, because a special custom, which conflicts with the general custom, applies to the group. As between States to whom the special custom applies, the special custom will prevail over the general custom, unless the general custom is *jus cogens*;<sup>39</sup> but as between a State covered by a special custom and a State that is not so covered, the general custom will apply.<sup>40</sup>

### Opinio juris

State practice, by itself, does not suffice to create a customary rule. The Statute of the International Court refers to a “general practice accepted as law” Thus, there is an additional imperative that a State believes that when it follows a certain practice there is a legal obligation to do so and that if it were to depart from the practice, it would suffer some form of sanction. This was clarified by the Court in the *North Sea Continental Shelf cases*:<sup>41</sup>

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it ... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.

Being a belief or conviction, *opinio juris* is necessarily a psychological element, which is slippery and difficult, albeit an essential, ingredient to prove. There are two methods of approach that the ICJ has taken. In many cases the Court is willing to assume the existence of an *opinio juris* on the basis of evidence of a general practice,<sup>42</sup> or a consensus in literature, or the previous determinations of the Court or other international tribunals.<sup>43</sup> In the second and more rigorous approach, the Court has called for more positive evidence establishing the recognition of the validity of the rules in question in the practice of States.<sup>44</sup> The choice of either method depends on two factors: first, the nature of the issues; and, second, the discretion of the Court.<sup>45</sup>

<sup>37</sup> VILLEGER, *supra*, note 17, at 13.

<sup>38</sup> Akehurst, *supra*, note 17, at 29.

<sup>39</sup> *Jus cogens*, according to Article 53 of the Vienna Convention on the law of treaties, is “...a peremptory norm of international law ... accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

<sup>40</sup> Akehurst, *supra*, note 17, at 29.

<sup>41</sup> *North Sea Continental Shelf Cases*, *supra*, note 23, at 44.

<sup>42</sup> See LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 380 (1958) [hereinafter LAUTERPACHT].

<sup>43</sup> See the *Gulf of Maine case*, Judgment of the Chamber, 1984 I.C.J. Reports 293-4, par. 91-93.

<sup>44</sup> See *The Case of the S.S. Lotus* (France v. Turkey) P.C.I.J. Ser. A, no.10, p 28; *North Sea Continental*

### 3. General Principles of Law

The phrase “general principles of law recognized by civilized nations” has been taken to connote principles so general as to apply within all systems of law that have achieved a comparable state of development.<sup>46</sup> They are understood as general principles of justice, closely linked to natural law.<sup>47</sup>

In the committee of jurists who prepared the Statute, there was no definite consensus on the precise significance of the phrase.<sup>48</sup> However, they regarded these principles in terms of rules accepted in the domestic law of all civilized states. Their intention was to authorize the Court to apply the general principles of municipal jurisprudence, in so far as they are applicable to relations of States.<sup>49</sup> An international tribunal chooses, edits and adapts elements from better developed systems: the result is a new element of international law, the context of which is influenced historically and logically by domestic law.<sup>50</sup>

It is essential to note that the general principles of law exist only when there has not been practice by States sufficient to give the particular principle status as customary law, and the principle has not been legislated by general international agreement.<sup>51</sup> If a given principle is affirmed constantly in international judicial decisions and accepted in the practice of States, it must clearly acquire the status of a custom, and it matters little if the principle has been originally borrowed from municipal law. Such a principle becomes incorporated into international law by the normal operation of the sources of that system. The same may be said of numerous rules of municipal laws, which are embodied in treaties.<sup>52</sup>

The question then of the status of general principles only comes into operation in the absence of relevant treaty obligations and of applicable rules of international customary law.<sup>53</sup> Article 38 empowers the Court, when both customary and conventional law will not suffice, to resort to the rules of municipal law for the disposal of cases submitted to it. Article 38 authorizes the use of analogy.<sup>54</sup>

Some of the principles the Court has applied relate to the administration of justice, such as, the principle that no one may be judge in his own cause,<sup>55</sup> the

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*Shelf Cases*, *supra*, note 23; *Military and Paramilitary Activities in and Against Nicaragua* (Merits) (Nicar. v. U.S.) 1986 I.C.J. Reports 14.

<sup>45</sup> BROWNLIE, *supra*, note 22 at 7.

<sup>46</sup> Virally, *The Sources of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 143 (1968) [hereinafter Virally].

<sup>47</sup> See Friedman, *The Uses of General Principles in the Development of International Law*, 57 AM. J. INT'L. L. 279 (1963); Kunz, *Natural Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L. L. 951 (1961).

<sup>48</sup> BROWNLIE, *supra*, note 22 at 15.

<sup>49</sup> 94 *Hague Recueil* 29 (1958 II).

<sup>50</sup> See Tunkin. 95 *Hague Recueil* 23-6 (1958 III); DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 356-8 (1957).

<sup>51</sup> COQUIA - DEFENSOR-SANTIAGO, *supra*, note 16 at 40.

<sup>52</sup> Virally, *supra*, note 45.

<sup>53</sup> SCHWARZENBERGER, *MANUAL OF INTERNATIONAL LAW* 34 (1967).

<sup>54</sup> HENKIN, *supra*, note 10 at 91.

<sup>55</sup> *Electricity Company of Sofia and Bulgaria*, 1939 P.C.I.J. (Ser. A/B) No. 79 at 199.

principle of *res judicata*,<sup>56</sup> and, generally, rules of procedure.<sup>57</sup> Others are principles of the most general character and applicable to the most diverse situations,<sup>58</sup> such as, good faith, abuse of rights, retroactivity, the obligation to repair a wrong, the territoriality of criminal law, acquiescence, and estoppel.<sup>59</sup>

### Chapter Three: Standard-Setting in International Economic Relations

#### A. Early State Practice

Classical international law, according to Professor Quincy Wright, appears to have left each State complete freedom to regulate or to prohibit commerce within its territory and with foreign States; but in practice, this has not been so.<sup>60</sup>

Professor Wright comments that “[c]ommercial treaties are among the oldest type of international agreements.”<sup>61</sup> Professor Georg Schwarzenberger has, in fact, traced treaties of commerce between Rome and Carthage, the agreements on frontier trade between Byzantium and Persia in the sixth century A.D., and the treaties of commerce and subsidy concluded between Kings of England and other medieval princes since the twelfth century.<sup>62</sup> The significance of these treaties in the development of rules in international economic relations has been underscored by Schwarzenberger in the following manner:

In a process of increasingly liberal grant of safe-conducts, the point was reached in the second half of the fifteenth century when the principle of freedom of commerce could be made articulate by reference to four standards: those of ancient rights, customary rights, most-favoured-nation treatment and national treatment.

Subsequently, treaties of commerce and navigation, concluded by Great Britain and other European Powers with emergent nations on the frontiers of western civilization in Latin America, Africa and Asia contributed further to the formulation of a number of new rules on the treatment of nationals of the contracting parties and their property. Through the nexus created between such treaties by most-favoured nation clauses, these rules received even wider application. Beyond

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<sup>56</sup> *Effects of Awards of the U.N. Administrative Tribunal*, 1973 I.C.J. Reports, 166 at 177.

<sup>57</sup> See the *Corfu Channel Case* 1949 I.C.J. Reports 18; *Right of Passage over Indian Territory* (Prelim.

Obj.) 1957 I.C.J. Reports 141-142.

<sup>58</sup> Virally, *supra*, note 45.

<sup>59</sup> See the *Eastern Greenland Case*, 1933 P.C.I.J. (Ser. A/B) No. 53 at 52; *Case Concerning the Temple at Preah Vihear*, 1962 I.C.J. Reports 17.

<sup>60</sup> Quincy Wright, *International Law and Commercial Relations*, AMERICAN JOURNAL OF INTERNATIONAL LAW PROCEEDINGS SET 2 (1940-41): 30 [hereinafter Wright].

<sup>61</sup> *Id.*

<sup>62</sup> Georg Schwarzenberger, *The Principles and Standard of International Economic Law*, in 117 RECUEIL DES COURS 18-19 (1966).

this, in pre-1914 international society these rules were increasingly taken for granted as an integral part of the minimum standard of international law regarding the treatment of foreign nationals and treated as part of general international customary law.<sup>63</sup>

The establishment of the League of Nations further provided opportunities for States to crystallize practice in the realm of economic relations. However, it was not until the Second World War that the need for a strong economic international order was finally recognized by world leaders according to Schwarzenberger.<sup>64</sup>

## **B. Evolution of Multilateral Instruments in Economic Relations: Bretton Woods System and the Development of New International Economic Rules**

The “beggar thy neighbor” policy which promoted extreme economic nationalism among the industrialized nations and triggered the “trade wars” before the Second World War became a grim reminder of the harshness of an international economic environment which paid lip service to customary international rules of commerce which either existed or were evolving at that time. In fact, Professor Schwarzenberger observed that during the inter-war period, the assumption that “(a)s long as the economic mechanisms of international trade were allowed to operate more or less automatically, a bilateral framework for the standards of international economic law sufficed” had been abandoned by States.<sup>65</sup>

The need for a system of international economic rules to address the abuses committed by States in the exercise of near absolute economic sovereignty before the Second World War was urged as early as 1941 by Professor Wright in his speech before the American Society of International Law when he argued that

International Law is ... ill adapted to the present interdependent world. The economic sovereignty of States must be limited by rules of positive law if a more stable and prosperous world order is to be achieved.<sup>66</sup>

He suggested six (6) approaches under international law to achieve this goal: first, the development of the concept of abusive exercise of powers by international tribunals; second, the development of the concept of basic human right to trade limited only by reasonable government control in the public interest; third, the establishment of an international economic commission charged with the task of conciliating claims and controversies arising from unjust governmental acts of business concerns; fourth, the founding of an international economic organization which could investigate and publicize the commercial practices of States; fifth, the negotiation of bilateral treaties on the basis of reciprocal and unconditional most-favored-nation treatment gradually reducing tariffs and eliminating other obstructions

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<sup>63</sup> *Id.* at 22.

<sup>64</sup> *Id.* at 24.

<sup>65</sup> Georg Schwarzenberger, *The Province and Standards of International Economic Law*, 2 INT'L. L. Q. 413 (1948).  
<sup>66</sup> Wright, *supra*, note 59, at 37.

to trade; and sixth, through multilateral treaties a code of fair practice in international commerce could be evolved.<sup>67</sup>

In response to the experience of the 1930s and anticipating the economic needs after the war, the United States and Great Britain led other Allied powers at Bretton Woods, N.H. in 1942 in designing the post-World War II international economic system based on a “directed order, a treaty order of made norms” as one contemporary writer described it.<sup>68</sup> Professor Andreas Lowenfeld recalls the distinction between the American and British expectations of this new economic order as follows:

For the United States, the essential policy objective was ‘the reconstruction of a multilateral system of world trade.’ In the words of Secretary of the Treasury Henry Morgenthau, new international financial institutions were conceived as ‘the alternative to the desperate tactics of the past – competitive currency depreciation, excessive tariff barriers, uneconomic barter deals, multiple currency practices, and unnecessary exchange restriction – by which governments vainly sought to maintain employment and uphold living standards.’ The British statement of goals, though similar in purport, was more modest, and reflected the prospect that the United Kingdom would occupy a debtor’s position at the war’s end: ‘Our long-term policy must ensure that countries which conduct their affairs prudently need not be afraid that they will be prevented from meeting their international liabilities by causes outside their control.’<sup>69</sup>

Out of these policy objectives emerged proposals to establish a trade organization (whose function now rests upon the General Agreement on Tariffs and Trade-World Trade Organization),<sup>70</sup> an international bank (International Bank for Reconstruction and Development or World Bank)<sup>71</sup> to provide capital for the reconstruction of Europe and an international institution composed of professional economists which will promote international monetary cooperation and provide temporary financing for countries facing severe balance of payments situation (International Monetary Fund).

### C. The Problem of “Soft Law” in Economic Relations

It has been observed by one writer that while States are often willing to undertake collective action in international economic relations, there is, however, a

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<sup>67</sup> *Id.* at 37-38.

<sup>68</sup> Frieder, *Law, de facto Agreements and Declarations of Principle*, 21 GERMAN Y.B. INT’L L. 30 (1978).

<sup>69</sup> ANDREAS LOWENFELD, 4 INTERNATIONAL ECONOMIC LAW: THE INTERNATIONAL MONETARY SYSTEM 14-15 (2<sup>nd</sup> ed. 1984)

<sup>70</sup> See generally JOHN JACKSON & WILLIAM DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (2<sup>nd</sup> ed. 1986).

<sup>71</sup> For a concise history of the World Bank, see ASHER AND MASON, THE WORLD BANK SINCE BRETTON WOODS (1973).

tendency to be less concrete in the nature of the obligations that they are ready to assume.<sup>72</sup> The following legal techniques have been identified as frequently resorted to:

First, States will retain discretion over the definition of the obligation they undertake. Second, they will avoid legal obligations ... Provisions which use these techniques tend to achieve the goals of collective action and limited constraint can be described as 'soft law'.<sup>73</sup>

The concept of soft law has become even more problematic in light of the phenomenon that these rules "do not only purport to influence the actions of States, but also of private individuals, including national and transnational corporations."<sup>74</sup> Professor Seidl-Hohenveldern opines further that "(i)n general, rules of 'soft' international law will not become directly applicable to individuals without the transformation or adoption of such 'soft rules' into the domestic law of the States having agreed thereto."<sup>75</sup> However, he argues that when "soft law" has been introduced into domestic law as regional or universal customary international law, transformation or adoption into domestic rules of law may be effected by an article in the constitution of the state concerned, declaring the general principles of (customary) international law to be part of the law of the land.<sup>76</sup>

In terms of legal effects, commentators would readily distinguish between "legal soft law" and "non-legal soft law". Gruchalla-Wesierski offers these definitions:

Legal soft law is found in international agreements, or decisions of international organizations, which legally bind States which are parties to them. Legal sanctions are clearly available for legal soft law. Non-legal soft law, also found in international agreements, is not legally binding upon the parties. Non-legal soft law generally makes available only non-legal (political) sanctions.<sup>77</sup>

Legal soft law may be classified into treaties and legally binding decisions of international organizations; while non-legal soft law may take many forms, including instruments, such as, codes of conduct.<sup>78</sup>

Professor Seidl-Hohenveldern emphasizes that while soft law rules usually retain their character of relatively loose commitments, they do constitute commitments nonetheless and States having accepted them should not be allowed to

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<sup>72</sup> See Tadeusz Gruchalla-Wesierski, *A Framework for Understanding 'Soft Law'*, in 30 REVUE DE DROIT

MCGILL 38 (1984) [hereinafter Gruchalla-Wesierski].

<sup>73</sup> *Id.*

<sup>74</sup> Ignaz Seidl-Hohenveldern, *International Economic 'Soft Law'*, in 163 RECUEIL DES COURS 198 (1979)

[hereinafter Seidl-Hohenveldern].

<sup>75</sup> *Id.* at 199.

<sup>76</sup> *Id.*

<sup>77</sup> Gruchalla-Wesierski, *supra*, note 70, at 40.

<sup>78</sup> *Id.* at 46.

disregard them as its own discretion.<sup>79</sup> Subsequent acts, in this regard, have been viewed as possibly giving rise to legal effects. For instance, one such effect is that “soft law qualifies an act that is in accord with it as done in good faith; or a contradictory act may be viewed as a result of abuse of rights.”<sup>80</sup>

Professor Seidl-Hohenveldern, however, cautions States against over-reacting and advises them to adopt proportionate actions to consequences of disregard of “soft rules” since the non-observance of soft commitments could hardly be qualified as an objective international delinquency.<sup>81</sup>

## Chapter Four: The Legal Nature of APEC

### A. Origins and Membership

The Asia-Pacific Economic Cooperation (APEC) was established in 1989 in response to the growing interdependence among Asia-Pacific economies.<sup>82</sup> It began as an informal dialogue group, but is now the primary vehicle for promoting open trade and practical economic cooperation within the region. Its goal is to advance Asia-Pacific economic dynamism and a sense of community.

APEC was established in 1989 with twelve (12) founding members, namely: Australia, Brunei Darussalam, Canada, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Republic of the Philippines, Singapore, Thailand and the United States. In November 1991, APEC accepted three new member economies, namely People’s Republic of China, Hong Kong (its designation has been changed to Hong Kong, China since 1 July 1997) and Chinese Taipei. Subsequently, in November 1993, APEC accepted Mexico and Papua New Guinea as new members. Chile became a full member in November 1994 and in November 1997, APEC economic leaders welcomed Peru, Russia and Vietnam as new members of the APEC community effective in 1998. APEC’s twenty-one (21) member economies had a combined Gross Domestic Product of over US\$16 trillion in 1996 and forty-five (45) percent of global trade.<sup>83</sup>

APEC operates by consensus. Members conduct their activities and work programs on the basis of open dialogue with equal respect for the views of all participants.<sup>84</sup> There is an APEC Chair, responsible for hosting the annual ministerial meeting of foreign and economic ministers.<sup>85</sup> The Chair rotates annually among APEC members. The APEC Chair for 1999 is New Zealand.

<sup>79</sup> Seidl-Hohenveldern, *supra*, note 72, at 205.

<sup>80</sup> Gruchalla-Wesierski, *supra*, note 70, at 62-64.

<sup>81</sup> Seidl-Hohenveldern, *supra*, note 72, at 205.

<sup>82</sup> *All About APEC* (visited 10 May 1999) <<http://www.apecsec.org.sg/'97brochure/'97brochure.html>> [hereinafter *All About APEC*].

<sup>83</sup> *Questions and Answers* (visited 10 May 1999) <<http://www.apecsec.org.sg/organization/Q&A/qna.html>>.

<sup>84</sup> *Organization* (visited 10 May 1999) <<http://www.apecsec.org.sg/'97brochure/'97organize.html>>.

<sup>85</sup> *Policies and Procedures* (visited 10 May 1999) <[http://www.apecsec.org.sg/organization/policy\\_procedure/policy\\_procedure.html](http://www.apecsec.org.sg/organization/policy_procedure/policy_procedure.html)> [hereinafter *Policies and Procedures*].

The initial years of APEC were focused largely on exchanges of views and project-based initiatives.<sup>86</sup> The concerns were simply to advance the process of Asia-Pacific Economic Cooperation and to promote a positive conclusion to the Uruguay Round of GATT negotiations. Today, APEC is a forum whose purpose is to build the Asia-Pacific community through achieving economic growth and equitable development through trade and economic cooperation.<sup>87</sup>

## B. Review of “Agreements”

### . Blake Island Economic Vision

On 20 November 1993, APEC economic leaders met for the first time at Blake Island, Seattle, Washington to hold informal discussions. Their vision was for an Asia-Pacific that harnesses the energy of its diverse economies, strengthens cooperation, and promotes prosperity, in which the spirit of openness and partnership deepens and dynamic growth continues, contributing to an expanding world economy and supporting an open international trading system.

They envisioned a community of Asia-Pacific economies in which there is continued reduction of trade and investment barriers so that trade expands within the region and with the world, and goods, services, capital and investment flow freely among APEC economies. People in APEC economies would share the benefits of economic growth through higher incomes, a highly skilled work force, high paying jobs and increased mobility. There would be improved education, literacy rates and growth in the arts and sciences. Advances in telecommunications and transportation would occur, and with the environment improved, there would be sustainable growth and a more secure future for the region.

### 2. The Bogor Declaration of Common Resolve

On 15 November 1994, Indonesian President Suharto hosted the second meeting of APEC economic leaders who discussed where the economies of the region need to go in the next 25 years. In their Declaration of Common Resolve, the economic leaders agreed to achieve the goal of free and open trade and investment in the region no later than 2010 for the industrialized economies and 2020 for developing economies. The economic leaders ensured that APEC would provide opportunities for developing economies to increase further their economic growth and level of development consistent with sustainable growth, equitable development, and member economy stability.

The Declaration outlined the need to reinforce economic cooperation in the Asia-Pacific region on the basis of equal partnership, shared responsibility, mutual respect, common interest and common benefit. Their vision was that APEC would

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<sup>86</sup> See Blake Island Economic Vision and Bogor Declaration of Common Resolve; Documents available

at <http://www.apecsec.org.sg/virtualib/history/history.html>.

<sup>87</sup> See Osaka Action Agenda, Manila Action Plan, Vancouver Declaration, Kuala Lumpur Declaration; *Id.*

lead the way in strengthening the open multilateral trading system, enhancing trade and investment liberalization, and intensifying Asia-Pacific development cooperation. The leaders also called for the acceleration of implementation of Uruguay Round commitments, and the successful launching of the World Trade Organization. Finally, the leaders also examined the possibility of a voluntary consultative dispute mediation service, to supplement the WTO dispute settlement mechanism, which is the primary channel for resolving disputes within APEC.

### **3. The Osaka Action Agenda**

In Osaka, on 19 November 1995, APEC economic leaders initiated the work of translating the Blake Island vision and the Bogor goals into reality. They adopted the Osaka Action Agenda, which firmly established the three pillars of APEC activities: free and open trade and investment, business facilitation, and economic and technical cooperation. They agreed to a set of fundamental principles as guides towards the achievement of liberalization and facilitation: comprehensiveness, WTO-consistency, comparability, non-discrimination, transparency, standstill, simultaneous start, continuous process, and differentiated time tables, flexibility, and cooperation.

They agreed that APEC would achieve the long-term goal of free and open trade and investment in several ways: first, through encouraging the efforts of voluntary liberalization within the region; second, by taking collective actions to advance liberalization and facilitation objectives; and, lastly, by stimulating and contributing to further momentum for global liberalization. To this end, each member economy brought a package of initial actions demonstrating their commitment to achieving liberalization and facilitation.

### **4. Manila Action Plan for APEC**

The Manila Action Plan for APEC (MAPA), was adopted by economic leaders on 25 November 1996. MAPA includes the individual and collective action plans and progress reports on collective activities of all APEC economies to achieve the Bogor objectives of free and open trade and investment in the APEC region by 2010 and 2020. MAPA revolves around six themes: greater market access in goods; enhanced market access in services; an open investment regime; reduced business costs; an open and efficient infrastructure sector; and strengthened economic and technical cooperation.

APEC leaders further directed that priority be given to the following themes in economic and technical cooperation in six areas: developing human capital; fostering safe and efficient capital markets; strengthening economic infrastructure; harnessing technologies of the future; promoting environmentally sustainable growth; and encouraging the growth of small and medium enterprises.

### **5. Vancouver Declaration – Connecting the APEC Community**

At their 1997 meeting, the APEC Economic Leaders recognized members' efforts to improve the commitments in their Individual Action Plans and reaffirmed their intention to update these annually. The Leaders endorsed their Ministers' agreement that action should be taken with respect to early voluntary sectoral

liberalization (EVSL) in fifteen (15) sectors, with nine (9) to be advanced throughout 1998 and implementation to begin in 1999. The Blueprint for APEC Customs Modernization, which put forward a comprehensive program to harmonize and simplify customs clearances by the year 2002, was approved. The Leaders reiterated their support for full and active participation in and support of the WTO by all APEC economies. The Leaders welcomed the progress of APEC fora in involving business, academics and other experts, women and youth in 1997 activities, and encouraged them to continue these efforts. They applauded the initiative to involve the youth throughout APEC's activities in 1997, and noted the benefits of electronic commerce. Leaders instructed that a work program on electronic commerce be developed, taking into account relevant activities in other international fora. The Leaders endorsed the Vancouver Framework for Enhanced Public-Private Partnership for Infrastructure Development as infrastructure is inextricably linked to the questions of financial stability that APEC is addressing.

## **6. Kuala Lumpur: Strengthening the Foundations for Growth**

The APEC Leaders met in Kuala Lumpur in November 1998 to reaffirm their confidence in the strong prospects for recovery for the economies of the Asia-Pacific. They agreed to pursue a cooperative growth strategy to end the financial crisis. They agreed to strengthen social safety nets, financial systems, trade and investment flows, the scientific and technological base, human resources development, economic infrastructure, and business and commercial links. Leaders also welcomed Ministers' decision to seek an EVSL agreement with non-APEC members at the World Trade Organization. The Leaders adopted the Kuala Lumpur Action Program on Skills Development to contribute towards sustainable growth and equitable development while reducing economic disparities and improving the social well-being of the people.

Leaders in Kuala Lumpur also reviewed developments in the regional economic slowdown and APEC's response to the crisis. They resolved to work together to support an early and sustained recovery in the region. To meet the challenges of the crisis, they agreed to pursue a cooperative growth strategy including the following elements: growth-oriented prudent macroeconomic policies, appropriate to the specific requirements of each economy; expanded international financial assistance to generate employment and to build and strengthen social safety nets; support for efforts to strengthen financial systems, restore trade finance, and accelerate corporate sector restructuring; new approaches to catalyze the return of stable and sustainable private capital flows into the region; a renewed commitment to APEC's goal of achieving free and open trade and investment; and urgent work within APEC and with other economies and institutions to develop and implement long-term measures to strengthen the international financial system.

Leaders in Kuala Lumpur supported continuing this work and instructed APEC Finance Ministers to develop measures to implement proposals to improve transparency and accountability, to strengthen national financial systems, and to enhance involvement of the private sector in the prevention and orderly resolution of international financial crises.

## 7. APEC Priorities in 1999

The key focus of APEC's work in response to the current financial crisis is to reinvigorate growth and investment in the region. Emphasis on trade and investment liberalization and strengthening institutional and human capacity will contribute significantly to an effective APEC response to the crisis.<sup>88</sup>

New Zealand has advised that it will seek to pursue three broad themes in 1999 as follows:<sup>89</sup> trade and investment liberalization and facilitation; strengthening markets; and broadening support for APEC.

### C. APEC Process of Engagement

#### 1. Areas for Action

There are three (3) general areas for individual and collective action by APEC member economies, corresponding to the three interrelated pillars of APEC.<sup>90</sup> With Pillar I, APEC groups are working to achieve trade and investment liberalization and the reduction and removal of formal barriers to trade, such as, tariffs and restrictions on foreign investment. In addition, as tariffs are reduced, APEC is giving increased attention to non-tariff barriers to trade.

Pillar II, business facilitation, includes a variety of steps economies are taking to make it easier to do business in the region. This includes things like simplifying and harmonizing the various members' customs procedures, mutual recognition of testing authorities for meeting industrial product standards, promoting investment by strengthening protection of intellectual property rights, and easing restrictions on regional travel by business people. Studies show that business facilitation holds great scope for expanding regional output and trade and thus providing benefits to consumers, workers and producers alike.

Pillar III, economic and technical cooperation, or "ecotech," covers a variety of capacity-building activities conducted by APEC bodies. These are aimed at enhancing members' – especially developing country members' – ability to benefit from the liberalization agenda and reducing disparities within the diverse APEC region. APEC Ministers have directed that ecotech work should focus on six priority areas: developing human resources, establishing stable capital markets, building economic infrastructure, harnessing technologies of the future, promoting environmentally sound growth, and strengthening small and medium-sized enterprises.

#### 2. Mechanisms

The means by which these goals are realized are twofold: first, through the individual action plans; and, second, through the collective action plans.

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<sup>88</sup> *All About APEC, supra*, note 80.

<sup>89</sup> *Policies and Procedures, supra*, note 84

<sup>90</sup> *Id.*

#### a. Individual Action Plans<sup>91</sup>

The Individual Action Plans are voluntary submissions made by individual member economies. The submission of these action plans is a prerequisite to membership,<sup>92</sup> but the content of these plans is discretionary upon the individual economy. The voluntary nature of the liberalization initiatives that individual economies undertake to carry out gives these plans their most distinctive feature. These individual action plans are a continuation or extension of unilateral liberalization initiatives which economies of the region have been implementing in the last two decades or so in their own economic interest. These action plans are revised annually in order to remain current and relevant. This remains APEC's main channel for trade liberalization.<sup>93</sup> However, under the Early Voluntary Sectoral Liberalization Initiative, APEC is also working towards free trade in several key industrial and services sectors ahead of the 2010/2020 timetable. Initial efforts here affect trade in fifteen (15) sectors: environmental goods and services, fish and fish products, toys, forest products, gems and jewelry, oilseeds and oilseed products, chemicals, energy, food, rubber, fertilizers, automotive products, medical equipment and instruments, civil aircraft, and a telecommunications equipment mutual recognition arrangement.<sup>94</sup>

#### b. Collective Action Plans<sup>95</sup>

The Collective Action Plans are plans reached through the process of consensus between APEC member economies.<sup>96</sup> They refer to the issue areas discussed in the Osaka Action Agenda, intended both to progress activity in each area, as well as to provide a means of monitoring and reporting the achievement of objectives.

In general, these collective actions by APEC economies focus on facilitating trade and investment within the region, and on making the conduct of business in the region easier, cheaper, faster, more predictable, and transparent.<sup>97</sup>

### D. Legal Nature of APEC Commitments

The APEC is a regional forum for consultation, review and revision with a set of collaborative multilateral declarations as its foundation. It is an arrangement whereby the member economies pledge to achieve the goals outlined in the various declarations.

In these declarations, the member economies have pledged to find cooperative solutions to the challenges of the rapidly changing regional and global economy. They

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<sup>91</sup> The Individual Action Plan of each member economy is available at <<http://www.apecsec.org.sg/iap/iap.html>>.

<sup>92</sup> *Membership* (visited on 10 May 1999) <http://www.apecsec.org.sg/membership/membership.html>.

<sup>93</sup> See Vancouver Declaration, *supra*, note 86.

<sup>94</sup> See Osaka Action Agenda, *supra*, note 86.

<sup>95</sup> Documents available at <[http://www.apecsec.org.sg/cti/cti\\_indes.html](http://www.apecsec.org.sg/cti/cti_indes.html)>.

<sup>96</sup> See Manila Action Plan, *supra*, note 86.

<sup>97</sup> *Id.*

support greater market access, reduction of tariff and non-tariff barriers, enhanced market access in services, an open investment regime, reduced cost in doing business, an open and efficient infrastructure sector, and strong economic and technical cooperation. The APEC economies have committed to achieving free and open trade and investment in the Asia-Pacific no later than the year 2020, taking into account the differing levels of economic development among APEC economies.

The question then arises as to the legal nature of the APEC commitments under international law. Can they be considered as legally binding upon the member economies? How can they be classified? Are they treaties, creating rights and obligations for the members? Or are they merely political agreements, without any legal effect?

A treaty is generally understood as an international agreement, contractual in nature, between States or organizations of States, creating legal rights and obligations between the parties.<sup>98</sup> The Harvard Research in International Law defines a treaty as a “formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves.”<sup>99</sup> The Vienna Convention on the Law of Treaties, which took effect in 1980, defines a treaty as “an international instrument concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.”<sup>100</sup>

Excluded from this definition of a treaty are nonbinding agreements, such as, joint communiques, informal “gentleman’s agreements”, or parallel declarations of intent or understanding.<sup>101</sup> These are declarations by States, whether unilaterally or collectively, that are not intended to constitute legal undertakings.

There is general acceptance of the view that international agreements are not legally binding unless the parties intend it to be. A treaty or international agreement requires an intention by the parties to create legal rights and obligations governed by international law.<sup>102</sup> If that intention does not exist, an agreement is considered to be without legal effect.

To determine such intent, inferences may be drawn from the language of the instruments as well as the attendant and subsequent circumstances of its conclusion and adoption. Emphasis is often placed on the lack of precision and generality of the terms of the agreements. Statements of general aims and broad declarations of principles are considered too indefinite to create enforceable obligations and, therefore, such agreements should be presumed to be nonbinding.<sup>103</sup> Mere statements of intention or of common purposes are grounds for concluding that a legally binding agreement was not intended.<sup>104</sup>

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<sup>98</sup> OPPENHEIM, INTERNATIONAL LAW, A TREATISE 877 (1955) [hereinafter OPPENHEIM].

<sup>99</sup> Article 1, AM. J. INT’L. L. SUPP. 686 (1935).

<sup>100</sup> See Vienna Convention, *supra*, note 7.

<sup>101</sup> HENKIN, *supra*, note 10 at 391.

<sup>102</sup> Schachter, O., *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L. 296

(1977) [hereinafter Schachter]

<sup>103</sup> O’CONNELL, INTERNATIONAL LAW 199-200 (1970).

<sup>104</sup> Schachter, *supra*, note 101.

Admittedly, it is very difficult to apply these criteria, especially in situations where the parties do not explicitly convey whether or not they intend to be legally bound, or when the parties intend that their declarations be taken seriously. Caution is necessary in inferring nonbinding intention from general and imprecise undertakings in agreements which are otherwise treated as binding. However, if the text and the circumstances leave the intention uncertain, it is reasonable to consider vague language and mere declarations of purpose as indicative of an intention to avoid legal effect.<sup>105</sup>

Following these criteria, it can be seen that the commitments enunciated under the various APEC declarations are not treaties, and are not legally binding as treaties. These declarations have not been ratified under international law,<sup>106</sup> neither is there any judicial pronouncement as to the legal nature of such agreements. Nor has there been registration of the agreements with the United Nations.<sup>107</sup>

Moreover, the language of these declarations indicates that they do not actually create legal rights and obligations between the parties. The aspirations enunciated are broad and indefinite, affirming general principles of liberalization and cooperation. They are broad policies, which the leaders then recommend for actions to their individual governments. All the actions taken, whether by individual countries or by APEC fora, are unilateral and voluntary. A perusal of the text shows that there are actually no legal rights and obligations created under the APEC declarations.

At most, they may be considered as agreements within the broader framework of the World Trade Organization.<sup>108</sup> The APEC commitments embody the principles of the global trading system under the WTO. These fundamental principles which make up the multilateral trading system are:<sup>109</sup> non-discrimination, market access, fair competition, reciprocity, the encouragement of development and economic reform.

As such, it is clear that the APEC commitments, by themselves, are not “governed by international law.” The *travaux préparatoires* of the Vienna Convention on the Law of Treaties confirm the conclusion that nonbinding agreements were

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<sup>105</sup> *Id.*

<sup>106</sup> The Vienna Convention on the Law of Treaties requires the adoption, authentication, promulgation, and registration of treaties.

<sup>107</sup> Article 102 of the Charter of the United Nations provides as follows:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this article may invoke that treaty or engagement before any organ of the United Nations.

<sup>108</sup> Regional trading arrangements, in which a group of countries agree to abolish or reduce barriers within the region, have been established in many parts of the world. The GATT recognizes, in Article XXIV, the value of closer integration of national economies through freer trade. It permits such groupings, as an exception to the general rule of most favored nation treatment [hereinafter Regional Trading Arrangements].

<sup>109</sup> RODRIGUEZ, THE GATT AND WTO: AN INTRODUCTION 73 (1998) [hereinafter RODRIGUEZ].

intended to be excluded from the Convention on the ground that they are not governed by international law.<sup>110</sup>

This is not to say that the declarations have no legal effect whatsoever. Even the so-called purely political instruments may have legal consequences. They may be considered as official acts of States, evidence of the positions taken by States, and “it is appropriate to draw inferences that the States concerned have recognized the principles, rules, status, and rights acknowledged. ... [W]here points of law are not entirely clear and are disputed, the evidence of official positions drawn from these instruments can be significant.”<sup>111</sup>

Governments may enter into nonbinding engagements as to future conduct, with a clear understanding shared by the parties that the agreements are not legally binding. The so-called “gentleman’s agreements” fall into this category. In these cases the parties assume a commitment to perform certain acts or refrain from them. The nature of the commitment is regarded as “nonlegal” and not binding. There is nonetheless an expectation of, and reliance upon, compliance by the parties.<sup>112</sup>

It has been observed that

States entering into a non-legal commitment generally view it as a political or moral obligation and intend to carry it out in good faith. Other parties and other States concerned have reason to expect such compliance from it. ... [P]olitical texts which express commitments and positions of one kind or another are governed by the general principle of good faith. Moreover, since good faith is an accepted general principle of international law, it is appropriate, and even necessary to apply it in its legal sense<sup>113</sup>

There is considerable authority to establish that estoppel is a general principle of law as well.<sup>114</sup>

The consequence of this good faith principle is that a party which committed itself in good faith to pursue a particular course of conduct would be estopped from acting inconsistently with its commitment or adopted position when the circumstances showed that other parties reasonably relied on that understanding or position.<sup>115</sup>

The fact that the States have entered into mutual engagements confers an entitlement on each party to make representations to the others on the execution of

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<sup>110</sup> See *Report of the International Law Commission to the General Assembly*, 2 BRIT. Y.B. INT’L. L. 96-97

(1959) [hereinafter *Report of the International Law Commission to the General Assembly*].

<sup>111</sup> SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 129 (1981) [hereinafter Schachter, International Law].

<sup>112</sup> HENKIN, *supra*, note 10 at 391.

<sup>113</sup> *Report of the International Law Commission to the General Assembly*, *supra*, note 114, at 130.

<sup>114</sup> See LAUTERPACHT, *supra*, note 41, at 168-172; *Report of the International Law Commission on the Law of Treaties*, INT’L. L. COMM. Y.B. 11, 212-213 (1963).

<sup>115</sup> *Case Concerning the Temple at Preah Vihear*, ICJ reports 17 (1962); *Nicaragua (Jurisdiction) Case*;

1986 I.C.J. Reports 14.

these engagements. It becomes immaterial whether the conduct in question was previously regarded as entirely discretionary or within the reserved domain of domestic jurisdiction. By entering into an international pact with other States, a party may be presumed to have agreed that the matters covered are no longer exclusively within its concern. When other parties make representations or offer criticism about conduct at variance with the undertakings in the agreement, the idea of a commitment is reinforced, even if it is labelled as political or moral.<sup>116</sup>

## E. State Responsibility

### 1. The Theory of State Responsibility

Under international law, in order that a state may incur responsibility, two (2) requisites must concur: first, the commission of an unlawful act under international law; and, second, the imputability of the unlawful act to the State concerned.<sup>117</sup>

An internationally unlawful act involves the violation of an international obligation, whether arising from treaty, custom, or general principles of international law.<sup>118</sup> It is this unlawful act which gives rise to state responsibility.<sup>119</sup>

Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. In general, if the obligation in question is not met, it is a basic principle of international law that a breach of an international obligation involves the duty to make reparation.<sup>120</sup> In its judgment in the *Chorzow Factory (Jurisdiction)* case, the Permanent Court stated that :

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”

Nonetheless, it is generally agreed that a nonbinding agreement, however seriously taken by the parties, does not engage their legal responsibility. Noncompliance by a party would not be a ground for a claim for reparation or for judicial remedies.<sup>121</sup> This is not to say that the agreement need not be observed, or that

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<sup>116</sup> Schachter, *supra*, note 101.

<sup>117</sup> BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 169-170 (1994) [hereinafter, Cheng]; *Draft Articles on State Responsibility*, ILC Commission, U.N. Doc. A/34/194 (1979) reprinted in 18 I.L.M., 1573, (1979).

<sup>118</sup> *Id.* at 173; *Case Concerning the Treatment of Polish Nationals in Danzig*, [1932] P.C.I.J. Ser. A/B No. 44.

<sup>119</sup> CHENG, *supra*, note 116 at 171.

<sup>120</sup> *Chorzow Factory Case (Jurisdiction) (Ger. v. Pol.)* [1927] P.C.I.J. Ser. A, No. 9, at 47; *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* 1949 I.C.J. Reports 184; and

*Lusitania Claims (U.S. v. Ger.)* 7 RIAA 17 (1924).

<sup>121</sup> Schachter, *supra*, note 101.

the parties are free to act as if there were no such agreement. It is possible to conclude that States may regard a nonbinding undertaking as controlling even though they reject legal responsibility and sanctions.

## **2. Consequences of Non-Compliance with International Obligations**

As has been previously stated, nonbinding agreements or “gentleman’s agreements” do not fall under international law. They are not treaty obligations, which create rights and duties among members. However, it has been established that the commitments under APEC are binding upon member economies, based upon the principles of fair play and estoppel. APEC Member economies may not ignore their declared commitments, merely because they are political.

Although APEC is currently pursuing a method of dispute settlement, there is still no effective mechanism for the solution of controversies. However, as between APEC members who are also WTO members, trade disputes between governments may be resolved utilizing the WTO dispute settlement mechanism.

WTO members commit themselves not to take unilateral action against perceived violations of the trade rules, but to seek recourse in the multilateral dispute settlement system and to abide by its rules and findings.<sup>122</sup> The aim of the WTO dispute settlement mechanism is to secure a positive solution to a dispute. Thus, finding a mutually acceptable solution to a problem between members consistent with WTO provisions is encouraged. This may be possible through bilateral consultations between the governments concerned.

## **Chapter Five: APEC Individual Action Plan and Philippine Municipal Law**

### **A. Review of the Philippine Individual Action Plan<sup>123</sup>**

This Individual Action Plan (IAP) articulates the Philippine response to the opportunities and challenges impelled, in general, by an increasingly globalized economic environment, and, in particular, by the Bogor call for free and open trade and investment in the Asia Pacific Economic Co-operation (APEC) region by 2010/2020. It is governed by the national vision of equitable growth and sustainable development as enunciated in Philippine Agenda 21 dated 26 September 1996.

It is understood that – as IAP’s are rolling and forward-looking- this IAP will, in due course, be updated to reflect future developments. The process of updating IAP’s shall be conducted in the same collaborative and consultative mode. It shall be guided by appropriate studies.

<sup>122</sup> RODRIGUEZ, *supra*, note 108, at 94.

<sup>123</sup> APEC Secretariat, *Philippines: Individual Action Plan* (November, 1996)

## 1. Tariff Measures

At present, the Philippines continues to implement its Tariff Reform Program, a comprehensive review and rationalization of the country's tariff structure, which started in 1980. Now in its third phase, the Tariff Reform Program provides for the progressive reduction in applied rates of duty. The targeted final rate under the program is a uniform rate of 5% by year 2004, except for sensitive agricultural products whose tariffs are set *inter-alia* per WTO commitments.

The Philippines aims to progressively reduce tariffs. From 1997-2004, the Philippines will: first, continue implementation of the Tariff Reform Program, moving towards a uniform rate of protection while maintaining exceptions for sensitive agricultural products; and second, gradually expand minimum access volumes according to WTO commitments.

The Philippines also aims to ensure transparency of tariff regime. In the period covering 1997-2004, the Philippines will participate actively in APEC's computerized database, updating its tariff data notifications as may be necessary.

## 2. Non-Tariff Measures

The Philippine import liberalization program calls for the elimination of non-tariff measures other than those maintained for reasons of health, safety, and national security. Pursuant to this, Central Bank Circular No. 92,<sup>124</sup> R.A. 8178<sup>125</sup> and R.A. 8180<sup>126</sup> were enacted.

However, non-tariff measures still remain, such as, quantitative restrictions on rice maintained for food security, per Annex 5 of the WTO Agreement on Agriculture, residual import licensing requirements under cover of GATT Article XVIII-B and import regulations maintained for reasons of health, safety and national security, as notified to the WTO.

To progressively reduce NTMs, from 1997 to 1999, the Philippines will progressively eliminate import-licensing requirements under cover of GATT Article XVIII-B, subject to review of the balance of payments situation. Likewise, to ensure transparency of non-tariff measures, the Philippines will exchange information with APEC on residual NTMs. This will be implemented starting in 1997 up to the year 2020.

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<sup>124</sup> This measure lifted restrictions on importation of new motor vehicles and certain used trucks and buses.

<sup>125</sup> This law removed quantitative restrictions (QRs) on sensitive agricultural products, except rice.

<sup>126</sup> This law liberalized the importation and exportation of petroleum products.

### **3. Liberalization of Trade in Services**

#### **a. Telecommunications**

Telecommunications is considered a public utility and under the Philippine Constitution, the provision of telecommunication services is limited to Filipino citizens or to corporations, associations or entities which are owned at least sixty percent (60%) by Filipino citizens. The remaining forty percent (40%) may be owned by foreigners. Domestic companies who wish to operate are required to secure a legislative franchise and a certificate of public convenience and necessity. Dial back, call back or any other similar scheme is prohibited. Reselling is also not allowed. The grant of any authorization is subject to availability of radio frequencies.

Broadcast service is classified under mass media and the operation thereof is limited to Filipino citizens.

In line with the adoption of a more liberalized environment for the telecommunications sector, a more defined legal framework upon which the sector is to develop is warranted. Thus, three major and essential regulations were issued starting in 1993: E.O. No. 59, on mandatory interconnection; E.O. NO. 109, mandating operators for CMTS and IGF to install and operate local exchange services to all unserved and underserved areas; and R.A. No. 7925, otherwise known as the Public Telecommunications Policy Act of 1995.

The Philippines participated in the Uruguay Round of Multilateral Trade Negotiations on trade in services and has included in its schedule of commitments certain identified areas in value-added services.

Within the context of the Philippine Constitution and Republic Act No. 7925, the Philippines has pledged to progressively reduce restrictions on market access for trade in services, from 1997 to 2010.

Specifically, the Philippines has promised to promulgate rules, regulations and guidelines to further allow the market to grow and operate efficiently wherein the private sector shall be the prime movers in a competitive and liberalized environment. These may be in the aspects of effective interconnection and reasonable and fair revenue sharing scheme to encourage growth and expansion of services to unserved and underserved areas; measures to foster a healthy competitive environment and one where service providers can interact with one another with the end in view of encouraging their financial viability while maintaining affordable rates; and, the installation of an administrative quasi-judicial process that is proactive, stable, transparent and fair, giving due emphasis to technical, legal, economic and financial considerations.

It also committed to progressively privatize government telecommunications facilities, currently owned and operated by government, including facilities being undertaken under various bilateral arrangements.

There is a commitment to progressively exempt any specific telecommunications service from its rate or tariff regulations if the service has sufficient competition to ensure fair and reasonable rates.

The government intends to remove the requirement to secure prior authority when upgrading existing plant and network facilities including the financing thereof by authorized carriers within their service areas.

There will be periodic review of radio spectrum to allow entry of new service providers, avail of new and cost effective technologies, and achieve a globally competitive telecommunications infrastructure.

It shall aim to harness and improve human resource skills and capabilities to sustain the growth and development of telecommunications in a fast changing environment.

Finally, is shall eliminate franchising requirement for a value-added service provider (as long as it does not put up its own network) and allow the same to competitively offer its services and/or expertise.

From 2010 to 2020, the Philippines shall also endeavor to enact laws to meet the deficiencies of its regulatory and policy framework and to further improve the investment environment and such other laws as may be necessary to make a globally competitive telecommunications sector. Likewise, the Philippines also aims to progressively provide for, among others, MFN and national treatment for trade in services.

In the period covered from 1997 to 2010, the Philippines shall, to the extent that foreign investments are allowed to participate in the equity of a domestic corporation, not discriminate against any WTO member. All domestic carriers with foreign investments shall be treated under a similar regulatory and policy framework.

#### **b. Transport**

The Philippines participated in the GATT Uruguay Round of Multilateral Trade Negotiations on trade in services including the extended negotiations on maritime transport services which have been suspended until the resumption of negotiations by year 2000.

Currently, various limitations on market access apply to all modes of transport services. For instance, under the Philippine Constitution, "no franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least 60 percent of whose capital is owned by such citizens."<sup>127</sup> In activities expressly reserved by law to citizens of the Philippines (i.e., foreign equity is limited to a minority share), the participation of foreign investors in the governing body of any corporation engaged in activities expressly reserved to citizens of the Philippines by law shall be limited to the proportionate share of foreign

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<sup>127</sup> PHILIPPINE CONST., art. XII, Sec. 11

capital of such entities. All executive and managing officers must be citizens of the Philippines.<sup>128</sup>

Likewise, all lands of the public domain are owned by the State.<sup>129</sup> Only citizens of the Philippines or corporations or associations at least sixty percent (60%) of whose capital is owned by such citizens may own land other than public land and acquire public lands through lease. Foreign investors may lease only private-owned lands.<sup>130</sup>

Moreover, Philippine laws provide that only aliens qualified to hold technical positions may be employed within the first five years of operation of the enterprise, their stay not to exceed five years upon entry. Each employed alien should have at least two Filipino understudies. Non-resident aliens may be admitted to the Philippines for the supply of a service after a determination of the non-availability of a person in the Philippines who is competent, able and willing, at the time of application, to perform the services for which the alien is desired.

In the field of air transport services, the Philippines has established the domestic and international civil aviation liberalization policy with the aim of improving air service availability, quality and efficiency through exposure to foreign markets and competition.

In international air transportation, two international carriers have been designated as official carriers. The Philippines has entered into an unlimited third and fourth freedom traffic at two points in member economies at the BIMP-EAGA. Domestic routes have been opened for entry to a minimum of two operators in each route.

In addition to the aforementioned restrictions, which apply to all modes of transportation, there remain several limitations on market access applicable specifically to maritime transport services. For instance, cabotage transport is still limited to Filipinos. Government-owned cargoes remain subject to the Cargo Reservation Law, which requires that cargoes owned by government-owned or controlled corporations shall be shipped on board Philippine flagged vessels. For specialized vessels, aliens may be employed as supernumeraries only for a period of six months. With respect to the leasing/rental of vessels without crew, bareboat charter or lease contracts are subject to approval by the Maritime Industry Authority. And any repairs, conversion or dry-docking of Philippine-owned or registered vessels are required to be done at domestic ship repair yards registered with the Maritime Industry Authority.

The Philippines has liberalized the domestic shipping industry by providing for the entry of new operators and investors to enhance the level of competition and bring about reasonable rates and improved quality of service. From 1997 to 2000, the Philippines further aims to progressively reduce restrictions on market access for trade in services. To achieve this goal, the Philippines will undertake studies pursuant to the Foreign Investments Act on the possibility of opening up the nationality

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<sup>128</sup> *Id.*

<sup>129</sup> PHILIPPINE CONST., art. XII, Sec. 2.

<sup>130</sup> PHILIPPINE CONST., art. XII, Sec. 3 & 7

requirement of auxiliary maritime services such as management of shipping agencies and multi-modal operation.

### **Energy**

Republic Act No. 8180 entitled "An Act Deregulating the Downstream Oil Industry and for other Purposes" was signed on 23 March 1996 and provided for the following which constitute the transition phase of the deregulation process: It provided for the liberalization of the import and export of refined petroleum products, liberalization of the entry of new players in the operation of refineries and other oil facilities. It likewise reduced the rate of duty of crude oil from 10% to 3%, and from 20% to 7% ad valorem on refined petroleum products. R.A. 8180 also adopted an automatic pricing mechanism to enable the domestic price of petroleum products to approximate the international price of oil, and set the Oil Price Stabilization fund at P1 billion.

Republic Act No. 8184 entitled "An Act Restructuring the Excise Tax on Petroleum Amending for the Purposes Pertinent Sections of the National Internal Revenue Code, as Amended", was signed on June 1996 and restructured the excise tax on refined petroleum products.

Executive Order No. 365 was signed on 28 August 1996 specifying the rates of duty on refined petroleum products. Further, it abolished the additional levy of P1.00/liter on P0.95/ liter on refined petroleum products except on lubricating oil base stock and other solvents, and crude oil, respectively.

In the coal industry, the importation of coal is presently regulated.

The electric power industry is undergoing restructuring and privatization with the objectives of ensuring availability and reliability of power supply, creating a competitive environment resulting in operational and economic efficiency, promoting private sector investment in power development to minimize government financial and risk exposure, rationalization of electricity prices and ensuring socially and environmentally compatible energy infrastructure.

Executive Order No. 215, which was issued in 1991, made possible private sector participation in power generation. As such, a 210 MW gas turbine was built by Hopewell of Hongkong. This can be considered as the first Build-Operate-Transfer (BOT) plant in the Philippines.

The ownership and operation of transmission lines and substation facilities, including grid interconnection is lodged with the National Power Corporation which is a government-owned institution. The distribution of electricity is undertaken by private utilities, cooperatives and local government units.

With the full liberalization of the downstream oil industry, all regulations on oil price setting, including the Oil Price Stabilization Fund and the foreign exchange cover, will be removed.

On the other hand, the import restrictions on coal will be lifted.

An Omnibus Bill on the policy framework to govern the electric sector will be proposed for legislation. The long-run marginal cost will be implemented in the pricing of electricity to reflect the true cost of providing the service. There will be a horizontal unbundling of the National Power Corporation's generation facilities into a number of distinct generation entities and subsidiaries.

#### **d. Tourism**

Proclamation No. 188 provides for the adoption of the Tourism Master Plan (TMP) as the blueprint for tourism development in the Philippines for the period 1991-2000. The TMP calls for the establishment of tourism state linked to a variety of satellite destinations served by an international gateway in the country's main islands. Provision of infrastructure facilities have been programmed by the government. On the other hand, tourism facilities and services have been identified for direct participation by the private sector, both local and foreign investors.

Investment in tourism-related activities is open to foreign nationals up to one hundred percent (100%) equity. To encourage greater investments in the industry, Executive Order No. 63 entitled "Granting Incentives to Foreign Investors in Tourist Related Projects, Establishments and for Other Purposes" and Executive Order No. 226, otherwise known as the "Omnibus Investments Code of 1987", were promulgated granting incentive to tourism enterprises. Some of the incentives available are entitlement to special investors resident visa, the right to remit earnings from the investment in the currency in which the investment was original made, and the right to repatriate the entire proceeds of the liquidation of the investments.

However, certain restrictions continue to govern the industry. Only citizens of the Philippines or corporations or associations at least sixty percent (60%) of whose capital is owned by such citizens may own land other than public lands and acquire public lands through lease. Foreign investors may lease only private-owned lands. No foreign equity is allowed if the specialty restaurant is not part of the facilities of a hotel. Aliens may be employed in specialty restaurants subject to pertinent provisions of the Tripartite Agreement among the DOT, DOLE and BI. A travel tax is imposed on all departing passengers, whether Filipino nationals or foreign with certain exceptions.

Furthermore, as a general rule, only citizens of the Philippines can be employed in tourism-oriented establishments. However, for hotels and resorts, aliens may be employed subject to the pertinent provision of the Tripartite Agreement among the Department of Tourism (DOT), Department of Labor and Employment (DOLE) and the Bureau of Immigration (BI). In such cases, only hotels/resorts duly accredited by the Department of Tourism shall be allowed to engage the services of aliens. Aliens may occupy a maximum of four managerial positions in a hotel or resort establishment. For new hotels or resorts, aliens required during the pre-operation stage and up to six months after the opening of the hotel/resort to the public may be engaged. The services of aliens may also be engaged during special occasions/events, such as, food festivals, provided the service contract shall be limited to a period of three months renewable for a maximum period of another three months.

The Philippines participated in the Uruguay Round of Multilateral Trade Negotiations on trade in services and has included a schedule of specific commitments in certain activities in the tourism sector. The Philippines is also actively participating in the ongoing ASEAN negotiations on services as well as in BIMP-EAGA tourism activities.

From 1997 to the year 2000, the Philippines will review existing laws on tourism movement and investment, and it will also review investment plans and investible areas for tourism projects. From 2001 up to 2020, the Philippines will endeavor to liberalize existing regimes on investments and employment of foreign nationals and coordinate the amendments of rules and regulations on the movement of tourists, such as, travel tax, immigration procedures and visa requirements.

#### **e. Distribution**

Republic Act No. 1180 or the Retail Trade Nationalization Act provides that only Filipino citizens may engage in retail trade. This forbids foreign citizens, associations, partnerships or corporations not wholly owned by Filipinos in participating directly or indirectly in retail trade.

The Philippines will consider amendments to Republic Act No. 1180 with the objective of allowing foreign investors to engage in retail trade subject to certain conditions, such as, limitation on capitalization, number of branches, etc.

#### **f. Financial**

The passage into law of Republic Act No. 7721 (An Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines) on 18 May 1994 had the effect of amending the General Banking Act or Republic Act No. 337 which, since 1948, had closed the domestic banking system to foreign banks (except for the four already operating then). Under Republic Act No. 7721, foreign banks are authorized to operate in the Philippine banking system subject, however, to compliance with the implementing rules on modes of entry, guidelines for approval, and capital requirements, among others.

In 1994, after being closed for nearly fifty (50) years, the insurance sector was likewise opened to new, one hundred percent (100%) foreign-owned companies. Under Department Order No. 100-94 and 00-94-A issued by the Department of Finance on 24 October and 18 November 1994, respectively, foreign insurance or reinsurance companies which will operate as a branch or where foreign equity in said company or intermediary is more than forty percent (40%) shall be allowed entry within two years from the effectivity of the Order. Capital requirements vary depending on the line of business, degree of ownership and mode of entry.

The Philippines participated in the Uruguay Round of Multilateral Trade Negotiations and made commitments under the GATS, particularly in the areas of banking, insurance and securities. Furthermore, as a member of ASEAN, the Philippines is actively involved in the negotiations on trade in services including the financial sector through the Coordinating Council in Services.

Currently, membership in the Board of Directors in investment companies is limited to Filipino citizens. In investment houses, foreign equity participation is allowed up to forty-nine percent (49%). A majority of the members of the Board are required to be Filipino citizens. Foreign equity participation in financing companies is limited to forty percent (40%). Two-thirds (2/3) of the members of the Board are required to be Filipino citizens.

The Philippines will review the current restrictions on foreign equity participation in investment banks, investment houses and financing companies. The Philippines will also review existing law on investment companies with the objective of including a provision specifically providing for a maximum of one hundred percent (100%) allowable foreign equity participation.

The country also aims to progressively provide for, among others, MFN and national treatment for trade in services. The Philippines will review restrictions on foreign membership in the Board of Directors of investment and financing companies.

#### **4. Foreign investment**

As of November 1996, the Philippine investment regulatory and facilitation framework is contained in nine (9) laws and executive issuances:

- a. Executive Order No. 226 (Omnibus Investment Code of 1987) provides rules by which foreign investments may avail of incentives;
- b. Republic Act No. 7042 (Foreign Investment Act of 1991) as amended by Republic Act No. 8179 (1996) inter-alia governs the entry of foreign investments without incentives. This liberalizes the minimum paid-in capital requirements for foreign investments in domestic market enterprises, opens selected economic activities to natural-born Filipinos who have acquired foreign citizenship;
- c. Republic Act No. 7227 (Bases Conversion and Development Act of 1992) provides incentives to enterprises located within the Subic Bay Freeport Zone;
- d. Republic Act No. 7916 (Special Economic Zone Act of 1995) provides incentives to enterprises located within the Special Economic Zones;
- e. Republic Act No. 7844 (Export Development Act of 1994) provides incentives for export-oriented business;
- f. Republic Act No. 7652 (Investors' Lease Act) allows qualifying foreign investors to lease private lands for an initial period of fifty (50) years, renewable for up to twenty-five (25) additional years;
- g. Republic Act No. 7721 eases the restrictions on the entry and operation of foreign banks;
- h. Republic Act No. 7718 (Amending the BOT Law of 1994) allows variations of schemes, eases restrictions on government financing and the setting of tolls and charges and increases the opportunity for wholly foreign-owned corporations to undertake projects;
- i. Republic Act No. 7888 allows the President to suspend the nationality requirements under Executive Order No. 226 in the case of equity investments by multilateral financial institutions such as the IFC and the ADB.

The Philippines does not discriminate against any investment source economy. All areas are open to foreign investment, except those restricted by legal and/or constitutional constraints, and for reasons of security, defense and moral concerns, and to protect SMEs.

Local content and/or foreign exchange requirements for motor vehicle developments and soap and detergent manufacture have been modified under WTO-TRIPS Agreement.

The Philippines guarantees foreign investment against expropriation except for public use or in the interest of national welfare and upon payment of just compensation. It also allows full repatriation of earnings, profits, dividends and investments subject to constitutional, legislative and administrative limitations.

Existing laws for the settlement of disputes allow for voluntary and compulsory arbitration and administrative adjudication and litigation. The Philippines is also a signatory to ICSID.

The entry and Sojourn of Personnel Movement of investors and key personnel are allowed, subject to existing immigration rules, regulations and procedures.

The Philippines' goal is to liberalize investment regime and overall investment environment by, among others, progressively providing for MFN and national treatment and ensuring transparency by the year 2020.

In its continuing liberalization program, the Philippines will improve its overall investment environment, taking into account its sustainable development thrust. The liberalization measures contemplated include the extension of the application of the condominium law to industrial estates, the opening of the retail trade to foreign participation and the relaxation of the requirements and improvement of benefits accorded to foreign entities setting up regional headquarters and warehouses. Moreover, the Philippines is considering the liberalization of foreign equity participation in board of investment companies, financing companies and investment banks/houses.

To enhance transparency of its investment regime, the Philippines will continue to update its contribution to the APEC guidebook on Investment Regimes and the APEC software network on investment regulations and investment opportunities. The Philippines will also participate in the APEC review mechanism.

To facilitate investment activities through, among others, technical assistance and cooperation by the year 2020, the Philippines will participate in technical assistance and cooperation activities, continue to pursue bilateral protection agreements with APEC economies and examine the impact of investment rule-making and liberalization in the APEC region.

## **5. Intellectual Property Rights**

The Philippines has established the legal framework for the protection of patents, trademarks, tradenames, service marks and copyright.

The Philippines is also a signatory to the following conventions/agreements:

- a. Convention Establishing the World Intellectual Property Organization (since 1980).
- b. Paris Convention for the Protection of Industrial Property (since 1965).
- c. Budapest Treaty on International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (since 1951).
- d. Berne Convention for the Protection of Literary and Artistic Works (since 1951).
- e. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (since 1984).
- f. ASEAN Framework Agreement on Intellectual Property Cooperation (since 1995).

Existing laws are currently being amended to align with the WTO-TRIPS Agreement. Specifically, amendments have been submitted to Congress to align laws on patents, trademarks and copyrights, strengthen IPR enforcement and update administrative procedures.

To ensure adequate and effective protection of intellectual property rights, in compliance with WTO-TRIPS commitments and to strengthen its IPR regime, the Philippines, as determined by Congress, will undertake the following by the year 2000 : align existing laws on patents, trademarks and copyrights with TRIPS; enact new laws on the protection of plant varieties, geographical indications, layout designs of integrated circuits and undisclosed information; strengthen enforcement of IPRs; and update administrative procedures to meet new trends and developments.

To ensure that IPRs are granted expeditiously and adequate procedures and remedies for infringements, the Philippines will continue to modernize IPR system through automation of administrative functions, updating of patent documents and S&T reference materials, and effective research and industry linkages. Furthermore, the Philippines shall enhance IPR legislation to expedite granting of IPRs and to improve civil and administrative regime for infringements.

To expand bilateral technical cooperation, the Philippines will continue to collaborate with APEC members to strengthen and modernize IPR system and to avail of training programs of IPRs.

## **6. Competition Law**

The Philippine Constitution mandates that the State must protect Philippine enterprises against unfair foreign competition and trade practices. The Constitution also prohibits monopolies and combinations in restraint of trade or unfair competition.

The basic statute which prohibits unfair trade practices, monopolies and combinations in restraint of trade is the Law on Monopolies and Combinations under Republic Act No. 3247, as amended, and the Revised Penal Code, as amended by Republic Act No. 1956.

Although the country has statutes which prohibit unfair trade practices, the Philippines does not have a comprehensive anti-trust legislation.

The Philippines' objective is to enhance the competitive environment in the Asia-Pacific region by introducing or maintaining effective and adequate competition policy and/or laws and associated enforcement policies, ensuring transparency and promoting cooperation in APEC.

The Philippines will review existing laws on competition with the end in view of improving the competition environment by the year 2000. To this end, the Philippines will, among others, endeavor to enact an anti-trust, and anti-monopoly law, including the establishment of a Fair Trade Commission to enforce competition laws.

After the year 2000, the Philippines will continue to review and further improve its competition policy regime until 2020.

Until 2020, the Philippines shall avail of technical assistance within APEC to review and develop its competition policies and laws. Likewise, it shall participate in dialogues and exchange of information among APEC economies to ensure transparency and enhance mutual understanding of national competition laws and policies.

## **7 Deregulation measures**

The Philippines has successfully privatized a number of government owned or controlled corporations and returned to private sector hands certain acquired assets. This consists of the first wave of privatization.

The Philippines is now in the second and third wave of its privatization efforts.

A major restructuring of the tax system is being undertaken. This is aimed at making the system more equitable, the rates more reasonable and to facilitate administration.

A major reform in the financial sector is the liberalization in the entry of foreign banks, with issuance of Republic Act No. 7721 in May, 1994. Under this law, entry of foreign banks is allowed under three (3) modes: first, ten new foreign banks can open branches in the Philippines with full banking authority; second, an unrestricted number of foreign banks is allowed to set up locally incorporated subsidiaries up to sixty (60%) percent of which may be foreign owned; and third, an unrestricted number of foreign banks may enter the Philippines by acquiring up to sixty (60%) percent ownership of domestic banks.

Other reforms that have been implemented are the further reduction of the reserve requirement, the lowering of the capital requirement for bank branching (particularly with respect to thrift banks), the expanded use of ATMs, the liberalization of accreditation guidelines for securities dealership of treasury bills and the simplification of reportorial procedures of banks. Similarly, the restrictions on repatriation of foreign investment has been lifted, and the ceiling on outward foreign investment has increased. There has been a reduction of the requirements for deposits and deposit substitutes, as well as the removal of restrictions on automatic conversion into pesos of certain portions of foreign loans, which has limited foreign loan approvals. In addition, there has been an extension of foreign currency denominated loans to indirect exporters, the lowering of BSP rediscount rate to increase utilization thereof, and the creation of an exporters' dollar facility funded by BSP.

The exchange rate continues to be market-oriented with the BSP participating in the foreign exchange market when warranted to minimize unwanted fluctuations.

The domestic oil industry has been liberalized with the issuance of Republic Act NO. 8180 on 28 March 1996. This measure removed the restrictions on importation and exportation of petroleum products.

The Foreign Investments Act of 1991 has been amended. The amendments include, among others, the elimination of the list of strategic industries, reduction of the minimum paid in equity capital from \$500,000 to \$200,000 for foreign owned domestic market enterprises and to \$100,000 if they involve advanced technology or if they employ at least fifty (50) direct employees.

Republic Act No. 529, which prohibits the payment of domestically contracted obligations in foreign currency, except in four cases, was repealed by Republic Act No. 8183 on 11 June 1996. Under the new law, all monetary obligations are to be paid in Philippine currency, although the parties may agree that the obligations shall be settled in any other currency at the time of payment.

To promote transparency of regulatory regimes by the year 2020, the Philippines will endeavor to further improve transparency of its regulator regime through more timely publication of laws and rules and regulations and in the most widely read newspapers.

The Philippines will also eliminate trade and investment distortions arising from domestic regulations.

In its continuing program, the Philippines will initiate and implement measures that will further deregulate its domestic regime by the year 2000, taking into account its sustainable development thrust.

The liberalization measures contemplated include the extension of the application of the condominium law to industrial estates, the opening of the retail trade to foreign participation and the relaxation of the requirements and improvement of benefits accorded to foreign entities setting up regional headquarters and warehouses. Moreover, the Philippines is considering the liberalization of foreign equity participation in board of investment companies, financing companies, and

investment banks/houses. Similarly, the deregulation of the rates and routes in maritime and land transport is being examined, as well as the elimination of restrictions on domestic borrowings of foreign firms.

Beyond the year 2000, the Philippines will continue to review and improve its regulatory regime up to 2020.

## **8. Government Procurement**

Government procurement (GP) in the Philippines is governed by four (4) main laws and administrative regulations:

- a. Commonwealth Act No. 138, otherwise known as the Flag Law.
- b. Presidential Decree No. 1594 which prescribes policies, guidelines, rules and regulations for government infrastructure contracts.
- c. Letter of Instruction No. 501, which covers the procurement of consulting services for government projects.

While all of the above provide for preferential treatment of local suppliers, Presidential Decree No. 1594 and Letter of Instruction No. 501 allow for the participation of foreign suppliers in respect of government procurement.

The Philippines is signatory to the ASEAN Preferential Trading Arrangements (PTA) which provides for a 2.5% preferential margin (not to exceed US\$40,000 worth of preferences per tender) in respect of international tenders for government procurement of goods and auxiliary services from untied loans submitted by ASEAN countries vis-à-vis non-ASEAN countries.

The Philippines endeavors to develop a common understanding on GP policies and systems as well as on each APEC economy's GP practices by the year 2020. The country has committed to do the following actions: compile and develop a database and make available to APEC partners information on GP laws and policies and opportunities; establish an inquiry point for public dissemination of GP laws and policies and opportunities; conduct extensive study of procurement policies in respect to the WTO Agreement on GP and similar initiatives; and participate on GP policy dialogues and exchanges of information within APEC.

In the year 2020, the Philippines aims to achieve liberalization of the GP market throughout the Asia-Pacific region.

The Philippines has already liberalized its GP regime, subject to the provisions of existing laws and administrative regulations.

## **9. Mobility of Business People**

Mobility of business travelers in the Philippines is governed by the Philippine Immigration Act. Under this law, a multiple entry visa valid for one year is granted to foreigners who work for BOI registered companies and regional headquarters (RHQs) and extended to their spouses and unmarried children below 21 years of age. A single entry re-arranged employment visa valid for one year is granted to foreigners who

work for representative offices, branch offices and other non-BOI or EPZA registered companies. Finally, a single entry treaty trader/investor visa valid for one year is granted to three nationals (Americans, Japanese and Germans) who invest at least P300,000.00.

The so-called 9(a) visa is issued by the Philippine consular office in the country from where the non-immigrant is coming from provided the Bureau of Immigration and Deportation (BID) has given authorization to issue such visa. The BID, however, cannot authorize the issuance of the visa unless an alien employment permit (AEP) is issued by the DOLE. Both working visa and AEP are valid for one year.

The Philippines' objective is to enhance the mobility of business people engaged in the conduct of trade and investment in the Asia-Pacific region.

In principle, the Philippines supports all efforts to facilitate the mobility of business people engaged in the conduct of trade and investments in the Asia-Pacific region. In order to make Philippine immigration laws more attuned to the needs of business people by the year 2000, the Philippines intends to grant multiple entry visas initially valid for two years to foreign nationals working for BOI-registered companies, and those holding investor or trader's visa and extend the privileges accorded to 9(a) visa holders from 59-day single entry to 60-day multiple entry. The country has also agreed to streamline the visa processing procedure to reduce processing time for 9(d) or treaty traders visa and 9(g) or pre-arranged working visa of foreign nationals working with BOI registered firms no longer entitled to the special non-immigrant 47-A(2) visa.

Furthermore, a new Philippine APEC Business visa will be introduced, to allow multiple entry for a maximum 59 days' stay per entry. Such visa will have a 5-year validity and is only available to bona fide business people only. The proposed Business Visa shall be offered on a reciprocal basis to all APEC economies. APEC business lanes shall be created at major ports of entry, and an Immigration Office in Makati City may be established.

The Philippines will consider establishing an immigration office in Makati City and will periodically review visa requirements and procedures and effect improvements where appropriate until 2020.

## **B. Legal Nature of Philippine Commitments**

APEC is an international forum dedicated to producing tangible economic benefits for the region.<sup>131</sup> The content of APEC's objectives can be divided into two: trade and investment liberalization, and economic and technical cooperation. The most prominent of APEC's commitments is the achievement of free trade in the region by 2010 for developed economies and 2020 for developing economies.<sup>132</sup>

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<sup>131</sup> APEC Secretariat, *Selected APEC Documents 1989-1994*, (Nov. 20, 1993).

<sup>132</sup> F. M. MACARANAS, *APEC AND THE PHILIPPINES: CATCHING THE NEW WAVE* 14 (1996).

These goals are shared by APEC with broader multilateral arrangements, such as, WTO, and, in fact, APEC exceeds these arrangements by setting time bound targets.<sup>133</sup>

From the start the understanding among members of APEC is that it would be consistent and complimentary to the WTO.<sup>134</sup> The Osaka Action Agenda set the framework for realizing the goals of the Bogor Declaration, and the leaders agreed on a set of nine fundamental principles to define the process within the WTO framework.<sup>135</sup> This language provides for a full and faithful implementation of Uruguay Round (UR) commitments by APEC, voluntary participation in the UR implementation process by APEC members who are not members of the WTO, and accelerating, deepening, and broadening of UR outcomes by APEC member on a voluntary basis.<sup>136</sup>

APEC has emphasized voluntary, though coordinated, unilateral actions of members to reduce and eventually remove all trade and investment barriers.<sup>137</sup>

The Individual Action Plan clearly and concretely spells out how each economy will move more rapidly towards the goal of free and open trade and investments. The IAP's are economic blueprints which each APEC member will follow in achieving APEC's vision of liberalized trade and investment in the Asia-Pacific by 2010 for the group's richer members and 2020 for the group's poorer ones.<sup>138</sup> These plans represent the best-effort commitments of each member and signals the process of directing all APEC economies steadily toward liberalization of trade and investment. The pace and extent of liberalization will vary according to each member country's readiness.<sup>139</sup>

The Philippine Individual Action Plan zeroes in on three areas, greater market access through low tariffs, reducing the cost of business and strengthening economic and technical cooperation.<sup>140</sup>

APEC is consensual and voluntary in approach. As stated in the Economic Leaders' Declaration of Common Resolve, "We have brought to Subic our individual and collective initiatives in fulfillment of our voluntary commitment to implement the Osaka Action Agenda." The Individual Action Plans are voluntary submissions made by member economies. The voluntary nature of the liberalization initiatives that individual economies undertake to carry out gives these plans their most distinctive feature. It might be said that the Individual Action Plans are a continuation or extension of unilateral liberalization initiatives which economies of the region have

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<sup>133</sup> *Id.*

<sup>134</sup> Ernesto M. Maceda, *Moral and Competitive Society*, 12 FOREIGN REL. J. 26 (1997).

<sup>135</sup> Julius Caesar Parrenas, *APEC 1996: The Challenge of Subic*, 11 FOREIGN REL. J. 16 (1996). [hereinafter Parrenas].

<sup>136</sup> APEC Secretariat, *Update on Activities within APEC* at 35 (September, 1996).

<sup>137</sup> Parrenas, *supra*, note 134.

<sup>138</sup> Domingo L. Siazon, *APEC and the Philippine Future*, 12 FOREIGN REL. J. 19 (1996) [hereinafter Siazon].

<sup>139</sup> FIDEL V. RAMOS, APEC AND THE FILIPINO VISION, AN ADDRESS BEFORE THE NATIONAL PREPARATORY

SUMMIT FOR APEC (December 7, 1995).

<sup>140</sup> Marinel Castillo, *APEC and the Philippine Agriculture*, 12 FOREIGN REL. J. 16 (1997).

been implementing in the last two decades or so in their own economic interest.<sup>141</sup> What the APEC process has added to the region's voluntary mode of trade and investment liberalization is a dynamic mechanism of consultation, review and revision, a mechanism calculated to favor concerting, expanding and improving action plans.<sup>142</sup> In a way the individual economy plans will always remain a work in progress until the goals of Bogor are finally achieved.<sup>143</sup>

The point of inquiry, however, is the legal nature of the Philippines' commitments under APEC, in general, and under the Philippine Individual Action Plan, in particular. This examination will be based on the provisions of municipal law in accordance with international law.

Article II, Section 2 of the 1987 Philippine Constitution provides that "the Philippines ... adopts the generally accepted principles of international law as part of the law of the land..."

In the absence of relevant treaties or statutes, the determination of what constitutes these general principles is done by the courts.<sup>144</sup>

The most relevant decision to date on this matter is *Tañada v. Angara* (G.R. No. 118295, 2 May 1997). The Supreme Court, in discussing the constitutionality of the Philippine accession to the World Trade Organization, affirmed the principles of equity, reciprocity, and economic interdependence underlying the Philippines' WTO commitments. The court stated that:

By the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda* – international agreements must be performed in good faith. A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties x x x

Following this, the WTO commitments made by the Philippines are legally binding upon it. Therefore, insofar as the APEC is a regional arrangement which supplements and complements the multilateral trading system,<sup>145</sup> the APEC obligations are likewise binding upon the Philippines.

Article VII, Section 21 of the 1987 Philippine Constitution states that no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate. However, in their deliberations on the present provision (Article VII, Section 21) the members of the Constitutional

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<sup>141</sup> APEC Secretariat, *MAPA for APEC Vol. 1* at 2 (1996).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> BERNAS, *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 56 (1996); *See*

*Mejoff v. Director of Prisons*, 90 Phil. 70 (1951).

<sup>145</sup> Article XXIV, General Agreement on Tariffs and Trade.

Commission recognized the distinction between a treaty and an executive agreement.<sup>146</sup>

In *USAFFE Veterans vs. Treasurer of the Philippines*<sup>147</sup> and *Commissioner of Customs vs. Eastern Trading*,<sup>148</sup> the Supreme Court also distinguished between a treaty and an executive agreement.

Executive agreement is a term commonly used to designate international agreements made by the President without the advice and consent of the Senate given by the two-thirds majority requisite for the conclusion of a treaty under the Constitution.<sup>149</sup> The right of the executive to enter into binding agreements without the necessity of subsequent congressional approval has been confirmed by long usage.<sup>150</sup> The making of executive agreements is thus a constitutional usage of long standing which apparently rests upon the President's vast but ill-defined powers in the fields of foreign relations and national defense.<sup>151</sup>

Generally, international agreements involving vital political issues or changes of a national policy or those involving international arrangements of a permanent character usually take the form of treaties which should be submitted to the Senate of the Philippines for its concurrence.<sup>152</sup>

International agreements embodying adjustments of detail carrying out well established national policies and traditions, amendments to existing treaties and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.<sup>153</sup> An executive agreement does not at all require the approval by the Senate. Nevertheless, it is a binding international obligation by the executive branch of the Government on the basis of prior congressional authorization and within the limits set by Congress, or even without prior congressional authority but within the power generally recognized as vested in the President.<sup>154</sup>

Caution, however, had been made by the United States State Department as shown in its Circular No. 175 dated December 3, 1955 which provides that Executive Agreements shall not be used when the subject matter should be covered by a treaty.<sup>155</sup> If an executive agreement has not been authorized by prior legislation or does not fall within the sphere of constitutional presidential authority, the agreement is regarded as void.<sup>156</sup>

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<sup>146</sup> Justice Jorge R. Coquia, *Opinion on the Constitutional Provision on Treaties*, 3 LAW. REV. 52 (1989)

[hereinafter Coquia].

<sup>147</sup> 105 Phil. 1039 (1950).

<sup>148</sup> 3 SCRA 351 (1961).

<sup>149</sup> Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation*, 17 J. AIR. L. & COM. 436,

438 (1950) [hereinafter Lissitzyn].

<sup>150</sup> *Commissioner of Customs v. Eastern Sea Trading*, 3 SCRA 351, 356 (1961).

<sup>151</sup> Lissitzyn, *supra*, note 148.

<sup>152</sup> Coquia, *supra*, note 145.

<sup>153</sup> See II Records 544-546 (1986).

<sup>154</sup> Coquia, *supra*, note 145.

<sup>155</sup> *Memorandum for the Senate Legislative Counsel and the Legal Adviser of the State Department*, I.L.M. 1588 (1975).

<sup>156</sup> *United States v. Guy W. Capps*, 04 F. 2d 655 (1953).

The Executive Agreement shall be used only for agreements, which fall into one or more of the following categories:

- a. Agreements which are made pursuant to or in accordance with existing legislation or a treaty
- b. Agreements which are made subject to Congressional approval or implementation; or
- c. Agreements which are made under and in accordance with the President's Constitutional Power<sup>157</sup>

Executive agreements fall under two classes: (1) agreements made purely as executive acts affecting external relations with or without legislative authorization which may be called presidential agreements, and (2) agreements entered into in pursuance of acts of Congress called Congressional-Executive agreements.<sup>158</sup> Congressional-Executive agreements have come about in different ways. In some instances, Congress has approved presidential agreements by legislation or appropriation of funds to carry out their obligations.<sup>159</sup>

A similar classification is followed in the Philippines. Memorandum Circular No. 89 dated 19 December 1988 provides guidelines on when an international agreement is considered a treaty which should be submitted to the Philippine Senate for concurrence in accordance with Article VII, Section 21 of the 1987 Philippine Constitution.

The obligations undertaken by the Philippines under APEC may be considered as a presidential executive agreement and a congressional-executive agreement.

Senate Resolution 97 adopted by the Philippine Senate on December 14, 1994 approves the commitments made by the Philippine government under the WTO as a treaty. In Subic, the APEC Leaders reaffirmed the primacy of the WTO-based multilateral trading system and urged all parties to effectively implement their Uruguay Round Commitments.<sup>160</sup> Thus, the commitments made by the Philippines under APEC is nothing more than an executive agreement to implement the treaty obligations made under the WTO.

Under the same Senate Resolution, however, there is a clause which states that nothing in this Resolution or in the WTO Agreement shall be construed to authorize the President alone to bind the Philippines to any amendment of any provision of the WTO Agreement or to exercise other than such powers as are already vested in him by the Constitution or laws.

Nonetheless, these commitments may be justified under the power of the President to enter into executive agreements by virtue of his constitutional powers. In the fields of the military and the foreign affairs, the President may exercise the largest measure of authority subject to the least amount of restriction under the

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<sup>157</sup> *Department of State Circular No. 175, Dec. 13, 1955*, 50 AM. J. INT'L. L. 785 (1956).

<sup>158</sup> 5 HACKWORTH, INTERNATIONAL LAW 380. [hereinafter Hackworth].

<sup>159</sup> See HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 173-176 (1972).

<sup>160</sup> Siazon, *supra*, note 137.

Constitution.<sup>161</sup> In these fields, he is perhaps entitled to claim a certain degree of inherent powers.<sup>162</sup> The President derives these powers over the foreign affairs of the country not only from specific provisions of the Constitution but also from custom and positive rules followed by independent States in accordance with international law and practice.<sup>163</sup> In discussing this subject, the United States Supreme Court directs attention to certain powers not provided in the Constitution but vested nevertheless in the United States government as inherently inseparable from the conception of statehood.<sup>164</sup> These are the power to acquire territory by discovery and occupation, the power to expel undesirable aliens, and the power to make such international agreements which do not constitute treaties in the constitutional sense, commonly known as executive agreements.<sup>165</sup>

Presidents have made numerous international agreements contemplated by a treaty, or which they considered appropriate for implementing treaty obligations and no one seems to have questioned their authority to make them. Perhaps it is assumed that Senate consent to the original treaty implies consent to supplementary agreements; perhaps by such agreements the President takes care that the treaty is faithfully executed.<sup>166</sup> However, executive agreements are never self-executing and cannot be effective as domestic law unless implemented by Congress.<sup>167</sup>

The distinction between so-called executive agreements and treaties is purely a constitutional one and has no international legal significance. Whether an agreement is regarded as a treaty or an executive agreement is immaterial in international law. It still has binding effect as a treaty.<sup>168</sup> However, as discussed in the previous chapter, the commitments made under APEC cannot be regarded as a treaty because these do not fulfill the requisites for a valid treaty. At most it is a political declaration which has binding effect.

A unilateral declaration by a state intended to benefit another State or group of States can be legally binding and governed by the law of treaties. An undertaking of this kind, if given publicly, and with intent to be bound, even though not made within the context of international negotiations, is binding.<sup>169</sup>

However if the text or circumstances leave the intention uncertain, it is reasonable to consider vague language and mere declarations of purpose as indicative of an intention to avoid legal effect.<sup>170</sup> Other indications may be found in the way the instrument is dealt with after its conclusion.<sup>171</sup> None of these acts can be considered

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<sup>161</sup> SINCO, PHILIPPINE POLITICAL LAW 297 (10<sup>th</sup> ed. 1954) [hereinafter Sinco].

<sup>162</sup> *United States v. Curtiss-Wright*, 299 U.S. 304 (1936); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>163</sup> SINCO, *supra*, note 160, at 298.

<sup>164</sup> *Jones v. United States*, 137 U.S. 202 (1890); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Altman and Co. v. United States*, 224 U.S. 583.

<sup>165</sup> *Id.*

<sup>166</sup> HACKWORTH, *supra*, note 157, at 176.

<sup>167</sup> *Id.* at 184-186.

<sup>168</sup> SINCO, *supra*, note 160, at 305.

<sup>169</sup> *Nuclear Test Cases*, 1974 I.C.J. 253,267,457,472. *See also Legal Status of Eastern Greenland*, 1933

P.C.I.J. (ser. A/B) No. 53, at 53.

<sup>170</sup> O'CONNELL, *supra*, note 102, at 199.

<sup>171</sup> *Id.*

as decisive evidence but together with the language of the instruments they are relevant.<sup>172</sup> The level and authority of the government representatives who have signed or otherwise approved the agreement may also be relevant.<sup>173</sup>

As can be gleaned from the fact that it was no less than the President of the Philippines who made such declarations, subsequent legislation enacted by Congress to fulfill such undertaking and the act of the country in hosting the 1996 APEC Summit in Subic, it is clear that the Philippines intended such commitments to have a binding effect.

Assuming *arguendo* that the Philippines did not intend such a pledge to have binding effect, the country is still obliged to act in accordance with the agreements. Governments may enter into precise and definite engagements as to future conduct with a clear understanding shared by the parties that the agreements are not legally binding.<sup>174</sup> The so-called gentlemen's agreement falls into this category. In these cases, the parties assume a commitment to perform certain acts or refrain from them. The nature of the commitment is regarded as non-legal and not binding.<sup>175</sup> There is nonetheless an expectation of, and reliance on, compliance by the parties.<sup>176</sup>

A significant practical consequence of the good faith principle is that a party which committed itself to a course of conduct or to recognition of a legal situation would be estopped from acting inconsistently with its commitment or adopted position when the circumstances showed that other parties reasonably relied on that undertaking of position.<sup>177</sup>

It is generally recognized that a non-binding agreement, however seriously taken by the parties, does not engage their legal responsibility.<sup>178</sup> What this means simply is that noncompliance by a party would not be a ground for a claim for reparation or for judicial remedies. This point, it should be noted, is quite different from stating that the agreement need not be observed or that the parties are free to act as if there were no such agreement.<sup>179</sup> States may regard non-binding undertakings as controlling even though they reject legal responsibility and sanctions.<sup>180</sup>

Such agreements are excluded from the Vienna Convention on the Law of Treaties because they are not governed by international law.<sup>181</sup> However, this conclusion does not remove them entirely from having legal implications.

Based on the foregoing discussion, the only conclusion that can be drawn is that the obligations undertaken by the Philippines under APEC in general and under the Philippine Individual Action Plan have legal effects under Philippine municipal law.

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Schachter, *supra*, note 101, at 299.

<sup>175</sup> *Id.* at 300.

<sup>176</sup> *Id.*

<sup>177</sup> HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 136 [hereinafter, KELSEN].

<sup>178</sup> Schachter, *supra*, note 101, at 301.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

### C. Consequences for Non-Compliance with Individual Commitments

The rights and obligations of a State in its international relations are determined by international law. It is this law, and not the municipal law of the State, which provides the standards by which to determine the legality of its conduct.<sup>182</sup> Thus, regardless of whether the Philippines regards its obligations under APEC as binding or not, it has to be ready to face the consequences of non-compliance with individual commitments.

Multilateral agreements for regional cooperation, and numerous bilateral and multilateral treaties on economic matters have dispute settlement clauses applicable to differences arising under those agreements. APEC has a similar clause.

Economic leaders of APEC's member economies declared to assist in resolving such disputes and in avoiding its recurrence, by examining the possibility of a voluntary consultative mediation service to supplement the WTO dispute settlement mechanism, which should continue to be the primary channel for resolving disputes.

The dispute settlement mechanism under the WTO provides for the suspension of the application of WTO benefits by one member to another in the event that the latter member fails to fully implement within a reasonable period, and for which no satisfactory compensation is agreed. Such authorized retaliation should entail suspension of concessions or benefits that affect the same sector, but could conceivably be implemented in other sectors under the same agreement, or even under other covered agreements.<sup>183</sup>

Not all interests of a State have the character of rights. The conduct by which a State violates some interest of another State may not be a delict, that is to say, the State whose interest is violated may not be authorized to execute a sanction by taking an enforcement action against the State which has violated its interest; but it may react to a similar violation of an interest of the latter State.<sup>184</sup> Such a reaction is called retorsion.<sup>185</sup>

Retorsion refers to retaliatory measures that an aggrieved State is legally free to take whether or not the offending State committed an illegal act.<sup>186</sup> Retorsion is often an equivalent act of retaliation in response to an unfriendly act. Trade boycotts or denial of trade benefits may similarly be directed against unfriendly acts or illegal conduct. But there are limits on retorsion. An unfriendly act that is disproportionate to an offense and causes substantial damage to another state may be viewed as an abuse of rights and, therefore, illegitimate.<sup>187</sup> Such action may also be taken by States not directly injured, but have joined in collective counter-measures on the ground that

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<sup>182</sup> H. BRIGGS, *THE LAW OF NATIONS* 60 (2d ed. 1982).

<sup>183</sup> Lilia R. Bautista, *Memorandum*, 11 *FOREIGN REL. J.* 102-103 (1996).

<sup>184</sup> KELSEN, *supra*, note 176, at 25.

<sup>185</sup> *Id.*

<sup>186</sup> HENKIN, *supra*, note 10, at 586.

<sup>187</sup> OPPENHEIM, *supra*, note 97, AT 345.

the violation affected a collective interest or a common concern of the international community.<sup>188</sup>

There are other forces non-legal in nature that motivates States to obey international law, such as, established self-interest and expediency.<sup>189</sup> It is easier to follow the rules of International law rather than oppose it. We have been adopting the policies of liberalization and deregulation because we think that these are good for us.<sup>190</sup> Related to self-interest and expediency is the factor of world opinion. The fear of adverse reaction among peoples of the world can certainly motivate the State to obey the rules of international law.<sup>191</sup> A very real motivation is encompassed by the desire for social approval in the society of nations.<sup>192</sup>

In summary, non-compliance of individual commitments under APEC and the Philippine Individual Action Plan may subject the Philippines to any or all of the following: the Dispute Settlement Procedure under the WTO, whenever appropriate, and the sanctions allowed under such system, retorsion, and social disapproval among the family of nations.

## Chapter Six: Conclusion

With respect to the consequences of membership and whether APEC commitments provide for concrete legal obligations, these commitments may be considered to be “non-legal soft law”. There is no immediately identifiable international delinquency. However, there are legal implications for deliberate and unreasonable disregard of APEC commitments.

It may be argued that in so far as imputations of violations refer to principles embodied in the WTO, there is enough basis to conclude that a breach of these GATT-WTO-based obligations engages WTO member States’ international responsibility but the resolution of the dispute hinges upon a trade issue between WTO member States .

On the other hand, the question of enforcement of the Individual Action Plans can be measured by existing principles of international law, such as, good faith, estoppel, and abuse of rights. To the extent that States have assumed subsequent acts pursuant to APEC commitments, then these principles shall be applied to determine responsibility.

Insofar as Philippine commitments are concerned, existing constitutional mandates and jurisprudence affirm the applicability of soft law rules. Research shows that the doctrine of incorporation found in the Constitution provides the means by which soft law may find application in domestic law. In a supporting manner, the

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<sup>188</sup> HENKIN, *supra*, note 10, at 551.

<sup>189</sup> COQUIA - DEFENSOR-SANTIAGO, *supra*, note 16 at 7.

<sup>190</sup> Juluis Caesar Parrenas, *APEC as an Instrument of Total Human Development*, 12 FOREIGN REL. J. 36 (1997).

<sup>191</sup> KAPLAN & KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 343 (1961).

<sup>192</sup> *Id.*

procedure on ratification of international agreements under Article 7 of the Constitution has been interpreted by the Supreme Court to be susceptible of exception with regard to executive agreements. Such agreements are the form that a majority of Philippine APEC commitments have assumed.

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