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PASCN Discussion Paper No. 2001-15

**Toward the Formulation of a Philippine Position  
in Resolving Trade and Investment Disputes  
in APEC**

*Ma. Lourdes Sereno*



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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*Ma. Lourdes Sereno*  
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For comments, suggestions or further inquiries, please contact:

**The PASCN Secretariat**  
Philippine Institute for Development Studies  
NEDA sa Makati Building, 106 Amorsolo Street  
Legaspi Village, Makati City, Philippines  
Tel. Nos. 893-9588 and 892-5817

## ABSTRACT

The task of finding a negotiating position on dispute settlement for APEC is not an academic matter. For one, the drivers of the move to create APEC, principally Australia and to a lesser extent, the United States, promised the world that APEC would show the way to more dramatic multilateral trade liberalization by delivering on a broad range of liberalization reforms coupled with trade investment facilitation actions. The delivery of liberal targets could only be realistic on the assumption that there is every economic incentive for all the Members of APEC to liberalize and that the political costs of liberalization, for the more protectionist Members, were acceptable. It also meant, that should those cost parameters no longer hold true, there is a degree of “binding-ness” in the commitments of APEC individual Members to prevent or minimize backtracking on the reforms. The question of “binding-ness” of the commitments on the other hand, become very material to the question of the choice of a mode for resolving trade and even possibly investment disputes in APEC. On the other hand, the presence, range and experience of and with dispute settlement mechanisms outside the APEC forum impacts on whether in fact, APEC will be the preferred venue for resolving these trade disputes. The degree of usefulness of APEC for resolving trade disputes thus becomes a core issue.

This paper explores these facets of the problem of finding a dispute settlement mechanism in APEC by contextualizing the problem in its territorial and economic environment. A survey of the different modes of dispute settlement is also presented together with a tally of the various modes and venues to which the various APEC Members subscribe. The paper ends with a description of strategic concerns of the Philippines in the trade and investment area together with suggestions on how the government may approach dispute settlement.

## **EXECUTIVE SUMMARY**

The introductory part of the paper starts with a description of the various trade organizations, blocs or arrangements that the Philippines is a party to or which it has with its trade partners. The description focuses on the impetus in the creation of those organizations as well as the major features of their dispute settlement system, or whatever system bears the nearest resemblance to such a mechanism. The organizations most-described are the WTO, the APEC and the AFTA.

The paper progresses to a definition of dispute settlement and the most-dominant mechanisms internationally employed in the trade and investment area. The WTO mechanism, the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, the International Convention on the Settlement of Investment Disputes, the UNCITRAL Model Law on the domestic recognition and enforcement of foreign arbitral awards, the International Court of Arbitration under the International Chamber of Commerce are described. Soft modes of settling disputes are also described, among which are: mediation, conciliation, good offices, unassisted negotiations, fact-finding, and commissions of inquiry.

The paper then describes what has happened within APEC itself on the matter of formulating a dispute settlement system. The guiding principles drawn up within APEC are identified, further discussions on the matter are related and the reports of the various Members on the trade and investment dispute settlement modes employed by them or to which they subscribe are tabulated by Member and by mode. A complication is briefly pointed out in the changes being introduced by cyberspace, in terms of cyberspace's creation of new planes in which disputes can erupt, as well as its introduction of another medium by which dispute settlement can be practiced through cyber-arbitration.

The paper ends with an analysis of the critical or strategic elements the Philippines should consider in formulating a position on dispute settlement in APEC. Three levels of approach are finally suggested for the Philippines to consider.

# TOWARD THE FORMULATION OF A PHILIPPINE POSITION IN RESOLVING TRADE AND INVESTMENT DISPUTES IN APEC

by Prof. Ma. Lourdes A. Sereno\*

Several major changes that have swept the globe since last year have rendered the issue of dispute settlement in the Asia-Pacific Economic Cooperation (APEC) more complicated. At this point, any dispute settlement model will have to await a fuller unraveling of the institutional effects of many economic and technological changes. Meanwhile, it is hoped that the more useful aspects of this author's earlier research will remain despite the changes that are confronting every one of us.

## WORLD TRADE LAW, TRADE "BLOCS," AND DISPUTE SETTLEMENT

In the late 1980s to the early 1990s, the most debated issue in trade was the impact of the supposed "balkanization" of the world into three trade blocs on the multinational trade regime under the General Agreement on Tariffs and Trade (GATT). The concern originated from the reaction of non-European Community leaders to the single European market project of the European Community on the theory that it had led to a protectionist regime, which in turn resulted in the labeling of the European Community as "Fortress Europe."

Supposedly, the other bloc was the North American trade bloc led by the United States, Canada, and Mexico. These countries have created what is now known as the North American Free Trade Agreement (NAFTA), with plans of further expansion in the Americas. Its leaders trumpeted the eventual emergence of a Western Hemisphere Free Trade Area (WHFTA), or the American Free Trade Area.<sup>1</sup>

Another trade bloc, which was perceived by some to be aborning, was the so-called East Asian trade bloc, supposedly led by Japan as well as China. The idea behind the bloc grew out of Malaysian Prime Minister Mahathir Mohamad's "Look East Policy" and his championing of the East Asia Economic Grouping (EAEG). Eventually, the proposal to create the EAEG was watered down and downgraded to an East Asian Economic Caucus within the APEC umbrella, due largely to opposition from the United States. Subsequent events revealed the non-existence of any such blocs as Asian governments, despite the regional currency crisis, had not banded together in a "regionalization" mode. Rather, most of them preferred to work within the APEC mechanism and, in the case of Southeast Asia, primarily within the Association of Southeast Asian Nations (ASEAN) mechanism.

APEC, formed with North American countries on the eastern side of the Pacific and the Asian countries on the western side, has indeed proven to be a dynamic regional grouping. For

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\* *Professor of International Economic Law*, University of the Philippines' College of Law; *Director*, Institute of International Legal Studies, U.P. Law Center; *Convenor*, Legal Issues in the Emerging World Environment, CIDS, Office of the U.P. President.

<sup>1</sup> Not the ASEAN Free Trade Area, which also called "AFTA."

one, it is presently highly significant because it includes China and Taiwan as members while the World Trade Organization (WTO), which is supposed to cover 90 percent of all world trade, does not. For another, APEC has put forth an ambitious agenda of becoming the single most important regional engine for trade and investment liberalization. Structurally, APEC is not a formal international organization in the sense that it has a distinct international legal personality. Rather, it is a structured forum for intense mutual consultation and dialogue on a wide range of issues, foremost among them, trade and investment.

A group of countries that can genuinely be called a trade group is the ASEAN. At present, not all of the ASEAN member countries are members of APEC.<sup>2</sup> ASEAN has been around for 33 years and, more often than not, has proven to be an effective mechanism for resolving regional political and security conflicts. It has also been successful in generating greater cultural and social exchange between its peoples. It has also led to the creation of successful partnering among its business leaders. It has largely survived on a very consensual approach to conflict resolution. However, despite its many attempts to introduce a more rules-based and formal mechanism to resolve trade and investment disputes, it has failed to show any success.

## **World Trade Organization**

If there is anything that characterizes WTO, it is its strong rule-based regime. It is rules-based in relation to other international fora or conventions, and vis-à-vis APEC and AFTA. The historical experience of the United Nations Organization at decisionmaking and implementation has been one of great difficulty and fractiousness. In the WTO, the decision-making process is clear; so is the rule-making process. Rule enforcement is also somehow clear. In the United Nations, for instance, it would be very difficult to impose sanctions on any of the members of the Security Council. It is also extremely difficult to bring a major power under the jurisdiction of a tribunal that can hand down an adverse decision against it, especially if it refuses to submit to that jurisdiction. This is not the case in the WTO. Accession to the WTO Agreement automatically means submission to the jurisdiction of the Dispute Settlement Body (DSB). The very first ruling issued by this body involved the United States,<sup>3</sup> which was required to change its federal rules on the initial level requirement of reformulated imported gasoline. The WTO has a system which, because of its design and structure, can apparently hold to task even the only remaining superpower in the world.

The second characteristic of this rule-based regime is that the disciplines involved are quite substantial. The range of issues covers not just trade in goods but also questions of intellectual property rights and investment rules. It also includes the problematic area of services and even the politically sensitive agricultural practices and agricultural subsidies. There are also plurilateral rules on government procurement.<sup>4</sup>

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<sup>2</sup> Vietnam, Myanmar, and Cambodia.

<sup>3</sup> WT/DS 2/AB/R (1996). United States—Reformulated Gasoline case

<sup>4</sup> By “plurilateral,” we mean agreements in the WTO, of which there are four that are not mandatory for WTO members.

Indeed, the disciplines are significantly substantial, because even the violation of an international treaty on intellectual property rights is usually heard not before the World Intellectual Property Organization (WIPO) but the WTO.<sup>5</sup> Likewise, it is with the WTO that the International Monetary Fund (IMF) is presently discussing the effects of the Asian regional currency crisis on global trade expansion. There are also ongoing discussions on whether any country can invoke the balance-of-payment exceptions to opt out of its obligations under the WTO. Every aspect of international economic life is somehow being affected by the WTO work. Countries are being subjected to a trade policy review mechanism on a periodic basis, which includes a report on a country's entire macro-economic framework. At present, a working group is discussing the relationship between anti-trust law, competition policy, and trade, subjecting even the structure of private businesses to possible international discipline.

The third characteristic of the WTO as a rule-based organization is that it has a formalized and working dispute settlement mechanism. No other organization has this system, not even APEC nor AFTA. All that AFTA has is a skeletal framework under the Protocol on Dispute Settlement, but it has not proven its capability to work. In contrast, the WTO has already handed down 21 final and enforceable decisions since it started operating in 1995.<sup>6</sup> A panel, which is the technical body tasked with adjudication of trade cases, or the Appellate Body that conducts final reviews, is currently resolving at least 30 cases. In fact, the threat of a panel or Appellate Body examination is already being used as a major negotiation tool on a bilateral basis by several members.

The WTO, among all economic organizations, is also the most highly organized. It has committees, councils, and working groups operating on a regular basis, with an administrative office in Geneva. As mentioned earlier, it also interacts closely with other international organizations like the IMF, the World Bank, and the WIPO. It is the dominant framework under which other international or regional economic organizations work, such as the APEC, which repeatedly emphasizes in all its documents that the WTO is the first and best framework of its choice and that it is not going to do anything to weaken in any way the primary role of the WTO. ASEAN has said as much.

### **Asia-Pacific Economic Cooperation**

APEC obligations are largely considered to belong to the area of "soft law." Some do not even consider its obligations as quasi-legal. It has individual targets and individual action plans, but the question of how these can be enforced or how countries can be individually accountable for the accomplishment of those targets is still in doubt. It does not establish any rule nor impose any obligatory behavior in the legal sense. In other words, it will be the collective force of all the APEC countries that will push individual members to comply with APEC targets.

Given its nature, APEC gives greater emphasis to trade and investment liberalization and facilitation, technical cooperation and assistance, private sector organizations, and people-to-

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<sup>5</sup> See India et al.

<sup>6</sup> As of August, 1999.

people initiatives. The nature of tariff liberalization commitments of its members is not rigid, making it impossible to talk about a dispute settlement mechanism considering the countries' reluctance to bind themselves to any further liberalization targets. The apparent consensus is not to push for a formal structure for dispute settlement at present. However, the dynamism of APEC lies in the agenda of setting the pace for WTO negotiations by advancing liberal trade targets. This is based on the assumption that if the individual APEC countries are more radical in their offers than what they set out in the last Uruguay Round, the extent of the liberality of the new offers will determine the pace of the WTO negotiations. Unlike APEC, which has the 2010 and 2020 virtually free trade area targets, the WTO has no such targets

### **ASEAN Free Trade Area**

By 2003 the tariff rate for the original six members of the ASEAN will only be from 0 to 5 percent for 98 percent of all their tariff lines by the year 2003 (Vietnam has a delayed target while Laos and Myanmar have set specific targets.) The only exceptions will be politically sensitive products. The pattern for discussions on trade targets and dispute settlement in the AFTA is still through negotiation and consensus making. ASEAN does not want to depart from the consensus mode of decision making despite a protocol on dispute settlement mechanism signed in November 1996. This protocol allows for a more formal process of bringing a complaint before a panel to be created whose decision can be appealed to the Senior Economic Officials Meeting (SEOM) and ultimately to the ASEAN economic ministers.

As early as 1976 when the basic ASEAN treaties were entered, a high council for the settlement of disputes had been provided for. But this council has never been convened. The protocol grants the creation of a technical panel, which will examine the substantive merits of economic complaints arising from violations of any obligation under the AFTA Common Effective Preferential Tariff (CEPT) scheme. For example, if a country bound itself that by 1998 the tariff for certain products would be only at 10 percent, an application of a tariff higher than that would be, technically, a violation. Theoretically, there is a way by which a member can bring a complaint, but it has never been utilized. So, the question is, Is ASEAN ready to depart from the old mode of consultation and negotiation before formal complaints are entered? Is any country willing to take action on trade disputes using the Protocol on Dispute Settlement Mechanism?

AFTA seems to be at a crossroads. While it has prided itself on being a consensus-based system, it also wants to adopt some of the dispute settlement characteristics of the WTO. ASEAN seems even more rule-based than APEC. The major problem, however, in establishing the rules orientation of AFTA is the lack of optimum free trade within the ASEAN because its national economies produce largely competing products. Some quarters believe that complementarity, which is the most desirable platform for economic integration, does not exist in the ASEAN. The result is a lack of will to implement a rigid system, where the probabilities of competing products within ASEAN jostling each other for market share are very high. Although this may be the case, it is undeniable that the ASEAN, especially through the AFTA scheme, has indirectly brought about greater interaction between the private sectors and the governments. It has largely been the spin-off of greater intra- ASEAN investments, and greater intra-ASEAN

interaction in the private sector that to a large extent has been responsible for the apparent solidarity of ASEAN.

Another difficulty in creating a more rule-based system in the ASEAN is that its core economies are still young. In fact, considerations of an ASEAN currency and a regional fund (without the full participation of Japan or any other mature economy) that can absorb goods coming from the ASEAN, as well as certain economic adjustment costs that will be brought about by the re-alignment of currencies, will not succeed.

## **POINTS TO CONSIDER**

There are several things to bear in mind in forming perspectives on international trade rules. First, trade negotiations occur at three different levels: (1) multilateral (WTO); (2) regional (in our region, APEC and ASEAN); and (3) bilateral country-to-country. Therefore, to understand where the market opportunities are, the business sector must be aware of whatever the negotiators intend to commit in all these different fora. In the Philippines, for instance, there is a grave misconception that many of the existing adjustments are the results of Philippine commitments to the WTO. The fact is that most of these commitments have been unilateral and are basically AFTA, not WTO, commitments. It is essential, therefore, to determine the source of the specific trade commitment being discussed.

The second thing to consider is the fact that one of ASEAN's largest trading partners, China, is not governed by any international trade framework. When the mayor of Beijing decided to change the location of the first McDonald's outlet from one corner of the city to another, McDonald's could not bring a complaint in any forum against China. China is not bound by any regional arrangement that requires it to observe any particular rules. It largely operates according to the terms of its economic relationships with particular countries.

## **BASIC DEFINITIONS**

Here is a working definition of certain concepts that are applicable to this paper, as provided by Justice Florentino Feliciano:<sup>7</sup>

A more traditional way of looking at the settlement of disputes between states would be to examine the degree to which a third party intervenes in the process of settlement. If the process by which settlement is reached is purely bilateral, the exercise is characterized as *negotiations*. A third party may intervene for a strictly limited purpose, say, to bring the parties to sit together and begin *inter se* negotiations (*good offices*). In addition to bringing the parties together, the third party may transmit proposals from one party to another; in this case, the process is called *mediation*. Should the third party be authorized to initiate *motu proprio* independent proposals for the settlement of the dispute, the process is

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<sup>7</sup> *Dispute Settlement Under the Aegis of the World Trade Organization*, in "Odyssey and Legacy: the Chief Justice Andres R. Narvasa Centennial Lecture Series," at 180 (1999).

called *conciliation*. The third party could, alternatively, be authorized to determine the antecedent facts, or the facts constituting a dispute; in this case, the third party is known as an *inquiry commission*. If a third party intervenes because he has been authorized to resolve the dispute on his own, there is either *arbitration* or *judicial settlement*, depending on whether the third party is chosen on an *ad hoc* basis, or is part of an institutionalized framework and standing system that is specifically designed for dispute resolution. The third party in this context may be an individual arbitrator, an arbitral board or tribunal, or a judge or court.

## **MODES OF RESOLVING TRADE AND INVESTMENT DISPUTES BY APEC COUNTRIES**

This section presents a tabulation of the various modes of resolving trade and investment disputes that APEC economies have utilized. The tabulation and the accompanying analysis were based on the official reports submitted by each APEC economy on the dispute settlement modes.

### **The WTO Dispute Settlement Mechanism<sup>8</sup>**

Dispute settlement under the WTO mechanism is the prompt settlement of situations in which a member considers that any benefit accruing to it directly or indirectly under the WTO Agreement is being impaired by measures taken by another member. A dispute settlement mechanism aims to secure a positive solution to a dispute. Thus, a solution mutually acceptable to the parties to a dispute is preferred. However, in the absence of a mutually agreed solution, the first objective is usually to secure the withdrawal of measures concerned. A measure is any internal act, whether a law, an administrative action, or a judicial decision of a member.

The DSB is the WTO organ that is mandated to administer the rules and procedures that govern the settlement of disputes. It is made up of the representatives of all the members of the WTO. Each member is entitled to one vote.

The DSB has the following powers and functions: (a) to establish panels, (b) to adopt or reject panel and Appellate Body reports, (c) to maintain surveillance of the implementation of rulings and recommendations, and (d) to authorize the suspension of concessions and other obligations. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be viewed as contentious acts. Members engage in this procedure to resolve disputes.

If a measure adopted by a country (A) within its territory impinges on, for example, the exports of another country (B), the first step in dispute settlement is the filing of a request for consultation by the complainant. In this case, B is the complainant.

If B requests consultation with A, then A must consider the complaint of B. A must reply to the request within 10 days after its receipt and enter into consultations with B in good faith

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<sup>8</sup> This section is drawn from Article XX and XXIII of the GATT 1994, *Understanding on Dispute Settlement*, and *Working Procedures*.

within a period of 30 days from the date of the request, with a view to reaching a mutually satisfactory solution. If A does not respond within 10 days, does not enter into consultations within a period of 30 days from the filing of the request, and if the consultation fails to settle a dispute within 60 days after the request for consultation, then B may proceed to request the establishment of a panel.

Good offices, conciliation, and mediation may be requested at any time by any party to a dispute. They may begin and be terminated at any time. Once they are terminated, the complaining party can then request the establishment of a panel.

If the complaining party so requests, a panel may be established by the DSB. The function of the panel is to assist the DSB in discharging its responsibilities. Accordingly, a panel should make an objective assessment of the matter before it, including the facts of the case and the applicability and conformity of the measure with the relevant agreements. It should also make other findings that will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements, besides consulting regularly with the parties to the dispute and giving them adequate opportunity to develop a mutually satisfactory solution.

The request for the establishment of a panel should be made in writing, indicate whether consultations were held, identify the specific measures at issue, and provide a brief summary of the legal basis of the complaint.

The panel shall fix a timetable one week after its composition. The timetable for the panel procedures should not exceed six months starting from the panel's establishment. It may be extended to, but in no case should be longer than, nine months. In determining the timetable for the panel process, the panel should provide sufficient time for the parties to the dispute to prepare their submissions. It should also set precise deadlines for written submissions by the parties.

Written submissions should be deposited with the secretariat for immediate transmission to the panel and to the other party or parties to the dispute.

The panel must keep its deliberations confidential and draft its reports without the presence of the parties to the dispute. Once it has produced a draft report, the panel shall submit the descriptive (factual and argument) sections of the draft to the parties involved for their comments. Comments must be in writing and must be submitted within the time set by the panel.

After receipt of comments from the parties, the panel shall issue an interim report to them, including both the descriptive sections and the panel's findings and conclusions. The parties may submit written requests for the panel to review precise aspects of the interim report for which the panel shall meet with the parties. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the members.

The DSB shall adopt the report within 60 days of the issuance of a panel report to the members, unless one of the parties to the dispute formally notifies the DSB of its

decision to appeal, or the DSB decides by consensus not to adopt the report. If the panel report is on appeal, the panel report shall not be considered for adoption by the DSB until the completion of the appeal.

Only parties to the dispute may appeal a panel decision.

The Appellate Body (AB) hears appeals from panel cases. It may uphold, modify, or reverse the legal findings and conclusions of the panel. Note that the AB reviews only issues of law covered in the panel report and legal interpretation developed by the panel.

Besides keeping its proceedings confidential, the AB drafts its report without the presence of any of the parties to the dispute. The AB shall submit its report to the members. Within 30 days following the report's issuance to the members, the DSB may adopt the AB report or by consensus reject it.

When a panel or the AB concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or AB may suggest ways by which the member concerned could implement the recommendations.

The DSB shall keep under surveillance the implementation of adopted recommendation or rulings. Any member may raise the issue of implementation of the recommendations or rulings at the DSB anytime following their adoption.

### **The 1958 New York Convention**

The Convention on Recognition and Enforcement of Foreign Arbitral Award was born in 1958. It came out of the desire to ensure international enforcement of valid foreign judgments as a way to encourage cross-border trade and investment. However, its many exceptions put a cap on the accomplishment of this policy goal. One drawback of the Convention is the limitation of access to these arbitral procedures to awards made in the territory of the contracting party. In other words, even as early as then, there was already a bias in favor of allowing only member countries or contracting parties that ratified the convention to use these procedures.

A second restriction is that the 1958 UN Convention allows the parties to limit arbitrable disputes to those that they consider commercial in their countries. It is a way of giving the contracting party the power to limit the disputes that will be subjected to this kind of arbitration.

A third is the reciprocity provision. Article 3 requires that the contracting states shall recognize arbitral awards as binding and enforce them in accordance with the rules of the territory where the award is made. This is the rule or the law of the enforcement forum or venue, which limits thereby the scope of the enforceability of the awards.

A fourth limitation, found in Article 5, refers to instances when a contracting party may refuse the award. That is, even if the award was legitimately processed and due process was

observed, the contracting party, a losing party, may still refuse recognition and enforcement on several grounds. This Convention specifically provides grounds that limit the basis for impugning an arbitral award. But to the extent that they still allow a party to impugn or not comply with the arbitral award, there is latitude to avoid the effects of the award, notwithstanding a binding agreement to submit to arbitration.

A party may impugn or refuse recognition and enforcement on the following grounds: 1) where a party presents proof to the competent authority of the enforcement forum that the contracting parties were under an incapacity; 2) that the agreement is not valid under the law applicable to it, meaning, in the substantive sense, it is not valid under the law where the award is made; and 3) non-compliance with due process, specifically if the parties were not given proper notice of the appointment of the arbitrators, or of the arbitration proceedings themselves, or if the contracting party was not able to present his case.

A fifth limitation states that where there is a conflict between the domestic or municipal law of the enforcement forum, there is a ground to resist recognition or enforcement of the arbitral award. More specifically, the provision states that “where the award is not yet binding or has been superseded or suspended by the competent authority of the enforcement forum, then the award will not be enforced.”

Despite these limitations, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is still the most important international instrument to support the international legal validity and binding force of an arbitration rendered under an arbitration agreement.

### **Convention on the Settlement of Investment Dispute**

The Convention on the Settlement of Investment Dispute (ICSID) is applicable to investment disputes, or when there is an investment agreement between an individual or a national of a certain state with a contracting party state. It is not applicable where the parties involved are both individuals or both nation states. It applies only when there is a need to resolve disputes brought either by a contracting state against an individual or by a national against another contracting state. The Convention prohibits the contracting parties from withdrawing from arbitration once they have agreed to submit to it. Also, under the Convention, no contracting state is allowed to give diplomatic immunity or protection to its national that happens to be the individual involved in the dispute. The state of which a party is a national cannot intervene in the arbitration process the moment it is set into motion before the ICSID. A specific proviso states that when a party submits to the ICSID arbitration process, it cannot resort to any other remedy—judicial, administrative, or otherwise. That is why a contracting state to the ICSID can specify a condition before it submits or consents to arbitration—that all administrative and legal remedies in its territorial jurisdiction be exhausted first, precisely because the moment it submits to arbitration, there is no other remedy and protection left for it from its own state.

Another characteristic of arbitration under the ICSID is that the arbitration tribunal shall be the judge of its own competence. Under the UN Convention, a contracting party may resist

enforcement of an arbitral award by questioning the competence of the tribunal, its composition, the manner of appointment, and even the arbitration proceedings. However, under the ICSID, parties are not allowed to raise such questions, as the tribunal itself will rule on its competence and the rules for the appointment and composition of the tribunal are very specific.

### **UN Commission on International Trade Law and UNCITRAL Model**

The UNCITRAL Convention created the United Nations Commission on International Trade Law, but it did not provide for the enforcement of foreign arbitral awards, only the model UNCITRAL law. The law, which has been adopted by about 80 countries, was later on enacted by the UN. Yet it must be emphasized that it is not a convention. The model law provides that the recognition and enforcement of foreign arbitral awards is not contingent upon the effectivity or binding force of municipal or domestic laws. Otherwise, there would be frequent resort to non-enforcement or many exceptions. Since the model law recognizes the minimum common characteristics or requirements for recognition of judgments by legal systems, it anticipates participants' objections on due process grounds. Thus, adjusting the model law allows for quasi-automatic enforcement of valid foreign judgments.

### **International Court of Arbitration of the International Chamber of Commerce**

The International Court of Arbitration (ICA) is the arbitration body attached to the International Chamber of Commerce (ICC). Its function is to provide for the settlement by arbitration of business disputes of an international character and to ensure the application of the rules of arbitration of the ICC. However, the ICA is not a court that decides the matter placed before the ICC for arbitration. Rather, it acts as the overseer of the arbitration process. The arbitration of a dispute is the job of arbitral tribunals, which are appointed by the ICC.

Among the more developed economies, arbitration through the ICA is the more preferred mode of settling private sector disputes. Having operated for more than 70 years now, the ICA's reputation for strong and solid supervision of arbitration conducted under its wings remains unsullied. However, it must be emphasized that the services of the ICA are not limited to dispute resolution by the ICC. It also offers the services of optional conciliators and pre-arbitral referees.

Arbitration is a widely used mode of settling international commercial disputes. Assuming that the domestic jurisdiction in which an arbitral award is sought to be enforced recognizes the final and binding character of an award rendered under the ICC rules of arbitration, then resort to arbitration can be considered as a positive and definitive solution to a trade and investment dispute.

### **Mediation<sup>9</sup>**

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<sup>9</sup> These descriptions are culled from the lecture of Dr. Aldo Chircop at the Workshop on International Maritime Dispute Settlement Procedure, conducted by the Institute of International Legal Studies, May 1999.

Good offices, mediation, and conciliation refer to the intervention of a third party aimed “not at deciding the quarrel for the disputing parties, but at inducing them to decide it for themselves.” In mediation, the third party facilitates the negotiations between the parties concerned. It involves direct conduct of negotiations between the parties at issue on the basis of proposals made by the mediator.” It facilitates communication to generate ideas and options around a deadlock. It is a political process, promoted as a mode of dispute settlement in many treaties, but its procedure is not regulated by international law.

On the other hand, good offices are a friendly offer by a third party, which tries to induce disputants to negotiate among themselves. Such efforts may consist of various kinds of actions tending to call negotiations between conflicting states into existence. Treaties and diplomatic practice do not easily distinguish between good offices and mediation, as they are similar and therefore may overlap. They may represent simply different degrees of advisory participation by a third state. If the offer is accepted by the contending parties and the third state thereafter participates in resulting negotiations, such participation is undertaken as mediation and the third state becomes a mediator. Naturally, a third party offering good offices may help identify yet another party as mediator.

The mediator acts as *amicus inter partes* in frequent communication with disputants through various means, including shuttle diplomacy. It serves as a facilitator and medium for communication between disputants.

### **Other “Soft Modes” of Settling Disputes**

There are other modes of settling international disputes that fall under the “soft”category. These are as follows:

1. Unassisted negotiations in normal diplomatic negotiations, where there is no role for third parties
2. Fact-finding (UN Charter), which is the objective and impartial ascertainment of facts underlying a dispute by a third party
3. Commissions of inquiry (provided for in the Hague Conventions for the Pacific Settlement of Disputes), which is the precursor of conciliation in the form of treaties, which were in turn used to avert war. The commissions investigated facts and produced reports, but were not generally successful in practice because they had no power of initiation.
4. Conciliation, where the parties refer the dispute to a body of persons primarily for the purpose of coming up with an impartial ascertainment of facts and a suggestion of the appropriate lines of a settlement. It is the more modern reformulation of former commissions of inquiry; and initiated by the disputants. A conciliation panel is formed, the procedures are set out, the panel produces a report with recommendations, but the report is not an award. The procedure is provided for in the General Act for the Pacific Settlement of Disputes (1928, 1949).

## **APEC PROPOSALS FOR DISPUTE SETTLEMENT**

In 1995, the Committee on Trade and Investment (CTI) of APEC decided to create a sub-forum on dispute settlement, which experts called the Dispute Mediation Experts Group (DMEG). Its work has been guided by the six-point principles adopted in Vancouver in 1997. Those principles are as follows:

- a. APEC dispute mediation should be aimed at encouraging greater confidence in the Marrakesh Agreement establishing the WTO and at reinforcing the integrity of WTP procedures.
- b. APEC dispute mediation should be without prejudice to rights and obligations under the WTO Agreement and other international agreements, and should not duplicate or detract from WTO institutions and procedures.
- c. APEC dispute mediation should be voluntary and encourage non-adversarial and voluntary approaches in the mutual economic interests of the parties involved and with due regard for the interests of other APEC members.
- d. Work in APEC on dispute mediation should be in keeping with the evolution of APEC's work on trade and investment liberalization and facilitation goals.
- e. APEC members should be encouraged to work within the framework of existing international agreements and conventions for the resolution of disputes involving private parties. By doing so, they will help in the reinforcement of these agreements and conventions.
- f. Priority should continue to be given to facilitating access to information on mediation, conciliation, and arbitration services available in member economies.

Under such guidelines, the DMEG has succeeded in creating a database of various modes of dispute settlement in the region, which was subsequently published in hard copy and posted on the APEC Web site. It has also sponsored several regional seminars on the WTO dispute settlement process and arbitration. This, on top of facilitating the exchange of ideas and experiences with the various modes of dispute settlement, foremost of which was that of the WTO.

In 1999 a commissioned report by the CTI recommended the abolition of the DMEG. It was suggested that the previous functions of the DMEG be merged with those of the chair of the CTI. The DMEG expressed its reservation over the recommendation, saying in effect that its work, which was primarily legal, could not be effectively carried out by non-legal institutions or persons. There is yet no final action on this recommendation.

One interesting point for further observation is whether the Trade Policy Dialogue, also conducted under the auspices of the CTI, can serve as an effective medium for dispute resolution. Apparently, the Philippines was able to raise its "tropical fruits" problems with Australia in the forum. Whether the response to such an issue effectively supported the Philippine struggle for greater market access for its fruit exports is not clear, though. What is clear, however, is that the Philippines was able to gain substantive and concrete progress in its complaint only when bilateral aggressive negotiations took place between the countries.



## INVENTORY OF THE VARIOUS DISPUTE SETTLEMENTT MODES BEING USED BY APEC ECONOMIES

As earlier mentioned, each member of APEC submitted a list of dispute settlement modes, which have been utilized or are recognized in their respective jurisdictions. This author has tabulated them in accordance with the classification of disputes that the DMEG formulated: between governments, between governments and private parties, and between private parties.

Country	Disputes between governments	Disputes between governments and private parties	Disputes between private parties
Australia	<ul style="list-style-type: none"> <li>• WTO Dispute Settlement Mechanism</li> <li>• Supports the view of the APEC DMEG that APEC government-to-government dispute mediation should aim to encourage greater confidence in WTO procedures and to reinforce the integrity of WTO procedures</li> <li>• Investment Promotion and Protection Agreement</li> <li>• ICSID</li> </ul>	<ul style="list-style-type: none"> <li>• International Arbitration Act 1974                             <ul style="list-style-type: none"> <li>➤ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)</li> <li>➤ ICSID</li> <li>➤ UNCITRAL</li> </ul> </li> <li>• Australian Centre for International Commercial Arbitration</li> <li>• Australian Disputes Centre</li> <li>• Others such as the Institute of Arbitrators and Mediators Australia, the National Dispute Center, the Conflict Management Centre, Lawyers Engaged in Alternative Dispute Resolution and the International Chamber of Commerce (Australian Chapter)</li> <li>• Commonwealth Arbitration Assistance Service</li> </ul>	
Brunei	<ul style="list-style-type: none"> <li>• WTO Dispute Settlement Mechanism</li> <li>• Bilateral Investment Treaties</li> </ul>	<ul style="list-style-type: none"> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)</li> </ul>	

Canada		<ul style="list-style-type: none"> <li>• NAFTA</li> <li>• Promotion and Protection of Investments</li> <li>• UNCITRAL Model Law</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)</li> </ul>	
Chile	<ul style="list-style-type: none"> <li>• WTO Dispute Settlement Mechanism</li> <li>• Free Trade Agreements with economies such as Canada, Mexico, and Peru</li> <li>• Investment Promotion and Protection Agreements</li> </ul>	<ul style="list-style-type: none"> <li>• ICSID</li> <li>• Multilateral Investment Guarantee Agency (MIGA)</li> <li>• Panama Convention in the Context of the Organization of American States (OAS)</li> </ul>	<ul style="list-style-type: none"> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)</li> <li>• Arbitration and Mediation Center</li> <li>• Chamber of Commerce</li> </ul>
China	<ul style="list-style-type: none"> <li>• WIPO</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)</li> <li>• Convention on the Settlement of Investments Disputes Between States and National of other States</li> </ul>	<ul style="list-style-type: none"> <li>• Bilateral Investment Protection Agreements</li> </ul>	<ul style="list-style-type: none"> <li>• Arbitration Law</li> <li>• Joint Ventures Law</li> <li>• Administrative Reconsideration Rules</li> <li>• China International Economic and Trade Arbitration Commission</li> </ul>

Hong Kong	WTO Dispute Settlement Mechanism	<ul style="list-style-type: none"> <li>• ICSID</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)</li> <li>• Office of the Ombudsman</li> </ul>	<ul style="list-style-type: none"> <li>• Hong Kong International Arbitration Centre</li> </ul>
Indonesia	Committed to finding ways to resolve trade and economic tensions among APEC economies through APEC dispute mediation services, without prejudice to rights and obligations under the WTO Agreement and other international agreements	<ul style="list-style-type: none"> <li>• Convention on the Settlement of Investments Disputes Between States and National of other States</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)</li> <li>• ICSID</li> </ul>	<ul style="list-style-type: none"> <li>• Indonesian National Board of Arbitration</li> <li>• Indonesian Center for Commercial Dispute Settlement</li> <li>• Special Commercial Court</li> </ul>
Japan	WTO Dispute Settlement Mechanism	<ul style="list-style-type: none"> <li>• Office of Trade and Investment Ombudsman</li> <li>• Convention on the Settlement of Investments Disputes Between States and National of other States</li> <li>• ICSID</li> </ul>	<ul style="list-style-type: none"> <li>• Protocol on Arbitration Clauses (the Geneva Protocol)</li> <li>• Convention on the Execution of Foreign Arbitral Awards (the Geneva Convention)</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)</li> <li>• Japan Commercial Arbitration Association</li> </ul>

Korea	WTO Dispute Settlement Mechanism	<ul style="list-style-type: none"> <li>• Convention on the Settlement of Investments Disputes Between States and National of other States</li> <li>• Bilateral investment promotion and protection agreements with APEC economies</li> <li>• Private parties affected by an administrative act of the Korean government may, in general, file a complaint with the administrative court, which may investigate allegations and make recommendations to redress the grievances</li> </ul>	<ul style="list-style-type: none"> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)</li> <li>• The Korean Arbitration Law (contains the provisions on arbitration and related procedures of the UNICITRAL Model Law)</li> <li>• Korean Arbitration Board</li> </ul>
Malaysia	<ul style="list-style-type: none"> <li>• WTO Dispute Settlement Mechanism</li> <li>• Bilateral Trade Agreements</li> </ul>	<ul style="list-style-type: none"> <li>• Investment Guarantee Agreements</li> <li>• ICSID</li> <li>• Convention on the Settlement of Investments Disputes Between States and Nationals of other States (Washington Convention)</li> </ul>	<ul style="list-style-type: none"> <li>• Arbitration Act of 1952</li> <li>• Rules for Arbitration of the Kuala Lumpur Regional Center</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320)</li> </ul>

Mexico	<ul style="list-style-type: none"> <li>• WTO Dispute Settlement Mechanism</li> <li>• Preferential Trade Agreements such as NAFTA</li> <li>• Participated actively and contributed to the work of APEC DMEG</li> </ul>	<ul style="list-style-type: none"> <li>• Domestic Courts</li> <li>• Mechanisms for settlement of investor-state disputes in both Free Trade Agreements and Bilateral Investment Treaties</li> </ul>	<ul style="list-style-type: none"> <li>• UNCITRAL Model Law</li> <li>• New York Convention, Panama Convention, Montevideo Convention, NAFTA and the Free Trade Agreements with Bolivia, Costa Rica, Colombia, Chile, Nicaragua and Venezuela concerning alternative dispute resolution mechanisms</li> </ul>
New Zealand	<ul style="list-style-type: none"> <li>• WTO Dispute Settlement Mechanism</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 (New York Convention)</li> <li>• WIPO Arbitrator's Centre</li> <li>• Investment Promotion and Protection Agreements</li> </ul>	UNCITRAL	Arbitrators' and Mediators' Institute of New Zealand
Papua New Guinea	<ul style="list-style-type: none"> <li>• Convention on the Settlement of Investments Disputes Between States and Nationals of other States</li> </ul>	<ul style="list-style-type: none"> <li>• There is an ongoing discussions between the government and private sector on the development of appropriate mechanisms/institutions</li> </ul>	

Peru	WTO Dispute Settlement Mechanism	Convention on the Settlement of Investments Disputes Between States and Nationals of other States	<ul style="list-style-type: none"> <li>• General Arbitration Law (based on the Model Law prepared by the UNCITRAL)</li> </ul>
Philippines	WTO Dispute Settlement Mechanism	<ul style="list-style-type: none"> <li>• ICSID</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)</li> </ul>	<ul style="list-style-type: none"> <li>• RA 876 (An Act to Authorize the Making of Arbitration and submission Agreements, to Provide for the Appointment of Arbitrators and the Procedure for Arbitration in Civil Controversies and for Other Purposes)</li> <li>• EO 1008 (Creating an Arbitration Machinery in the Construction Industry of the Philippines)</li> </ul>
Russia	<ul style="list-style-type: none"> <li>• Convention on Settlement of Investment Disputes Between a State and Foreign Citizens</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 (New York Convention)</li> <li>• European Convention on International Commercial Arbitration of 1961</li> </ul>		

Singapore	<ul style="list-style-type: none"> <li>• WTO Dispute Settlement Mechanism</li> <li>• Bilateral consultations and Arbitration (through Investment Guarantee Agreements)</li> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York Convention)</li> </ul>	ICSID	<ul style="list-style-type: none"> <li>• Singapore International Arbitration Center</li> <li>• Singapore Mediation Center</li> <li>• Advisory on Construction Mediation</li> <li>• Singapore Information Technology Dispute Resolution Advisory Committee</li> <li>• Consumer Association of Singapore</li> </ul>
Taipei	<ul style="list-style-type: none"> <li>• WTO Dispute Settlement Mechanism</li> <li>• Active participation in the APEC discussion on DM services</li> </ul>	Ongoing review of its practice in dealing with disputes (1997-2010)	Ongoing review of its practice in dealing with disputes (1997-2010)
Thailand	WTO Dispute Settlement Mechanism	<ul style="list-style-type: none"> <li>• ICSID</li> <li>• ASEAN Investment Agreement</li> <li>• UNCITRAL</li> </ul>	<ul style="list-style-type: none"> <li>• Convention on the Recognition and Enforcement of Foreign Arbitral Award (the New York Convention)</li> </ul>

USA	WTO Dispute Settlement Mechanism	ICSID	Convention on the Recognition and Enforcement of Foreign Arbitral Award (the New York Convention)
Vietnam	<ul style="list-style-type: none"> <li>• Protocol on Dispute Settlement of ASEAN (for disputes with ASEAN member countries)</li> <li>• International Arbitration</li> </ul>	<p>With respect to foreign investors and businessmen:</p> <ul style="list-style-type: none"> <li>• Conciliation (in accordance with UNCITRAL Conciliation Rules 1980)</li> <li>• UNCITRAL Arbitration Rules 1976</li> <li>• ICSID</li> </ul> <p>With respect to domestic businessmen and investors:</p> <ul style="list-style-type: none"> <li>• Court (in accordance with the Ordinance on Settlement of Claims and Petitions of Citizens or the Ordinance on Procedures for Settlement of Administrative Cases)</li> </ul>	<ul style="list-style-type: none"> <li>• The Vietnam International Arbitration Center</li> <li>• Economic Arbitration Centers</li> </ul>

### Preferred Modes of Dispute Settlement by APEC Member Countries

MODE	Number of Countries
WTO	16
ICSID	12
UNCITRAL	8
New York Convention	17
Washington Convention	8

## **WORLD TRADE LAW AND CYBERSPACE**

The most important change that has taken place in the world in the past two years has been the explosion of Internet usage and the proliferation of the commercial applications of the medium. While it has been one of the principal sources of growth for the more advanced economies—despite the crash of many technology and Internet stocks—it has also highlighted the reality that all major legal infrastructure in place, whether they are the model laws proposed by the UNCITRAL, the ICC, or the WTO, as well as those in the more advanced economies, are not sufficient to deal with the very complicated issues in cyberspace.

Two cyberspace issues impact greatly on the international trade law system. The first arises from the fact that the concept of electronic trade, be it of goods or services, was not anticipated in the global trade framework. This has led to serious debate on whether goods delivered electronically ought to be governed by GATT, GATS, or an altogether entirely different set of rules. The temporary solution to this impasse is the present standstill agreement where trade in information technology goods is to remain at zero for the time being. Meanwhile, the WTO has created a committee to determine the impact of electronic commerce on world trade, especially on world trade rules.<sup>10</sup>

The second issue concerns national enforcement. The WTO perspective, despite its global bias, assumes the ability of nations to tax and monitor border trade. When this ability is muted by the very medium by which this trade is carried out, then the relevance of issues such as national protection and intellectual property rights protection becomes murky. To highlight the magnitude of the issue, the United States has estimated that its states are losing billions of dollars in tax revenues simply because the rules and the enforcement mechanism are not there.

### **EFFECTS OF CYBER DISPUTES ON THE EXISTING DISPUTE SETTLEMENT MODEL**

It is very difficult to put brass tacks on all the modes, mechanisms, processes, and jurisdictions that are trying to settle pieces of the entire gamut of cyberspace trade disputes. In the first place, jurisdiction in cyberspace is very hard to define. Enforcement in some instances is nearly impossible.

The anti-trust ruling against Microsoft by a US federal court forced us all to rethink whether the integration and convergence model which information and communications technology could be accommodated in a legal framework that frowns on monopolies and combinations. When the German Internet firm Letsbuyit.com tried to bring consumers together to force prices of particular products to be lowered, a German court ruled that it violated two German laws against combinations in trade and selling below a minimum price. Critics said this ruling was wrong because it went against the integration and free market philosophies of the European Common Market.

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<sup>10</sup> US Commerce Secretary William Daley reported in Seattle that there was a broad consensus for extending the moratorium from 12 to 18 months. With the collapse of the talks in Seattle, doubt persists on whether this agreement holds or not.

An injunction suit has been filed against Napster.com for piracy by the Recording Industry Association of America. Several non-American songs are part of the Napster collection. What does a fellow APEC or WTO member do in that regard? What about cybersquatting on domain names? The WIPO has been issuing rulings in this area, but what is the extent to which existing WTO and APEC dispute settlement mechanisms affect this?

## **APEC ECONOMIES' PREFERENCE FOR WTO DISPUTE SETTLEMENT**

Apparently, APEC economies prefer to file complaints with the WTO if they believe that there is a WTO-cognizable complaint. In this regard, we can think of the famous Canada-Australia salmon case, the US-Canada periodicals case, the Singapore-Malaysia semiconductors case, the US complaints against Korea and Japan for taxes on alcoholic beverages, etc. It was never evident in any of these disputes that the mediation services nor good offices of APEC were resorted to. One gets the impression that the economies still believe that more is to be gained by resorting to the formal mechanism under the WTO than to try out the untested waters of the APEC.

In the case of the Philippines' trade dispute with Australia over the import quarantine against Philippine mangoes, bananas, and pineapple, the country used APEC to raise the issue without using, however, its proposed dispute mediation process.

## **ANALYSIS AND RECOMMENDATIONS**

It appears that the existing proposals within APEC do not push for a strong dispute settlement mechanism because of the existence of the WTO. It also appears that countries such as the Philippines are willing to use APEC for raising its trade and investment concerns without necessarily expecting results.

To appreciate the implication of what particular mode of dispute resolution the Philippines will push for, the following points must be emphasized:

1. China, one of our most important trade partners and with whom we have been running an enormous trade deficit, and whose products are often the subject of anti-dumping petitions filed before the Tariff Commission, is not yet a member of the WTO, although that may soon change. Until that time comes, however, whatever trade dispute the Philippines or any private Philippine entity may have with China cannot be resolved using the rules-based and judicialized mode that is being employed in the WTO.
2. Although the Philippines is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, there is no strong tradition of arbitration, except possibly perhaps with respect to arbitration in the construction industry. Despite the existence of an arbitration law, there has not been any noticeable use of arbitration as a mode of settling disputes between private individuals.
3. APEC members which also belong to NAFTA have instituted among themselves a

judicial system of dispute settlement, which, although different in process, jurisdiction, and the qualifications of judges, are strongly rules-oriented.

4. In the ASEAN, only Singapore has a strong tradition of making use of arbitration for the purpose of settling disputes. Indonesia and Malaysia have arbitration centers, but these have not yet gained sufficient recognition as reliable and professional arbitration centers, unlike their regional counterparts in Hong Kong and Singapore. Brunei is not a signatory to ICSID. What all this demonstrates is that even in the ASEAN, the degree of comfort with third party-assisted or arbitrated disputes is not uniform, ranging from a strong system in Singapore to relatively weaker systems in the other countries.

The APEC has spent a lot of effort in collating and describing in narrative form the various modes of dispute resolution in the APEC economies. That first job is important, considering that the build-up of this kind of database is important if APEC is to propose anything of substance in the dispute settlement arena. Already, there are indications of a trend within APEC, some of which have been made explicit by APEC documents while some can be deduced only from observing the kind of attention and activities that the APEC and the DMEG have been giving to particular dispute settlement modes, namely:

1. The preferred option will still be the WTO dispute settlement mechanism for those that are part of the WTO. This is contrary to the position that the Philippines adopted earlier where it discouraged the immediate use of the WTO dispute settlement (DS) system. Apparently, although there is wisdom in this approach, the other APEC members that are also members of the WTO do not believe that it makes sense to temper their frequent use of the WTO DS system. This is true particularly of the United States and Canada, which have been among the most frequent users of the WTO DS system.
2. Mediation is only being encouraged on a government-to-government level, if ever, and again, only as a second alternative to the WTO system. In fact, government-to-government mediation may become relevant only with respect to APEC members that are not members of the WTO.
3. As long as the developed non-Asian countries dominate the agenda of the DMEG, then it may be theorized that the following will continue to occur:
  - The WTO DS will take preeminence over other modes;
  - There will be a stronger drive to make the database on the existing dispute settlement modes as open and accessible to businessmen in the region as possible.

Consider the other side of the picture. The only mechanism for resolution of economic disputes in the ASEAN is the 1996 Protocol on Dispute Settlement Mechanism. In an earlier article,<sup>11</sup> this author stated that, theoretically, although the pattern sought to be emulated by the Protocol is based on Article XXII and XXIII of the 1947 GATT (now the GATT 1994), which are the foundational dispute settlement articles of the whole international trade law framework being implemented by the WTO, there is very little chance of the Protocol being anything more

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<sup>11</sup> *Dispute Settlement in ASEAN Economic Agreements*, in "The ASEAN: Thirty Years and Beyond," at 385 (1997).

than what it is now: paper provisions. The consensus culture of ASEAN is so strong (although this has been increasingly breached) that the Protocol will not likely be operationalized for a long time. Therefore, there is no ASEAN regional dispute settlement mechanism that can adversely affect the initiatives that will be launched in APEC in the area of dispute settlement.

Realizing these alongside its strategic trade interests and internal weaknesses, the Philippines may adopt a position on APEC dispute settlement and mediation along these lines:

1. For economies that are not part of the WTO, a 'fast-track' mediation system should be set up for government-to-government disputes.
2. The APEC's technical capability as well as each individual member's commitment under the technical assistance mode should be utilized to strengthen the country's own lack of training, expertise, and experience in arbitration.
3. The Philippines should determine for itself the relevance of the APEC in the area of dispute settlement and mediation in light of the fact that the APEC has not even been used as a consultative mechanism before APEC members resort to the use of the WTO DS mechanism.

Realizing the variety and complexity of existing international mechanisms for resolving trade and investment disputes, the Philippines should take advantage of this occasion to draw to the attention of its people and its policy makers its own failings in this area. The best strategy that the Philippines can adopt in fact is not one that will depend on APEC mechanisms nor follow the APEC preferences. If the government is to maximize the opportunities and minimize the risks that the globalized economic environment poses to its people, then the least it can do is to engage in a massive educational and information campaign to make them aware of the inadequacy and serious deficiencies of the traditional, formal, and judicial method of settling disputes. What is important is that our people realize that there is a menu of options for settling potential disputes with their business partners, competitors or foreign governments, and which their own governments may have with foreign business entities, as well as with governments. The process has to start now.

## BIBLIOGRAPHY

- Alagappa, M. 1992. Institutional Framework: Recommendations for Change. In *The ASEAN Reader*. Singapore: Institute of Southeast Asian Studies.
- Asia Pacific Economic Cooperation . 1994. *APEC Economic Leaders' Declaration of Common Resolve (Bogor Declaration)*. Bogor, Indonesia.
- Asia Pacific Economic Cooperation. 1995. *APEC Economic Leaders' Declaration for Action*. Osaka, Japan.
- Asia Pacific Economic Cooperation Experts' Group on Voluntary Consultative Dispute Mediation. 1996. Report for the Committee on Trade and Investment. Singapore: APEC Secretariat.
- Association of Southeast Asian Nations. 1967. *The ASEAN Declaration (Bangkok Declaration)*. 1967. Thailand.
- Association of Southeast Asian Nations. 1996. *ASEAN Protocol on Dispute Settlement Mechanism*. Jakarta, Indonesia.
- Australian Pacific Economic Cooperation Committee. 1995. *Harmonising International Law to Benefit Trade, Business and Investment in the Pacific Region: An Initiative Under the Auspices of the Pacific Economic Cooperation Council (PECC) Pacific Economic Cooperation Committee*. Canberra, Australia.
- Declaration of ASEAN Concord*. 1976. Indonesia.
- Griesgraber, M. and B.G. Gunter, eds. 1997. World Trade: Toward Fair and Free Trade in the Twenty-First Century. In *Rethinking Bretton Woods, Vol. V*. London and Chicago: Pluto Press.
- Jackson, J.H. 1997. *The World Trading System: Law and Policy of International Economic Relations*. 2<sup>nd</sup> edition. Cambridge, Massachusetts: MIT Press.
- Jackson, J.H. 1998. *The World Trade Organization: Constitution and Jurisprudence 98-99*. London: Pinter.
- Marrakech Agreement Establishing the World Trade Organization, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round [hereinafter Results of the Uruguay Round], 6, 6-18; 33 I.L.M. 1140, 1144-1153 (1994).

Pacific Business Forum. 1995. *The Osaka Action Plan: Roadmap to Realising the APEC Vision*. Report of the Pacific Business Forum. Singapore: APEC Secretariat.

Petersmann, E.-U. 1997. *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*.

Quisumbing, P.V. 1992. The Role of Law in ASEAN Development. In *The ASEAN Reader*. Singapore: Institute of Asian Studies.

The Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand. 1987. *Agreement for the Promotion and Protection of Investments*. Manila.

Vermulst E, and B. Driessen. 1995. An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements. 29 *J. World Trade* 131, 136.

World Trade Organization. 1995. Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes. In *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*. Geneva, Switzerland: WTO.

World Trade Organization. N.d. *Understanding on Rules and Procedures Governing the Settlement of Disputes*. Annex 2, WTO Agreement. Geneva, Switzerland: WTO.