

## THE IMPACT OF WTO AND AFTA OBLIGATIONS ON PHILIPPINE AGRICULTURE\*

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This paper seeks to define the legal rights and obligations of WTO and AFTA Members and analyze the same according to their impact on international trade policy for the Philippine agricultural sector. It starts with a discussion of the enforceability of international treaty obligations in Philippine law. It then discusses the treaty structure of the Philippines in the area of international trade. A discussion of the basic obligations under the WTO umbrella of agreements follows. After this introductory discussion, the most important legal obligations as they relate to agriculture are identified as they appear in the following: the GATT 1994, the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Safeguards, the Anti-Dumping Agreement and the Countervailing Duties and Subsidies Agreement. Following this, the ASEAN Free Trade Agreement as it impacts on agricultural exports and imports within the ASEAN is discussed. Recommendations cap the paper.

### 1. International Treaty Obligations under Philippine And International Law

Under Philippine law, international treaty obligations that have complied with the ratification requirements of the Constitution occupy the same status as statutes enacted by the legislature. Treaties with immediate effect are capable of repealing a prior inconsistent statute. One important effect of this is that a treaty, therefore, can only be struck down for being inconsistent with a Constitutional provision, not for being inconsistent with an existing or a prior statute.

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In international law, international treaty obligations constitute the law between the nations who are parties to the treaty. Municipal law, or national law, is not a source of international law. Therefore, the incompatibility of a treaty obligation with a national law is not a valid defense for non-compliance with an international treaty obligation. Even the inconsistency of a treaty obligation with the fundamental law of a nation-state is not internationally cognizable as justification for evasion of duties under an international treaty.

The combination of the legal efficacy of treaty obligations in both the international level and national level produce the following results:

1. The Philippines is required to comply with all the international trade treaties that it has signed as a party;
2. In the event that a treaty is struck down for unconstitutionality either because of its failure to comply with the substantive or procedural requirements of the Constitution, that will not affect the fact that in international law, the Philippines will still have valid, binding obligations under the treaty;
3. The effects of non-compliance with international treaty obligations will depend on the treaty provisions on non-compliance, as well as the political and economic response that the other treaty signatories will take in light of the non-compliance by another partner. In existing international trade treaties, the repercussions can be as severe as the cutting off of trade ties, trade retaliation, renegotiation, protests, or even indifference or tolerance of the non-complying behavior.

## 2. Basic International Trade Treaties

The Philippines' trade treaty obligations can be classified into three: bilateral trade treaties, regional trade treaties, or multilateral trade treaties. For purposes of our discussion, we make this classification in the sense of the geographical area of coverage and the extent of the trade covered.



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Bilateral trade treaties are the usual treaties of friendship, navigation and commerce. The usual coverage of such treaties are the basic *most-favored-nation* clause (MFN) which grants both parties the right to demand treatment at least equal to the most preferential treatment given to other countries, and the right of repatriation of investment clause.

Philippine regional trade treaties have been entered into in the ASEAN. Examples of these are the pre-AFTA ASEAN preferential trade and investment treaties. The most comprehensive and important regional trade treaty that the Philippines has is the Treaty Establishing the ASEAN Free Trade Area (AFTA) and the adoption of the Common Effective Preferential Tariff Scheme (CEPT), which is the basic mechanism for the operationalization of the AFTA. The APEC is not a regional trade organization. There are no international legal obligations created by the APEC mechanism. The operative documents on APEC commit the Members only to cooperate in the consultative forum that APEC principally is. There is no APEC trade treaty, in the technical sense that we mean a treaty to be, and this point is quite important, for although the trade and investment liberalization targets in APEC are quite radical, their efficacy as obligations depends only on the extent to which the countries are willing to abide by their commitments unilaterally, *sans* the legal sanction behind enforcement of genuine legal obligations.

The most important multilateral trade treaty that the Philippines has entered into is the Marrakesh Agreement Establishing the World Trade Organization (WTO). A treaty made up of 482 pages of legal texts (in its final form), and 22,000 pages of tariff bindings, it remains the most dramatic, comprehensive international obligation covering many important economic areas. It covers not only trade rules, but to a certain extent, even investment and intellectual property obligations. It also links the legal relationship between trade and environment. The Philippines has committed to observe the 482 pages of obligations covering allowable and non-allowable trade behavior, as well as specific market access commitments contained in its Schedule of Commitments appended to the Marrakesh Protocol.

### 3. WTO Commitments in Agriculture

The specific sources of obligations, as well as rights, in the area of agriculture under the WTO can be found in several documents:

1. As stated, the Schedule of Commitments whereby Philippine tariff obligations, up to the 4-digit tariff headings, are provided. Note must be made of the Philippine tariff rate quota which provides for the conversion of the protection afforded by products previously covered by either quotas or outright import ban, into tariffs. For those products so converted, there are two applicable tariffs, the *in-quota* rate and the *out-quota* rate. The latter is the regular or normal tariff, which is the maximum applicable by the Philippines on the indicated products. In-quota tariff rates apply to a minimal quantity, increasing over a period of ten years, which are to be granted concessional rates for the purpose of introducing the heretofore-banned product into the market. This is a technique for gradual market penetration or introduction.
2. The Agreement on Agriculture, consisting of thirty pages of 21 articles and 5 annexes;
3. The Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures, which consist of 15 pages of legal text made up of 14 articles and 3 annexes;
4. The Agreement on Technical Barriers to Trade, consisting of 24 pages of legal text in 15 articles and 3 annexes;
5. The Agreement on Trade-Related Investment Measures, consisting of 5 pages of legal text in 9 articles and 1 annex;
6. The Anti-Dumping Agreement, consisting of 29 pages of legal text in 18 articles and 2 annexes;
7. The Agreement on Subsidies and Countervailing Measures, consisting of 41 pages of legal text in 32 articles and 7 annexes;



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8. The Agreement on Import Licensing Procedures, consisting of 9 pages of legal text in 8 articles;
9. The Agreement on Safeguards, consisting of 10 pages of legal text in 14 articles and 1 annex;
10. The Agreement on Trade-Related Aspects of Intellectual Property Rights, consisting of 38 pages of legal text in 73 articles;

and of course, the most important and basic agreement,

11. The 1994 General Agreement on Tariffs and Trade (1994 GATT), consisting of 72 pages of text, legal and non-legal, in 38 articles and 9 annexes.

For the sheer magnitude of the ten WTO agreements listed above, let us just focus on the six Agreements that are most important and relevant to the agricultural sector: the 1994 GATT, and the Agreements on Agriculture, Sanitary and Phytosanitary Measures, Anti-Dumping, Subsidies, Safeguards and Trade-Related Intellectual Property Rights. Of course, it need not be said that the most that can be done in this presentation is to give the highlights of the Agreement. It may very well be that an important legal conflict in the future may be found in other Agreements or in a provision that I will fail to highlight here. The problems of temporality, however, will prevent me from dwelling on all the possibilities for now.

### 4. Basic Obligations under GATT 1994

#### *GATT Law: A Review of Basic Rules*

The basic rules animating the fields of trade in goods and services, if they were to be collapsed in the simplest way possible, can, in my view, be clustered into four, for ease of discussions. It goes without saying, of course, that from these four, various specific applications, exceptions, modifications and other ramifications would spring forth, considering that the GATT has a 48-year history.

The first rule to be remembered is the "most-favored nation obligation." In the 1947 GATT, it is thus worded:

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

MFN obligations are standard fare in bilateral treaties of friendship, commerce and navigation. In the concrete, it means that preferential treatment in favor of the nationals of a favored state, as a general rule, is prohibited under both GATT and GATS. If the preferences are created by virtue of an integration agreement, there are conditions the agreement must satisfy in order that the preferential measures be considered as GATT and GATS-conforming. There are exceptions to this, of course, and we will discuss these later.

The second rule is the "national treatment" rule. The national treatment rule in GATT states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of *all* laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. (Art. III, par. 4)

Please take careful note that the rule on national treatment applies only to sectors that have been committed by each particular country in its schedule of specific commitments.



The third rule is the rule on "non-violation of tariff bindings," found in Article I, par. 1(a) of the GATT which reads:

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Schedule annexed to this Agreement.

Succinctly put, the rule means that each country, save in the exceptional circumstances recognized by the Agreement, is obligated not to impose border duties and restrictions of any kind, which are higher than that committed under that country's schedule of commitments.

The fourth rule that I would propose is one which covers a wide array of other specific rules, and that is the rule that no measure which amounts to a disguised form of restraint on trade is to be allowed. In the GATT, this is provided for very substantially, starting from a specific delimitation of the general exceptions under Article XX, to specifics such as balance-of-payments (Article XII), marks of origin (Article IX), and safeguards (Article XIX), to the fleshing out of old principles or the creation of new grounds under the Agreement on Technical Barriers to Trade, Sanitary and Phytosanitary Measures, Rules of Origin, and Preshipment Inspection, and then to the more detailed Agreements on Anti-Dumping and Subsidies and Countervailing Measures.

## 5. Agreement on Agriculture

The Agreement on Agriculture is a radically new addition to the treaty-predecessor of the Marakkesh Agreement, which was the 1947 GATT. In the 1947 GATT, much of agriculture was excluded, and an import quota or even an outright ban, was allowable under its Article XI, paragraph 2(c). Agriculture, together with textiles, was the last bastion of protected goods. Trade liberalization progressed in manufacture, but not in agriculture, for the plain reason that the most advanced economies of the world, the proponents of liberal trade, maintained a complex system of subsidies and protection to their agricultural producers. The Marakkesh Agreement, and the establishment of the WTO, almost never came about because of the agricul-

tural dispute on subsidies between the European Communities and the United States. Indeed, it was agriculture that remained as the last "hold-out". This is perfectly understandable and natural, considering that resistance to trade arises from domestic political opposition, and in country after country, agricultural issues turned out to carry the heaviest political sensitivity. When the two majors, the US and the EU, decided to progressively reduce the degree of domestic support to their agricultural sectors, the WTO came about. In a sense, the WTO will rise and fall on the quality of resolution of agricultural disputes. It was true then during the negotiations. It is true now in the light of the fact that the most difficult and colorful cases brought before the WTO Dispute Settlement (DS) system concern agricultural and fisheries products. We will have a brief discussion on the more interesting WTO cases, shortly.

The Agreement on Agriculture can be considered to consist of three major obligations: (1) the obligation to reduce domestic subsidies or support and to reduce current export subsidies, as well as to refrain from granting new export subsidies; (2) the obligation to tariffify products previously subject to quota or otherwise prohibited; and (3) the obligation to observe due notice and transparency requirements in imposing allowable export prohibitions and restrictions.

#### *Domestic support and export subsidies*

Domestic support consists of all manner of support to agricultural producers, whether or not it falls under the technical definition of subsidies under the Agreement on Subsidies and Countervailing Measures. Domestic support is not *per se* prohibited, but there is a commitment to gradually decrease the level of domestic support to the point where it is no longer trade-distortive. However, there is a whole range of domestic support measures that need not be removed nor even reduced, which is to be identified in this paper. To ensure that the domestic support is valid under the WTO, therefore, these must be examined from the point of view of two legal standards—the standards imposed by the Agreement on Agriculture and the standards imposed the Agreement on Subsidies. I believe that the Philippines does not maintain any existing actionable or prohibited subsidy in favor of any agricultural sector.



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Domestic support consists of all support provided to agricultural producers, whether directly given or non-product-specific. Not all kinds of domestic support is subject to the reduction commitment. Generally, price support is required to be reduced progressively until it is eliminated. Other categories of support are allowable, provided they satisfy the following criteria:

1. The support is provided through a publicly-funded government program, and not through price transfers from the consumers to the producers;
2. The government program is in accordance with any of the following policy objectives:
  - a. the provisioning of general services, such as agricultural research, pest and disease control, training services, extension and advisory services, inspection services, marketing and promotion services, infrastructure services;
  - b. public food stocking for food security purposes;
  - c. domestic food aid;
  - d. income payment to producers that is not linked to price support;
  - e. government participation in income insurance and safety-net programs;
  - f. disaster relief programs;
  - g. structural adjustment assistance through producer retirement programs;
  - h. structural adjustment assistance through resource retirement programs;
  - i. structural adjustment assistance through investment aids;
  - j. environmental programs;
  - k. regional development programs.

It is interesting to note that many of the programs which have been announced by the Department of Agriculture will fall under the above allowable government programs, and it is foreseen that, except in one isolated sector, the government need not expect any complaint regarding the WTO-compatibility of its existing programs.

Export subsidies are those that are contingent on export performance. Members maintaining export subsidies are required to progressively reduce the same, and are required not to provide subsidies in excess of the level committed in their Schedule. Even developing country Members, who may be exempted from the obligation to reduce existing export subsidies, are not allowed to exceed their committed level of export subsidies. As a rule-of-thumb, therefore, the country is well advised to stay away from any investment incentive or financial support that is contingent on export performance. There are legitimate ways of supporting our export winners, and these consist in the general government programs for domestic support, identified earlier.

*Obligation to tariffy and the  
issue of market access*

The issue that has occupied the attention of the Department of Agriculture for the past few years in international trade policy has been the conversion program of existing agricultural quota into tariff levels. We have read a lot in the newspapers about the Minimum Access Volume (MAV) program of the government and how some of our trading partners initially complained about the manner by which our tariff rate quota obligation was being implemented under the MAV system.

Briefly stated, the MAV program was set in place to comply with our obligation to provide for a minimum volume of imports that are to be assessed a preferential rate of duty in order that imports will gain a gradual access to the Philippine domestic market. I will not dwell on the specifics of the disputed points.

Let me point out, however, that market access commitments work both ways. While there are valid concerns regarding the dislocation of domestic agricultural producers with the abolition of the quota system, foreign markets, on the other hand, have also dramatically opened to Philippine agricultural products. It is therefore very important that our policymakers maintain a balanced and holistic view of the issues surrounding international trade. If the Philippines were to be perceived to be unreasonably protectionist, we will lose negotiating strength in terms of gaining access for our own exports.



*Export prohibitions, due notice  
and transparency*

As a general rule, WTO Members are prohibited from imposing export bans of any product. An export ban, however, is allowed on agricultural products but only on the following grounds: (1) to prevent or relieve critical shortage of foodstuffs or other essential products (Art. XI, par. 2(a), GATT 1994); (2) to support the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (Art. XX, par. (g), GATT 1994); (3) when necessary to protect human, animal or plant health or life (Art. XX, par. (b), GATT 1994).

A developing country Member, which is a net food importer, need not observe the *notice and transparency* requirement. But a net food exporter is required to give notice to other Members, and to consider the food security requirement of the other Members. A Member who is a substantial importer of the product in question may request information on the export ban, with the view of minimizing the damage or risk to that other Member's own food security situation.

*Special safeguards rules*

The idea behind the tariffication of products previously covered by quotas is to substitute the new tariff level for the protection afforded by quotas. The formula provided for in the Agreement on Agriculture, when applied, will result in very high out-quota tariffs compared to other products, manufactured as well as agricultural. This protective wall is expected to minimize the dislocation of domestic producers and to introduce competition on a gradual basis, in order to provide room for competitive adjustments to be made by domestic producers. The problem, of course, occurs when this protective wall is not enough to prevent serious dislocation for local producers. The solution that the WTO offers is through the special and ordinary safeguards rules. The special safeguards rules can be found in the Agreement on Agriculture while the ordinary safeguards rules can be found in the GATT 1994.

Under the Special Safeguards rules, an import duty, on top of that imposed as ordinary customs duties, may be imposed on a prod-

uct, which has been tariffed, provided: (1) the volume of imports exceeds a trigger level or the price of the imports falls below a trigger price; (2) the product has been identified with the special mark "SSG" in the Member's Schedule; (3) the additional import duty may not be imposed on products qualified under the tariff rate quota commitment on minimum market access volume, i.e., the product imported at the in-quota rate; (4) the additional duty shall only be maintained for one year, and only at the rate of 1/3 of the customs duty in effect for that year; (5) due notice and transparency shall be observed in the imposition of the Special Safeguards; and (6) a Member cannot make use of the Special Safeguards and the ordinary safeguards under the Agreement on Safeguards and Article XIX of GATT 1994 at the same time.

We are aware of complaints by certain agricultural sectors regarding the very low price at which certain agricultural imports are entering the country. It would be worthwhile to examine whether the conditions for the imposition of Special Safeguards exist in order to minimize the dislocation that they may be suffering from. The rules on ordinary safeguards follow.

## **6. Agreement on the Application of Sanitary and Phytosanitary Measures**

The intent of this Agreement is to ensure that sanitary and phytosanitary measures are not used as a disguised form of non-tariff barrier. Members are encouraged to harmonize sanitary and phytosanitary measures by applying as the base of their measures international standards and guidelines, whenever applicable. They may only introduce standards higher than the international standards when there is scientific justification for such higher standards, or when such higher standards result from the Member's determination of its level of acceptable risk. Members are required to observe principles of transparency, e.g., publication of rules, establishment of information or inquiry points, and notification procedures.

International standards are defined as the following: (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission; (b) for animal health and zoonoses, the standards, guidelines and recommendations developed



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under the auspices of the International Office of Epizootics; (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and (d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all members, as identified by the WTO's Committee on Sanitary and Phytosanitary Measures.

The two most interesting cases involving agriculture that have been decided on by the WTO's Dispute Settlement Body are the *EC-Meat Hormones* case and the *Australia-Salmon* case. In the *EU-Hormones* case, the Appellate Body ruled that the EC measure prohibiting the importation of meat treated with growth hormones is not compatible with the latter's obligations under the Agreement on Sanitary and Phytosanitary Measures because the risk sought to be eliminated by the import prohibition was not supported by scientific evidence. In the *Australia-Salmon* case, the ruling of the Appellate Body was to the same effect. Now, there are important legal nuances that the decisions sought to draw, and I have oversimplified the conclusions in both these cases. But for purposes of this convention's objective, let me briefly summarize the relevant dominant principle in SPS: that before SPS measures higher than international standards may be imposed by an importing Member of the WTO, these standards must be based on sufficient scientific evidence, and the measure must not be applied in a manner that is a disguised restriction on international trade or that does not result in trade distortion more than is necessary.

This is an area that the Philippines must pay very close attention to. My impression is that we need to strengthen our participation in the more important international standard-setting organizations to ensure that our particular products of export interest are not required to conform to standards higher than what the scientific data can validly support. We are aware of the problems that carageenan, coconut, mango, and banana producers have experienced or are experiencing as a result of high SPS measures. On the other hand, the SPS Agreement allows us to impose standards that we feel comfortable with for our own imports, as long as these standards are supported by

scientific evidence. We have heard of the controversy surrounding carabeef importation, as well as canned processed meat from an Asian country, for example. The question is, what is the scientific data surrounding the same? In coming to a decision on the matter, the Philippines may use its own data, adopt international standards, or adopt equivalent measures being used by another Member as long as the importing Member can objectively demonstrate that such equivalent measure achieves the importing Member's appropriate level of protection.

The Philippines should push for greater acceptability of its exports by ensuring that the SPS measures being imposed by others are not higher than those warranted by scientific evidence, by ensuring that international bodies do not arbitrarily set standards to the prejudice of Philippine agricultural and fisheries exports, and must improve its own standard-setting program. The SPS Agreement mandates technical assistance to developing countries in this area, and requires that when a new SPS measure is being imposed by a developed country Member, the application of such measure should be introduced gradually to enable developing Members to cope with the measure, and that technical assistance is to be provided to the exporting developing country Member to minimize the adverse impact of such SPS measure on the economy of such developing country.

## **7. GATT 1994 and Agreement on Safeguards**

"Safeguards" is the emergency mechanism whereby temporary surcharges may be imposed in addition to the ordinary customs duties in situations where:

...as a result of unforeseen events and of the effect of the obligations incurred by a contracting party in this Agreement, including tariff concessions, any product is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products...

Each country has the freedom to design its own safeguards law. However, it is required that the law and its application conform to



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minimum substantive conditions imposed by the GATT 1994, as well as the Safeguards Agreement, and these are: (1) significant increase in imports of a particular product, either absolutely or relative to domestic production; (2) in such conditions as to cause or threaten to cause serious injury to domestic producers of the like or directly competitive products; (3) the threat or actual injury is directly caused by the increasing imports, and not due to decreasing competitiveness of the local product caused by an independent reason (such as a labor strike, etc.).

There are procedural requirements for the imposition of a safeguards duty, including: (1) a notice being sent out to all WTO Members, (2) an investigation where the above facts are established, (3) the surcharge must be temporary, not to exceed four years, unless extended, but the total period must not exceed eight years, (4) the duty must be applied on an MFN basis.

The Philippines does not have a "safeguards law". It is reported that there are several safeguards bills in Congress. It is needed even more urgently than an anti-dumping law, contrary to what many believe. It is highly recommended that Congress enact a safeguards law as soon as possible, considering that among the "safety-net" provisions in the WTO Treaty, this should be the easiest to utilize without incurring the danger of violating any international trade obligation. It also dispenses with the necessity to prove unfair trade, considering that only the elements of increasing imports, serious, actual or threat of injury, and the causality between the level of imports and the injury is sufficient to authorize the imposition of safeguards duties without incurring the dangers of serious trade disputes at the WTO.

### 8. Anti-Dumping Agreement

The Anti-Dumping Agreement is not the legal basis for the imposition of anti-dumping duties in the Philippines, contrary to the initial misimpression of some quarters. That basis must exist in Philippine law. The purpose of the Anti-Dumping Agreement is to ensure that the imposition of anti-dumping duties by WTO Members on the product of another WTO Member satisfies certain substantive and procedural requirements.

The Anti-Dumping Agreement provides that:

...a product is to be considered as dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the, like product when destined for consumption in the exporting country. (Article 2.1)

In such an event, where the importation of dumped products as defined above exists, the Philippines, in accordance with Philippine law, may impose anti-dumping duties provided that the following conditions are satisfied:

1. that it has been established that the effect of the dumping is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry;
2. the determination of injury is based on positive evidence and involve the examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products;
3. the evidence must be positive and relevant, and not merely simple, unsubstantiated assertions; and
4. that the determination has been pursuant to an application initiated by the domestic industry, followed by an investigation which follows the procedural requirements of notice and due process, and must meet the quantum of evidence to prove the existence of dumping, injury and causality as it is defined by the Anti-Dumping Agreement.

The Philippine Anti-Dumping Law can be found in Republic Act, 7843. It defines dumping to occur when "a specific kind or class of foreign article is being imported into, sold, or is likely to be sold in the



Philippines at a price less than its normal value, the importation or sale of which might injure or retard the establishment or is likely to injure an industry producing like articles in the Philippines.”

The Anti-Dumping Law goes through several levels of inquiry, first with the Department of Trade and Industry and the Department of Finance where a complaint is filed, then to the Tariff Commission for the substantive hearing of the complaint. There are several fundamental deficiencies in the law, which accounts for its inability to measure up to the objectives of arresting unfair trade practices. There are also questions surrounding the “procedural tightness” of findings made under the law.

#### **9. Agreement on Subsidies and Countervailing Measures**

Under article 1.1, there is a subsidy when:

1. there is a financial contribution by a government or public body within the territory of a Member where: (i) government practice involves a direct transfer of funds (e.g., grants, loans, and equity infusion), potential direct transfers of funds (e.g., loan guarantees);
2. government revenue that is otherwise due is foregone or not collected (e.g., tax credits);
3. government provides goods or services other than general infrastructure, or purchases goods;
4. government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or
5. there is any form of income or price support; and
6. by virtue of such measures, a benefit is concerned.

A subsidy is subject to GATT rules only when it is specific to an industry, enterprise or group of industries and enterprises, and it is specific to such entities when: (a) there is explicit limited access to such subsidy to certain enterprises; (b) in all other cases where it can be shown that the subsidy is in fact specific, such as in the following instances: use of a subsidy program by a limited number of enterprises, the grant of disproportionately large amounts of subsidy to certain enterprises, predominant use of subsidies by certain enterprises, and the manner by which discretion is exercised by the granting authority.

The legal effects of these subsidies are determined according to which category they fall under: prohibited subsidies, actionable subsidies, or non-actionable subsidies.

Under the first category, a subsidy is prohibited when it is contingent on export performance, or contingent upon the use of domestic-over-imported goods. If a Member can show that a subsidy maintained or introduced by another Member is prohibited, the subsidy must be immediately withdrawn, otherwise, the complaining Member may take countermeasures. Actions under this paragraph are subject to the expedited procedure provisions of the Understanding on Dispute Settlement.

Under the second category, a subsidy is actionable if there is injury to the domestic producers in another member, there is impairment or nullification of benefits to other Members, or there is serious prejudice to the interests of another Member. If the Dispute Settlement Body determines that the subsidy causes such adverse effects, then the subsidizing Member must withdraw such subsidy.

Under the third category, non-actionable subsidies (e.g., assistance to industrial research, pre-competitive development activity, assistance to disadvantaged regions), another Member may seek a determination and recommendation on the matter of the subsidy.

The Philippines has a period of eight years or until 2002 within which to eliminate existing subsidies. The Philippines must develop a strong countervailing duties regime, and until it can do so, the government cannot claim that it has provided sufficient legitimate protection to domestic producers.



### 10. Agreement on Trade-Related Aspects of Intellectual Property Rights

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires the Members to make available:

...patent protection for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step, and are capable of industrial application.

Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by law.

Members may also exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
- (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof."

As far as live agricultural products are concerned, the Philippines must be strongly concerned about having a plant variety protection law. A draft law is presently before Congress, and it must be urged to act on this bill expeditiously. Otherwise, imports of high-breed seeds, especially in the grains sector, will not come in. If the AFMA is based on high-technology competition, then we have to ensure the availability of the best plant materials to our local producers.

## 11. ASEAN Free Trade Agreement (AFTA) and Common Effective Preferential Tariff (CEPT) Scheme

The establishment of the AFTA involved the implementation of a Common Effective Preferential Tariff (CEPT) scheme. As originally designed, the scheme covered manufactured products, including capital goods and processed agricultural products with at least 40 percent Asean content; it explicitly excluded agricultural products. (The scheme also does not cover services.) The most significant feature of the CEPT scheme is its tariff reduction schedule; tariff reductions are to be phased in over a period of time, which began January 1, 1993. Originally, the goal was to reduce tariffs to 5 percent over a 15-year period or by 1 January 2008 but it has now been accelerated to 10 years which means that the phase-in period ends in 2003; in December 1998, under the "Hanoi Bold Measures", this was further pushed forward to the year 2002 and under the fast-track plan, individual countries may voluntarily submit to reduce their tariffs by the year 2000. The list of product inclusion to be fast-tracked will have to be submitted in September 1999.

Brunei and Singapore already have tariffs at less than 5 percent while the rest of the ASEAN members had average tariff rates of more than 20 percent at the inception of the scheme. In implementing the CEPT scheme, preferential tariff reductions need not be across-the-board. The Agreement allows "two or more Members to enter into arrangements for tariff reductions to 0%-5% on specific products at an accelerated pace to be announced at the start of the programme." All quantitative restrictions on products covered by the CEPT scheme are to be eliminated "upon enjoyment of the concessions applicable to those products." Other non-tariff barriers are to be eliminated within "a period of five years after the enjoyment of concessions applicable to those products." Foreign exchange restrictions for payments covered by the CEPT scheme are to be removed.

Specific products covered by the CEPT scheme may be placed on a temporary "exclusion" list when a Member is temporarily not ready to include such products in the scheme. However, this list will have to be phased out by the year 2000. "Sensitive" products, on the other hand, may also be excluded, subject to a corresponding waiver of concessions applicable to such products and will have to be phased out by 2001-2003. "Sensitive" products cover poultry, poultry meat, swine



swine meat, corn, sweet potatoes, grains, sorghum, garlic, cabbages, and onions. By the year 2010, the tariff rates must be reduced to 0-5 percent on these products.

Rice is in the "highly sensitive" category and its final tariff rate by 2010 could be higher than 0-5 percent (no decision has yet been reached on the Philippines' beginning and final rates). Malaysia has committed to reduce its tariff rates on rice to 20 percent by 2010 and Indonesia, to 0 percent.

Safeguard measures may be taken in two instances:

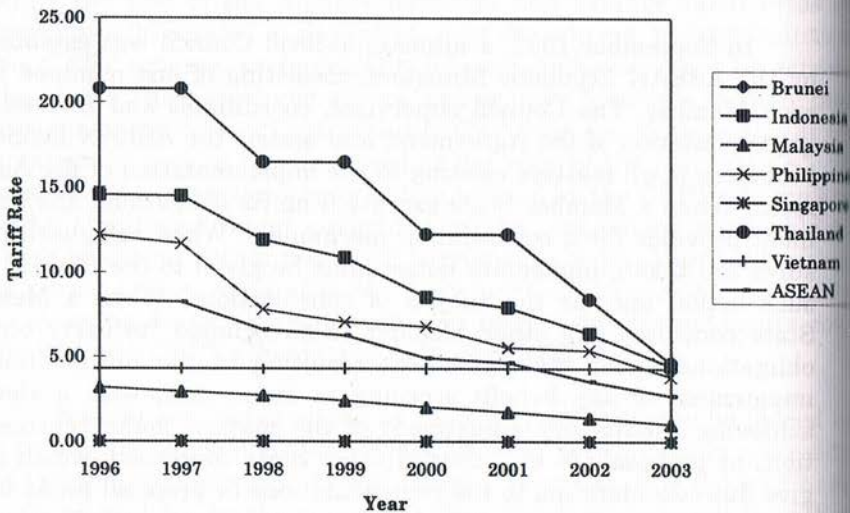
- (a) when the import of a CEPT product is "increasing in such manner as to cause or threaten to cause serious injury to sectors producing like or directly competitive products in the importing Member," the importing Member may provisionally suspend preferences;
- (b) when a Member, to forestall a threat of or to stop a serious decline in its monetary reserves, "finds it necessary to create or intensify quantitative restrictions or other measures limiting imports."

In September 1992, a ministerial-level Council was established by the ASEAN Economic Ministers, consisting of one nominee from each Member. The Council supervises, coordinates and reviews the implementation of the Agreement, and assists the ASEAN Economic Ministers in all matters relating to the implementation of the Agreement. When a Member State excepts from its obligations, the agreement provides for a consultation mechanism. When safeguard measures are taken, immediate notice must be given to the Council and such action may be the subject of consultations. When a Member State considers any other Member to have failed "to carry out its obligations under the Agreement resulting in the nullification or impairment of any benefit accruing to them, may, with a view to achieving satisfactory adjustment of the matter, make representations or proposals to the other Member State concerned, which shall give due consideration to the representations or proposal made to it." If any difference between Member States cannot be settled amicably, it is to be submitted to the Council, and if necessary, to the ASEAN Economic Ministers.

**Table 1 - CEPT Reduction for Live Animal (HS: 1-5)**

Country	1996	1997	1998	1999	2000	2001	2002	2003
Brunei	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Indonesia	14.55	14.48	11.91	10.87	8.53	7.92	6.35	4.44
Malaysia	3.17	2.93	2.71	2.40	2.04	1.74	1.38	1.04
Philippines	12.18	11.69	7.79	7.05	6.77	5.53	5.36	3.81
Singapore	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Thailand	20.79	20.79	16.49	16.49	12.25	12.25	8.41	4.62
Vietnam	4.29	4.29	4.29	4.29	4.29	4.29	4.29	4.29
ASEAN	8.35	8.25	6.58	6.26	4.92	4.64	3.54	2.7

**Figure 1. CEPT Reduction for Live Animal**



Source: ASEAN website—[http://www.aseansec.org/sitemap.htm/afta/afta\\_tr1.htm](http://www.aseansec.org/sitemap.htm/afta/afta_tr1.htm)

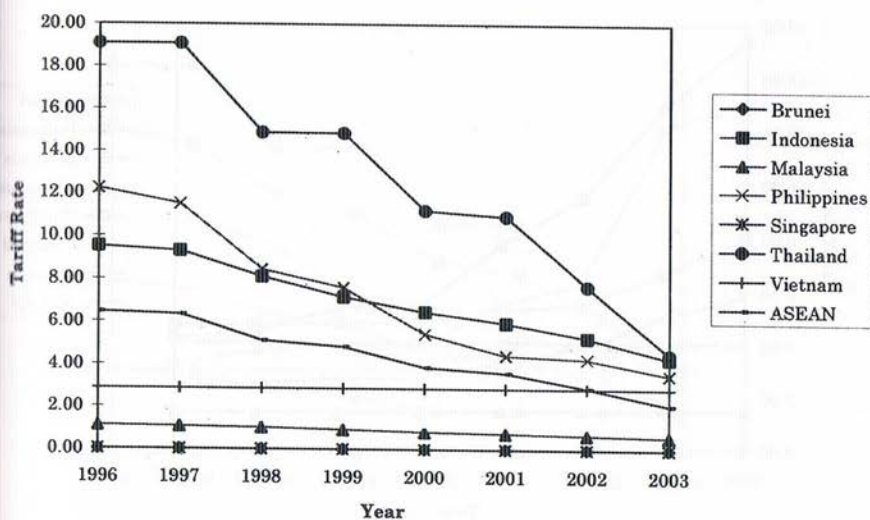


THE IMPACT OF WTO AND AFTA OBLIGATIONS

Table 2 - CEPT Reduction for Vegetable Products (HS: 6-14)

Country	1996	1997	1998	1999	2000	2001	2002	2003
Brunei	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Indonesia	9.51	9.30	8.11	7.17	6.48	5.95	5.27	4.29
Malaysia	1.11	1.07	1.01	0.93	0.82	0.76	0.68	0.60
Philippines	12.23	11.51	8.45	7.61	5.44	4.44	4.27	3.52
Singapore	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Thailand	19.08	19.08	14.89	14.86	11.21	10.94	7.69	4.50
Vietnam	2.87	2.87	2.87	2.87	2.87	2.87	2.87	2.87
ASEAN	6.46	6.35	5.12	4.83	3.87	3.61	2.91	2.10

Figure 2. CEPT Reduction for Vegetable Products

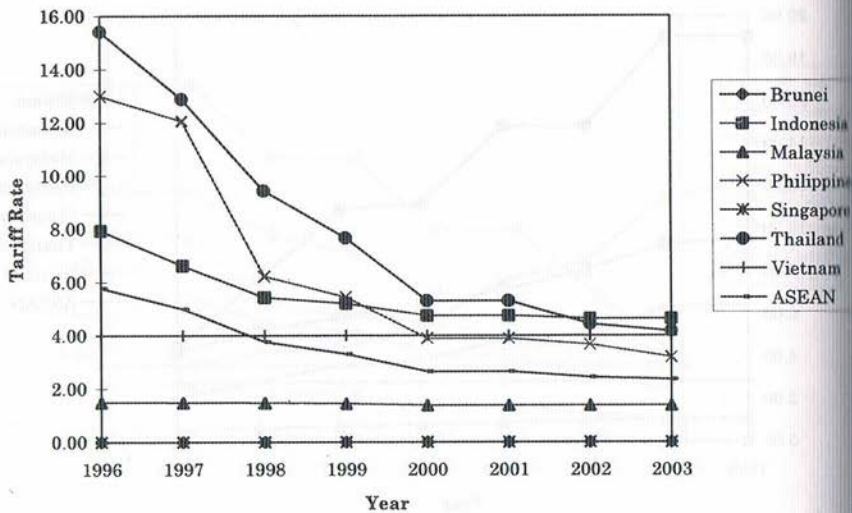


Source: ASEAN website—[http://www.aseansec.org/sitemap.htm/afta/afta\\_tr1.htm](http://www.aseansec.org/sitemap.htm/afta/afta_tr1.htm)

**Table 3 - CEPT Reduction for Fats and Oils (HS: 15)**

Country	1996	1997	1998	1999	2000	2001	2002	2003
Brunei	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Indonesia	7.93	6.62	5.43	5.20	4.74	4.74	4.63	4.63
Malaysia	1.50	1.49	1.47	1.44	1.38	1.38	1.38	1.38
Philippines	13.00	12.06	6.22	5.44	3.88	3.88	3.66	3.66
Singapore	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Thailand	15.42	12.89	9.42	7.65	5.31	5.31	4.42	4.42
Vietnam	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00
ASEAN	5.78	5.00	3.76	3.30	2.64	2.64	2.43	2.43

**Figure 3. CEPT Reduction for Fats and Oils**



Source: ASEAN website—[http://www.aseansec.org/sitemap.htm/afta/afta\\_tr1.htm](http://www.aseansec.org/sitemap.htm/afta/afta_tr1.htm)

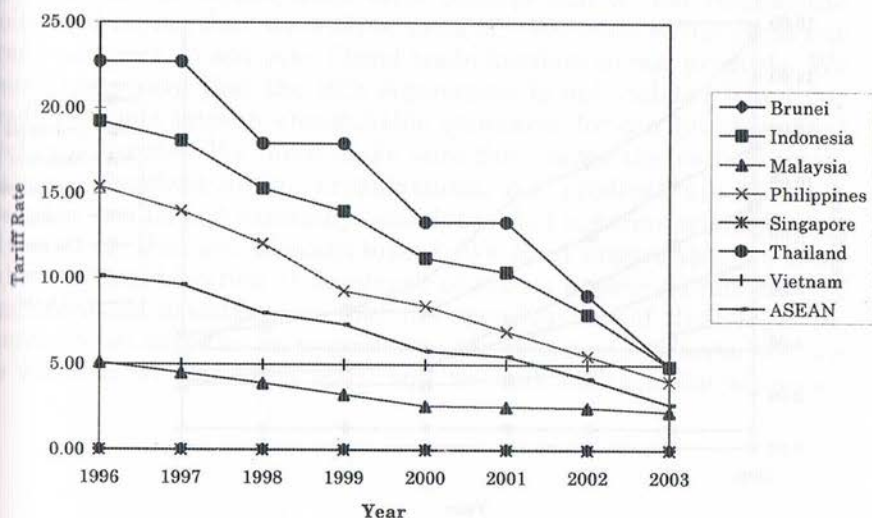


THE IMPACT OF WTO AND AFTA OBLIGATIONS

Table 4 - CEPT Reduction for Prepared Foodstuffs (HS: 16-24)

Country	1996	1997	1998	1999	2000	2001	2002	2003
Brunei	0.04	0.04	0.04	0.04	0.04	0.04	0.04	0.04
Indonesia	19.24	18.12	15.30	13.98	11.20	10.38	7.93	4.89
Malaysia	5.09	4.50	3.90	3.25	2.60	2.55	2.49	2.27
Philippines	15.39	13.98	12.05	9.27	8.42	6.92	5.50	4.03
Singapore	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Thailand	22.71	22.71	17.96	17.96	13.33	13.33	9.05	4.91
Vietnam	5.00	5.00	5.00	5.00	5.00	5.00	5.00	5.00
ASEAN	10.13	9.63	7.99	7.32	5.78	5.47	4.17	2.71

Figure 4. CEPT Reduction for Prepared Foodstuffs

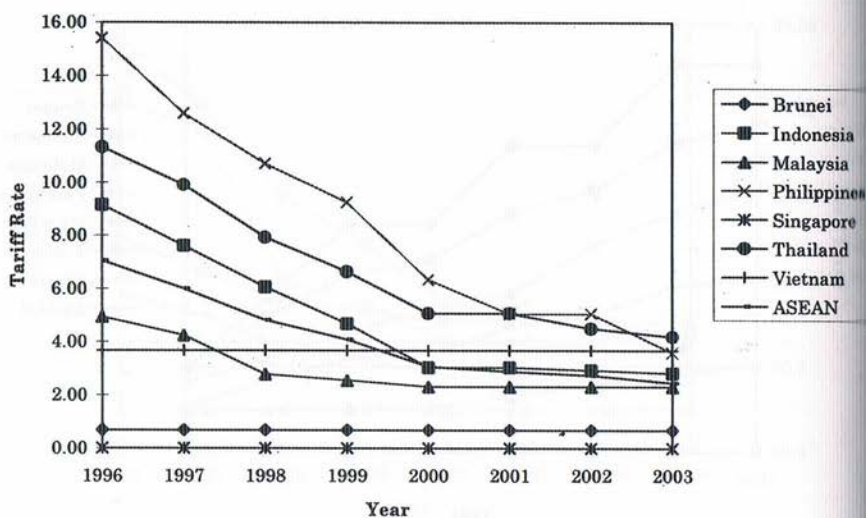


Source: ASEAN website—[http://www.aseansec.org/sitemap.htm/afta/afta\\_tr1.htm](http://www.aseansec.org/sitemap.htm/afta/afta_tr1.htm)

**Table 5 - CEPT Reduction for Hides and Leathers (HS: 41-43)**

Country	1996	1997	1998	1999	2000	2001	2002	2003
Brunei	0.68	0.68	0.68	0.68	0.68	0.68	0.68	0.68
Indonesia	9.15	7.61	6.06	4.68	3.03	3.03	2.93	2.82
Malaysia	4.94	4.24	2.78	2.55	2.31	2.31	2.31	2.31
Philippines	15.40	12.60	10.71	9.24	6.33	5.05	5.05	3.50
Singapore	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Thailand	11.33	9.91	7.93	6.63	5.07	5.07	4.49	4.19
Vietnam	3.67	3.67	3.67	3.67	3.67	3.67	3.67	3.67
ASEAN	7.04	5.99	4.81	4.08	3.06	2.88	2.74	2.40

**Figure 5: CEPT Reduction for Hides and Leathers**



Source: ASEAN website—[http://www.aseansec.org/sitemap.htm/afta/afta\\_tr1.htm](http://www.aseansec.org/sitemap.htm/afta/afta_tr1.htm)



## 12. Conclusion

The Philippine government has announced the passage of the Countervailing Duties and Subsidies Law. It has also been announced that an Anti-Dumping Law and a Safeguards Law is on the way to enactment. It is high time that these legislation come into existence, for four and a half years have passed since we ratified the Marakkesh Agreement. Our policymakers knew that these legal mechanisms for protecting our domestic producers were necessary, but apparently the recognition of that need has not translated into timely and concrete legal remedies for the producers who may experience dislocation under the new legal regime.

However, protecting our producers from unfair competition and serious unwarranted dislocation is just one aspect of liberalization. The more exciting part lies in the export market, where some of our agricultural products are posed to emerge as winners. What we need to do is to first identify the markets where we have a competitive edge that were opened up under the Uruguay Round and which must remain open under the Marakkesh Protocol. We must be vigilant about maintaining the openness of these markets by ensuring that our WTO partners do not violate their tariff ceilings and do not restrict the volume of access that we wish to avail of. We must ensure that our trade partners do not pose illegal trade barriers to our products. We must make sure that the SPS Agreement is not violated when our trade partners impose unjustifiable standards for our plant, animal and food exports. We must make sure that under the various international standard-setting organizations, our products are not subjected to health and sanitation standards that are impossible to comply with, or that are Western-biased. We must ensure that we capitalize on the obligation of developed countries to provide information and technical assistance so that the specifications of their legal regimes do not serve as an impediment to our export interests. We can be winners; we must just learn how to think and act like winners.

This paper has demonstrated the undeniable fact that trade in agriculture will continue to be conducted under increasingly complicated international legal settings and will produce increasingly-challenging and more highly-technical legal obligations. There is no reason to expect that the next round of negotiations will be easy for any of us, especially not for our negotiators. We have to have seasonably and adequately prepared for the negotiations to commence next year. We do not wish to commit a mistake, which we will regret and will bring about unintended domestic consequences. We do not wish to miss the opportunities waiting for our export products in markets that have been until lately inaccessible to Filipino producers. To do this, we must ensure sufficient private sector support and professional technical assistance to our negotiators. We must maximize the existing opportunities that present themselves in a relatively open international market, by preparing and training the agricultural sector to compete. Government must do its part. Business must likewise do its part. We can only hope that the net benefit of all this effort is continuing support to the Constitutional goals of equity in opportunities, rising productivity, and increasing national production.