March 2016

The Philippines and the Trans-Pacific Partnership:

A READINESS ASSESSMENT

TRADE-RELATED ASSISTANCE FOR DEVELOPMENT (TRADE) PROJECT

This report is made possible by the generous support of the American People through the United States Agency for International Development (USAID). The contents of this report are the sole responsibility of Deloitte Consulting LLP and do not necessarily reflect the views of USAID or the United States Government.

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GLOSSARY OF ACRONYMS

AANZFTA	ASEAN-Australia-New Zealand Free Trade Area
ACIA	ASEAN Comprehensive Investments Agreement
ACFTA	ASEAN-China Free Trade Area
AEC	ASEAN Economic Community
AFAS	ASEAN Framework Agreement on Services
AIFTA	ASEAN-India Free Trade Agreement
AJCEP	ASEAN-Japan Comprehensive Economic Partnership
AKFTA	ASEAN-Korea Free Trade Area
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ATIGA	ASEAN Trade in Goods Agreement
BIT	Bilateral Investment Treaty
BLA	Bureau of Legal Affairs
CEPT	Common Effective Preferential Tariff
CO	Certificate of Origin
DND	Department of National Defense
DOLE	Department of Labor and Employment
FDI	Foreign Direct Investment
FOB	Free on Board
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GCG	Governance Commission for GOCCs
GOCC	Government-Owned and Controlled Corporations
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communications Technology
ILO	International Labor Organization
IPO	Intellectual Property Office
ISDS	Investor-State Dispute Settlement
ISP	Internet Service Provider
ITU	International Telecommunications Union
IPB	ICT Price Basket
MC	Memorandum Circular
MFN	Most Favored Nation
MRA	Mutual Recognition Agreement
NAFTA	North American Free Trade Agreement
NAIA	Ninoy Aquino International Airport

NTC	National Telecommunications Commission
OCP	Operational Certification Procedure
ODG	Office of the Director-General
PCA	Philippine Competition Act
PJEPA	Philippines-Japan Economic Partnership Agreement
PTE	Public Telecommunications Entity
PTNS	Public Telecommunications Networks and Services
RA	Republic Act
RAO	Reference Access Offer
ROO	Rules of Origin
RTC	Regional Trial Court
RVC	Regional Value Content
SME	Small and Medium Enterprise
SOEs	State-Owned Enterprises
SSDS	State-State Dispute Settlement
SSS	Social Security System
TISA	Trade in Services Agreement
TPM	Technological Protection Measures
TPP	Trans-Pacific Partnership
TPPA	Trans-Pacific Partnership Agreement
TRADE	Trade-Related Assistance for Development Project
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UPOV	International Union for the Protection of New Varieties of Plants
USAID	United States Agency for International Development
USD	United States Dollar
USF	Universal Service Fund
VAS	Value Added Service
WCO	World Customs Organization
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Office
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

FOREWORD

The U.S. Chamber of Commerce is pleased to be working with the Trade-Related Assistance for Development (TRADE) project on the Philippines Trans-Pacific Partnership (TPP) Readiness Assessment. This timely document will contribute to an informed debate about the challenges and opportunities for the Philippines as it considers whether to seek membership in the TPP in the coming years.

The current TPP members represent approximately 40% of the world economy, with a combined population in excess of 800 million people. The 12 countries currently in the agreement account for more than a quarter of world trade. By reducing trade and investment barriers and establishing new, market-oriented rules to address rapidly developing changes in international commerce, the TPP will open markets, modernize the world trading system, and set a higher standard for trade agreements moving forward.

For these reasons, the U.S. Chamber of Commerce strongly supports the TPP, and we welcome Manila's interest in it. This Readiness Assessment is intended to gauge how well prepared the Philippines is to be part of this ambitious trade agreement. By examining Philippine trade and investment law and regulation against the obligations outlined in the TPP agreement, this Readiness Assessment is meant to determine areas in which reforms may need to be undertaken if the country is to join the agreement. It is not intended to be a negotiating roadmap – that is a matter for trade negotiators. Rather, it is intended to identify inconsistencies between existing Philippine law and practice, and the obligations to which TPP members have signed up.

The Readiness Assessment includes chapters on Trade in Services, Competition Policy, Rules of Origin, the Telecommunications Sector, Investor-State Dispute Settlement, and Intellectual Property. These chapters have been prepared by independent experts, and this document summarizes and synthesizes their findings. This summary document, as well as the full-length version of each of the chapters, is available on the U.S. Chamber of Commerce website at https://www.uschamber.com/event/the-philippines-and-tpp-opportunities-and-challenges.

We want to thank the TRADE Project, the U.S. Agency for International Development, and the American Chamber of Commerce in the Philippines for their partnership in this important effort. In addition, we want to thank FedEx, GE, and TransUnion, for their sponsorship of the event at which this report will be launched.

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U.S. Chamber of Commerce

EXECUTIVE SUMMARY

The Trans-Pacific Partnership (TPP) is an ambitious free trade agreement (FTA) that brings together twelve countries – Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam – in a regional trading bloc spanning both sides of the Pacific Ocean. Each country commits to treat goods imported from another member country the same way as goods produced internally. Countries will progressively eliminate their customs duties, starting upon signing the agreement, with subsequent cuts every January 1, including on sectors that may be sensitive, such as agriculture or textiles. In addition, TPP members aim to: (1) remove restrictions on trade, including export quotas and performance requirements; (2) enhance the transparency of import and export licensing, and other non-tariff measures; (3) develop disciplines on export credits, insurance programs, state trading enterprises, and other regulatory measures; (4) publish import and export laws, procedures and requirements, tariff rates, import taxes and fees, tariff quotas, and trade restrictions; (5) reduce administrative fees; and (6) establish mechanisms to address issues that could impede trade.

In September 2010, the Philippines announced its interest to join the TPP.[1] The Philippines is currently a signatory of a number of FTAs on a bilateral basis or as a member of the Association of South East Asian Nations (ASEAN), and in fact has FTAs with seven of the twelve TPP members. Many of these Agreements were prepared and signed before 2010 and have been shaped by developments during this period. As the Philippines considers participation in the TPP, it is crucial for it to have a critical assessment of its readiness to meet the obligations set out in this new generation agreement and the commitment demanded of its members.

This paper summarizes the findings of six "TPP readiness assessment" studies undertaken by the USAID Trade-Related Assistance for Development (TRADE) Project, in anticipation of the Philippines' eventual pursuit of TPP membership. The studies examined consistency of the country's existing policy framework with the agreement's requirements, and the implied changes that may be necessary if the Philippines is to meet these requirements. The topics examined (with corresponding chapters in the TPPA) are considered to be of significant interest for the Philippines, inasmuch as commitments and obligations in these areas are so far not in any of the Philippines' existing FTAs. These are: (1) competition policy; (2) telecommunications sector; (3) rules of origin; (4) investment protection, specifically investor-state dispute settlement (ISDS); (5) intellectual property (IP); and (6) scheduling modalities for negotiations on services trade liberalization. A brief scan is also made of other topics/chapters in the TPPA that are deemed of interest to the Philippines.

Competition Policy (Chapter 16): Competition legislation is not new in the Philippines. Two of its oldest laws, Republic Acts No. 3815 (Revised Penal Code) and No. 386 (Civil Code) contain anti-trust provisions. However, until recently, the exact definition of unfair competition, monopolies, and cooperation in restrictions to trade remained ambiguous, and enforcement of the same was largely non-existent. These were addressed with the recent enactment of Republic Act No. 10667 (Philippine Competition Act). The Act satisfies the TPPA's requirement of having a competition law that promotes and protects competition in the Philippine market. Current legislation satisfies TPPA requirements regarding all of private rights of action, cross border exchange of information, and consumer protection.

[1] http://www.gov.ph/2010/09/24/speech-of-president-aquino-at-the-council-on-foreign-relations-new-york- city/

Telecommunications (Chapter 13): The TPPA requires that telecommunication suppliers of other parties are provided access to and use of the Philippine's public telecommunication networks and services, at reasonable and non-discriminatory terms and conditions. Many TPPA requirements with respect to telecommunication services are met by exising Philippine legislation. Key gaps remain, however. The TPPA prohibits a party from proscribing the resale of any public telecommunications services and, while the Philippines makes no such prohibition, especially to suppliers of another party, suppliers cannot offer these services in the Philippines, because of franchising requirements. The Philippines NTC has the authority to require unbundling, but has not done so and has no power to compel submission of information from the PTEs. The Philippines has no regulations on international mobile roaming services, and there is a lack of transparent and reasonable rates for such service. The TPPA also requires number portability, which has not been implemented. It also requires universal service, i.e., that all citizens have access to basic telecommunication services at reasonable price. This is somewhat met by Republic Act No. 7925 (the Public Telecommunication Policy Act) and by the requirement for local exchange carriers to cross subsidize underserved areas. Unfortunately, the traditional approach of cross-subsidization is no longer effective and impedes competition.

Rules of Origin (Chapter 3): The Philippines shares the operating principle, form and substance of the TPPA regarding what constitutes an originating good. Although some differences arise in the application of regional value content, accumulation, and other rules, the de facto Philippine rules of origin regime and product specific rules are similar. The primary difference between the TPPA and the Philippines FTAs is related to how an importer makes claims for preferential treatment and determines origin status. While the TPPA empowers the importer to do so based on information from the manufacturer or exporter, the FTAs of the Philippines require that the CO be issued by the competent authority of the exporting party, for the account of the exporter. Other implementation differences follow accordingly. For example, under existing FTAs the competent authority is required to keep relevant documentation, while the TPPA only requires importers and exporters to do so. To verify origin, under existing FTAs, the Customs authority of the importing party may contact both the private sector directly and the competent authority of the exporting country. The TPPA, on the other hand, only provides for contacting the private exporter directly.

Investor-State Dispute Settlement (Chapter 9): ISDS is not new to the Philippines, as it has been an integral part of many bilateral agreements. Should the Philippines join the TPPA, however, ISDS cases may rise because of the current range of constitutional constraints relating to nationalized industries and service sectors (in mass media, private radio networks, advertising; natural resources or mining enterprises, land ownership, public utilities; and education and practice of professions); (2) performance or export requirements (exceptions to weaponry manufacture for export, preferences for certain infrastructure and government-funded contracts, and export or technology transfer requirements); and (3) labor issues (e.g., national senior management requirement).

Intellectual Property (Chapter 18): In the Philippines, the protection and promotion of IP rights is enshrined in the 1987 Philippine Constitution and in a number of laws (incuding Republic Act No. 8293 or the IP Code), as well as in a series of international treaties administered by WIPO, bilateral/reciprocal treaties, and multilateral treaties under ASEAN. Issues arise, however, with the protection for all of types of IP and with related criminal and civil penalties and administrative remedies. The IP Code was enacted to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), but the requirements of the TPPA exceed those of the TRIPS Agreement. For example, there is no express protection in the IP Code for certification marks and geographic indications and the

Code does not afford the required protection to unregistered well-known marks. The TRIPS Agreement, and consequently the IP Code, does not include the TPPA requirement that patents are made available for any of the following: new uses of a known product, new methods of using a known product, or new processes of using a known product. The TPPA will require additional patent protection for plant varieties and agricultural chemical products, which may have implications on food security, and for public health in the case of pharmaceutical products, where additional protections may delay the entry of generic medicines into the market. A number of differences between the IP Code and the TPPA are related to enforcement of IP rights. For example, the information, possessed by the infringer, that may be subject to judicial order, is limited under the IP Code, but much broader under the TPPA. The provision to inform right holders of the details of counterfeiting operations is optional under the IP Code, but compulsory under the TPPA. Criminal penalties for aiding and abetting trademark infringement are not provided for in the IP Code, but are required by the TPPA.

Modalities for Scheduling Service Commitments (Chapter 10): The TPPA approaches service commitments via a negative list approach, unlike previous agreements that the Philippines has been a party to, which follow the GATS positive list approach. The former requires that all parties respect the core disciplines for all service measures and sectors and specify the restrictive measures they wish to retain in annexes as of non-conforming measures. This will require significant preparation for negotiations to avoid liberalization that may be broader than intended.

In many respects, the Philippines already has many of the domestic laws and regulations that would be needed if it is to become a party to the TPP Agreement (TPPA). To comply with its obligations under the WTO and other existing FTAs, the country has already instituted a number of necessary internal mechanisms and procedures. Nonetheless, should the Philippines join the TPP, additional commitments will be needed and selected revisions to existing laws, regulations, and procedures will need to be implemented.

For example, the Philippines would have to reduce tariffs for imports from TPP members over and above what its current FTAs provide, including for goods normally protected from tariff cuts such as glass, plastics, iron and steel, and motor vehicles. Additional obligations are required by the TPPA to ensure that SPS measures are not applied as barriers to trade. Republic Act No. 9184 or the Government Procurement Reform Act, which explicitly specifies preferential treatment towards domestically-produced and manufactured goods and to domestic bidders, is contrary to the TPPA. Also contrary to the TPPA are labor laws whereby: (1) Filipinos between the age of 15-18 can be employed in non-hazardous environments; (2) foreign employers cannot hire Filipinos directly except through entities authorized by DOLE; (3) overseas Filipino workers are required to remit a portion of their income to their families/dependents in the Philippines; and (4) the minimum wage varies from region to region. While Republic Act No. 7394 (the Consumer Act) provides the basic framework for consumer protection, it needs to be made more robust not only to promote consumer confidence on e-commerce, but also to deter improper business practices related to e-commerce. Perhaps the biggest hurdle to TPP accession is the Constitutional provision restricting foreign ownership and participation in Philippine businesses (e.g., in public utilities and other services).

Even as it is already “TPP ready” in many key respects, pursuing TPP membership will demand of the Philippines further significant adjustments in the policy environment, as embodied in administrative measures, laws, and the Constitution itself. The Philippine government must take full stock of such adjustments being called for, and carefully weigh their public welfare implications, in order to equip itself with negotiating positions that will

help it ensure that eventual TPP membership, once achieved, would indeed redound to the greatest good for the greatest number of Filipinos.

THE PHILIPPINES AND TPP: A READINESS ASSESSMENT

INTRODUCTION

On February 4, 2016, the formal Agreement to establish the Trans-Pacific Partnership (TPP) was signed by 12 economies – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. Once the TPP Agreement (TPPA) enters into force, it would create a free trade area comprising an aggregate market of 800 million people, with a combined GDP of US$ 28 trillion (or 40% of global GDP). Current TPP trade of US$ 9 trillion for goods and US$ 2 trillion for services make up 30% of world trade.

Each TPP member is bound to accord national treatment to goods imported from other members, that is, treat them no differently from goods produced internally. They must also progressively eliminate barriers to goods and services traded among members. In addition, countries have committed to: (1) remove restrictions on trade, including export quotas and performance requirements; (2) enhance the transparency of import and export licensing, and other non-tariff measures; (3) develop disciplines on export credits, insurance programs, state trading enterprises, and other regulatory measures; (4) publish import and export laws, procedures and requirements, tariff rates, import taxes and fees, tariff quotas, and trade restrictions; (5) reduce administrative fees; and (6) establish mechanisms to address issues that could impede trade.

As one of the platforms for economic integration in the Asia-Pacific region, the TPP is open for accession by any member economy of the Asia Pacific Economic Cooperation (APEC), or other economies as may be agreed by its members. New members must be willing and able to meet TPP's high standards, and the terms of accession still to be adopted by the original members. The Philippines has already articulated, on several occasions, its desire to join the TPP once membership is opened to new members. To do so, and in accordance with the TPPA, the Philippines would have to make commitments over and above what its current FTAs provide, including for goods normally protected from tariff cuts, such as glass, plastics, iron and steel, motor vehicles. The Philippines' existing bilateral and regional FTAs[2] include a significant number of tariff lines for tariff elimination, although rice, sugar, maize, plastics, iron and steel, motor vehicles, and other goods are only subject to tariff reduction.

The TPPA comprises 30 chapters spanning a wide range of commitments made by member countries in various aspects of trade and investments, illustrative of the much higher level of ambition beyond traditional free trade agreements that the TPP seeks to achieve (see Annex). In anticipation of the Philippines' eventual pursuit of TPP membership, the USAID Trade-Related Assistance for Development (TRADE) Project undertook several studies focused on selected key provisions of the TPP Agreement of particular interest to the Philippines. The studies examined consistency of the country's existing policy framework with the agreement's

[2] The currently existing bilateral FTA is with Japan (PJEPA), while regional FTAs are with the rest of ASEAN (AFTA), and ASEAN collectively with China (ACFTA), Korea (AKFTA), Japan (AJCEPA), India (AIFTA) and Australis and New Zealand (AANZFTA).

requirements, and implied changes that may be necessary if the Philippines is to meet these requirements. This paper summarizes the findings of six such "TPP readiness assessment" studies on topics (with corresponding chapters in the TPPA) considered to be of significant interest for the Philippines, inasmuch as commitments and obligations in these areas are so far not in any of the Philippines' existing FTAs, including its FTAs with seven of the 12 TPP countries. These topics, discussed in turn below, are: (1) competition policy; (2) telecommunications sector; (3) rules of origin; (4) investment protection, specifically investor-state dispute settlement (ISDS); (5) intellectual property (IP); and (6) scheduling modalities for negotiations on services trade liberalization. A brief scan is also made of other topics/chapters in the TPPA that are of interest to the Philippines.

COMPETITION POLICY: TPP-READY[3]

Chapter 16 of the TPPA requires the adoption of national competition laws that prohibit anticompetitive business conduct to promote economic efficiency and consumer welfare. Each TPP member must apply its national competition laws to all commercial activities in its territory or those that have effects within its jurisdiction, and should have an authority responsible for ensuring this. Any person accused of violating such laws must be provided with opportunity to be represented by counsel, given information about the competition concerns, and allowed to seek a review in a court of adverse decisions. The authority in charge of competition laws must have authority to resolve enforcement actions by mutual agreement. With these standards, rules for administrative hearings for violations, including the introduction of evidence, must be published. Furthermore, each member country shall ensure that all related final administrative decisions are published, in writing, describing any relevant findings of fact and the reasoning on which the decisions are based.

Competition legislation is not new in the Philippines. Two of its oldest laws, Republic Acts No. 3815 (Revised Penal Code) and 386 (Civil Code), already contain anti-trust provisions. In the RPC, monopolies and combinations in restraint of trade are prohibited and penalized, while the Civil Code allows the collection of damages by the injured member from unfair competition or dominant market position.[4] More significantly, the Constitution provides that the State shall regulate or prohibit monopolies when the public interest so requires. Combinations in restraint of trade or unfair competition are absolutely prohibited.[5] Legislation for particular industries likewise contain anti-trust language, such as in the electric power and oil industry, intellectual property, finance, trade and manufacturing. However, until recently, the exact definition of unfair competition, monopolies, and combinations in restraint of trade remained ambiguous, and enforcement of the same by regulators was largely non-existent.

These ambiguities were addressed with the recent enactment of Republic Act No. 10667, the Philippine Competition Act (PCA). The PCA aims to prevent economic concentration that will unduly stifle competition, lessen, manipulate or constrict the free market and the protection of consumer welfare.[6] The law thus prohibits the following acts: (1) Restricting competition as to price, or components thereof, or other terms of trade; (2) Bid manipulation; (3) Agreements that set, limit or control production, markets, technical development, or investment, or that divide or share the market; and (4) Abuse of one's dominant position by engaging in conduct that would substantially restrict competition, including selling below cost, imposing barriers to entry, subjecting transactions to unrelated obligations, discriminating unreasonably between customers, limiting production or technical development, and others. In addition, mergers and acquisitions that substantially prevent, restrict or lessen competition are prohibited.[7] Such agreements or acts are subject to administrative penalties, after due notice and hearing of an independent quasi-judicial body, and/or criminal penalties, through the judicial system. The PCA satisfies the TPPA's requirement of having in place a competition law that upholds and protects competition in the Philippine market.

[3] Based on TRADE (2015), "Competition Policy and Regulation in the Philippines: A TPP Gap Analysis."
[4] Civil Code, Articles 19 and 28.
[5] 1987 Constitution, Article XII, Section 19.
[6] Republic Act No. 10667 (RA 10667), Section 2.
[7] *Id*., Section 20.

Enforcement of the PCA rests on a national, quasi-judicial body, the Philippine Competition Commission. The Commission has the powers to: (1) investigate, including the inspection of business premises upon court order, and decide on cases involving violations of the PCA; (2) review proposed mergers and acquisitions and prohibit the same if warranted; (3) consult with stakeholders; (4) apply remedies to anti-competitive agreements, such as injunctions, requirement of divestment, and disgorgement of excess profits; (5) conduct related administrative proceedings, issue subpoenas, and impose sanctions; and (6) issue advisory opinions and guidelines on competition matters. Any adverse decision by the Commission is appealable to the Court of Appeals in accordance with the 1997 Rules of Civil Procedure.[8]

In the event that the Commission decides to initiate a criminal action before the Department of Justice for violations of the PCA, the Revised Rules of Criminal Procedure shall apply for preliminary investigation and prosecution before the proper court. The Revised Rules of Criminal Procedure sets out the procedure for the conduct and/or hearing of the case, as well as presentation of evidence.[9] Any injured member may also file a separate and independent civil action before the proper court after the Commission has completed its preliminary inquiry.[10] Such action will be governed by the Rules on Civil Procedure. In addition, jurisprudence has already set forth guidelines on how the Commission should dispose of cases brought before it, satisfying the requirement that judgments be in writing, set out any relevant findings of fact and the reasoning and legal analysis on which the decision is based. Further, any regulations of government agencies require publication under the Revised Administrative Code[11] to ensure adequate notice to the public.

To resolve enforcement actions by mutual agreement with the respondent entity, the PCA provides that the Commission may choose to forbear from applying the provisions of said law, if in its determination, (a) enforcement is not necessary to the attainment of the policy objectives of the said law, (b) doing so will not impede competition in the pertinent market and (c) it is consistent with public interest and the benefit and welfare of the consumers.[12] Moreover, the Commission is to develop a Leniency Program where an entity could be granted immunity from suit, or reduction of fine in exchange for voluntary disclosure of information.[13]

Due Process

Under the TPPA, when a member's national competition authority issues a public notice on a pending or ongoing investigation, it must avoid implying that the person referred to in the notice has engaged in the alleged conduct or violated the law. While this can be specially provided under the implementing rules of the PCA still under formulation, Philippine quasi-judicial agencies have traditionally been careful to comply with the due process requirements under law and jurisprudence, which requires that the tribunal's decision should be based on *substantial* evidence presented.[14]

The TPPA also requires that national competition authorities afford the person under investigation reasonable opportunity to consult with said authorities with respect to significant procedural issues

[8] *Id.,* Section 39.
[9] *Id.,* Section 31.
[10] *Id.,* Section 45.

[11] Revised Administrative Code, Book VII, Chapter 2.
[12] RA 10667, Section 28.
[13] *Ibid.*, Section 25.
[14] Miro vs. Mendoza, et. al., G.R. Nos. 172532 172544-45, 20 November 2013.

that arise during the investigation. To the extent that the "opportunity to consult" means that the person under investigation can inquire on the legal or factual basis of the investigation, this is consistent with current Philippine procedural rules on quasi-judicial or administrative cases.

Private Rights of Action

An article of the TPPA deals on private rights of action, as a supplement to the public enforcement of national competition laws. Private rights of action is defined as the right of a person to seek redress, including injunctive, monetary or other remedies, from a court or other independent tribunal for injury to that person's business or property, which is caused by a violation of competition laws. If there are no such laws or measures, the Member shall adopt or maintain laws or measures that allows a person: (a) to request that the national competition authority initiate an investigation into an alleged violation of national competition laws; and (2) to seek redress from a court or other independent tribunal following a finding of violation by the national competition authority. These rights should be available to persons of other TPPA members on terms no less favorable than those available to its own persons.

An independent private right of action is specifically provided for under Section 45 of the PCA after the PCC has completed its preliminary inquiry. Additionally, such injured private party can lodge its complaint with the PCC under Section 31 of the PCA. Should a private party institute a separate civil action, the Rules on Civil Procedure shall apply to such case. This is available to Filipinos and foreigners on violation of the PCA and other pertinent laws, i.e. the Civil Code of the Philippines.

Cross-Border Exchange of Information

Prescribed under the TPPA is cooperation between member countries in their enforcement of competition laws, including mutual assistance, notification, consultation and exchange of information. Hence, upon request, the State Party shall have the obligation to make available public information on: (a) its competition law enforcement policies and practices; and (b) exemptions and immunities to its national competition laws, provided that the request specifies the particular good or service and market of concern and includes information explaining how the exemption or immunity may hinder trade or investment between the Members. Technical cooperation is likewise provided under the TPPA, which contemplates sharing advice or training on relevant issues and assistance to a member as it implements a new national competition law.

There is no prohibition under existing laws from sharing already available public information with another State, pursuant to a free trade agreement. However, existing laws provide for certain information that is considered confidential and cannot be disclosed. Under the PCA, "confidential business information" submitted by entities relevant to any inquiry or investigation conducted pursuant to the PCA, as well as any related deliberation, may not be disclosed.[15] This is consistent with the TPPA, which does not require the disclosure of confidential information. The TPPA only provides that, if such information is obtained by the national competition authority, and which is to be used in an enforcement proceeding, a procedure should be in place to allow the person under investigation timely access to information that is necessary to prepare an adequate defense.

[15] RA 10667, Section 34.

Consumer Protection

The TPPA obliges members to cooperate in the enforcement of consumer protection laws in appropriate cases of mutual concern. Nothing under existing Philippine laws prohibits the exchange of information related to the enactment and administration of consumer protection laws, or consulting on ways to reduce consumer protection law violations that have significant cross-border dimensions.

More expansively, the TPPA requires the adoption or maintenance of consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities. Such activities refer to those fraudulent and deceptive commercial practices that cause actual harm to consumers or that pose an imminent threat of such harm. Examples mentioned are: (1) making misrepresentations of material fact that cause significant detriment to the economic interests of misled consumers; (2) failing to deliver products or provide services to consumers after the consumers are charged; or (3) charging or debiting consumers' financial, telephone, or other accounts without authorization.

The Philippines need only maintain existing consumer protection laws, particularly Republic Act No. 7394, or the Consumer Act of the Philippines ("Consumer Act") to be consistent with the above. This law prohibits deceptive sales acts or practices, committed whenever the "producer, manufacturer, supplier or seller, through concealment, false representation of fraudulent manipulation, induces a consumer to enter into a sales or lease transaction of any consumer product or service.[16] Any unfair or unconscionable sales act or practice by a seller or supplier is likewise penalized.

Overall, then, the Philippine legal framework on competition already appears consistent with the requirements under Chapter 16 of the TPPA, especially with the recent enactment of the Philippine Competition Act.

[16] RA 7394, Article 50.

TELECOMMUNICATIONS SECTOR: REMAINING GAPS[17]

In 2014, the gross value added of telecommunications in the Philippines was PhP 334 billion, or 2.6 percent of GDP. The industry employed 0.9 percent (352 thousand) of the working population. However, the high price and poor quality of telecommunication services have become binding constraints to the country's development. According to the International Telecommunication Union (ITU), the costs of information and communications technology (ICT) services in the Philippines are excessively prohibitive. In the ITU's ICT Price Basket (IPB), the Philippines ranked 117th out of 166 countries as of end-2013. Among the members of the Association of Southeast Asian Nations (ASEAN), ICT services in the Philippines cost 6.1 percent of per capita gross national income, compared to the regional average of 3.7 percent. Yet, despite these rates, based on the Ookla Net Index for December 2014, the Philippines had among the slowest Internet speeds, ranking 167th out of 190 countries. Average download speed in the country was 3.4 Mbps, while average upload speed was only 1.3 Mbps, compared to the regional averages of 18.1 and 14.3 respectively. The Philippines also scored low on reliability, with only 69 percent reported achieving the speed advertised by their provider. In contrast, the reliability rating of the other non-LDCs in ASEAN ranged from 89 to 100 percent.

Access and Use of Public Telecommunications Networks and Services

Under Chapter 13 of the TPPA, each TPP member must ensure that service suppliers of other members have access to and use of public telecommunications services offered in its territory or across its borders, at reasonable and non-discriminatory terms and conditions. In the Philippines, interconnection between public telecommunications service providers or entities (PTEs) on a reasonable and non-discriminatory basis is already mandated. However, operation of the network is considered a public utility that can only be operated by Filipinos or entities with at least 60% of its capital owned by Filipino citizens.[18] These restrictions, mandated by the 1987 Constitution, are seen to diminish the Philippines' competitive capacity, limit the range of services available to domestic consumers, and constrain FDI. Easing these restrictions will entail amending the Constitution, or enacting creative legislation, such as amending the law that defines "public utilities."

The TPPA also requires members to ensure that an enterprise of a member may use public telecommunications services for the movement of information in its territory or across its borders. Measures to ensure the security and confidentiality of messages may be taken as long as they are not applied in an arbitrary or unjustifiable discrimination or as a disguised restriction on trade. Generally, there is no issue with this provision in the Philippines. Such access is of course subject to national security and privacy considerations such as those that the Data Privacy Act and Anti-Wiretapping Act address.[19]

Furthermore, the TPPA requires members to ensure that no condition is imposed on access to and use of public telecommunication networks and services (PTNS), other than to safeguard the public service responsibilities of suppliers. In particular, such responsibilities refer to their ability to make their networks or services available to the public or protect

[17] Based on TRADE (2015), "Philippine Telecommunications Law and Regulation: A TPP Gap Analysis."

[18] Commonwealth Act No. 146.

[19] RA 101073, Section 2; RA 4200, Section 1.

the technical integrity of PTNS. Conditions for access may include: (1) a requirement to use a specified technical interface for connection; (2) a requirement for the inter-operability of those networks and services; (3) type approval of equipment that interfaces with the network and technical requirements for the attachment of that equipment; and (4) a licensing, permit, registration or notification procedure that is transparent and provides for the processing of applications in accordance with a member's laws or regulations.

As PTNS in the Philippines are owned and operated by private entities, access is dependent on negotiations between contracting parties. However, public utilities are not allowed to *"provide or maintain any service that is unsafe, improper or inadequate or withhold or refuse any service which can reasonably be demanded and furnished…"*[20] To the extent that their networks may be jeopardized, PTNS can impose the above conditions for access. The Philippines also provides for mandatory interconnection for all duly authorized PTEs under RA 7925. The law provides that interconnecting carriers shall negotiate on access charges or revenue sharing arrangements, which is submitted to the regulatory agency, the TC, for information. Should the parties fail to agree on the same, it may submit the dispute to the NTC for resolution.[21]

Suppliers of Public Telecommunications Services

Interconnection: Interconnection refers to the linking with suppliers to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier.[22] The TPPA requires that each member ensure that suppliers in its territory provide, within the same territory, interconnection with suppliers of other members at reasonable rates. Likewise, each member must ensure that a *major* supplier in its territory provides interconnection for the facilities and equipment of suppliers of other members. While Philippine regulations provide for the above guidelines in the interconnection of PTEs under NTC Memorandum Circular No. 14-7-2000 (MC 14-7-2000),[23] they do not extend to interconnection with PTEs of other countries seeking to operate in Philippine territory, given the persisting constitutional restriction on the latter.

In order to facilitate interconnection and promote transparency, NTC MC 10-7-2007 mandates the development of Reference Access Offers (RAOs). As under the TPPA, a RAO is the default offer of a public telecommunication entity for access services provided to requesting service providers. However, no PTE has ever submitted a RAO for NTC's approval. A major PTE in the Philippines asserted that the NTC cannot compel entities to reveal interconnection terms, characterizing such information as trade secrets.[24] While a major PTE in the Philippines may file all interconnection to which it is party, the NTC itself discloses that the information filed as extremely limited.[25]

Number Portability: The TPPA requires that each member country ensure that suppliers in its territory provide number portability without impairment to quality and reliability, on reasonable and non-discriminatory terms and conditions. Number portability is the ability of a customer to transfer an account from one

[20] Commonwealth Act No. 146, Section 19.
[21] RA 7925, Section 18.
[22] See also Executive Order No. 59, Section 2.

[23] NTC Memorandum Circular No. 14-7-2000, Section 5.
[24] NTC can't compel telcos to reveal interconnection terms, abs-cbnNEWS.com, 20 January 2010, available at http://www.abs-cbnnews.com/business/01/20/10/ntc-cant-compel-telcos-reveal-interconnection-terms.
[25] Interview with NTC Official, 13 August 2015.

service provider to another without changing number. Without it, consumers are tied to the provider – a barrier to exit used by incumbent operators to exploit monopolistic or dominant power. There is currently no regulation that mandates number portability in the Philippines. Past efforts of the NTC to introduce it were met with strong opposition from operators, who argued that number portability would be too costly to implement.

Access to Telephone Numbers: The TPPA requires a member to ensure that suppliers of the other members are afforded non-discriminatory access to telephone numbers. NTC Memorandum Circular No. 11-5-94 provides for the numbering plan within the country, which establishes the minimum functional dialing characteristics and capabilities that the national switching network and switching equipment and accessories comprising the said network must comply with.[26] This is publicly available and PTEs are obligated to conform to the said regulation.

Additional Obligations Relating to Major Suppliers

Equal Treatment: The TPPA requires equal treatment to be accorded by a major supplier in a member's territory to suppliers of other members, as to itself, its subsidiaries, its affiliates or non-affiliated suppliers regarding the availability, provisioning, rates, or quality of like services, and the availability of technical interfaces for interconnection. This requirement is met by MC 14-7-2000. The TPPA also prohibits a member from proscribing the resale of any public telecommunications services. While the Philippines makes no such prohibition, especially to suppliers of another member, said suppliers cannot offer these services in the Philippines. The current regulatory framework leaves arrangements for the resale to the contracting parties, but there is a statutory requirement that no person shall commence the business of being a public telecommunications entity without a franchise[27] from the legislature, and a certificate of public convenience and necessity from the NTC. An exception exists for value-added service (VAS) provider, provided it does not put up its own network.[28] However, this is subject to the following: (1) prior approval of the Commission is secured to ensure that VAS offerings are not cross-subsidized from the proceeds of their utility operations; (2) other providers of VAS are not discriminated against in rates nor denied equitable access to their facilities; and (3) separate books of accounts are maintained for the VAS. The equality of treatment clause in RA 7925 (Section 23) pertains to the grant of legislative franchises. Considering that foreign telecommunications providers cannot be given a legislative franchise to operate a PTNS, the said equality of treatment clause finds no application in the Philippine context.

Unbundling of Network Elements: Unbundling requires incumbents to to lease only specific elements of a network. It allows competing operators to enter the market and provide services with considerably less sunk cost and can advance the introduction of new services while relying on the existing network and technology. The TPPA requires the members to provide its telecommunications regulatory body the authority to require a major supplier in its territory to offer access to network elements on an unbundled basis on terms and conditions and at cost-oriented rates that are reasonable, non-discriminatory, and transparent. NTC MC 14-7-2000 has similar provisions, but also provides that existing agreements on a bundled basis

[26] Memorandum Circular No. 11-5-94, 1.1.3.

[27] RA 7925, Section 16.
[28] *Ibid*, Section 11.

shall continue to be in force, until the NTC would have reestablished rates and settling procedures. Thus, the implementation of the unbundling has not been enforced. According to the NTC, it is extremely difficult to do so, citing high costs. At any rate, the NTC has no power to compel submission of information from the PTEs.

Leased Circuits Services: Each member must provide its regulatory body the authority to require a major supplier in its territory to provide suppliers of other members leased circuit services in a reasonable period of time, on terms and conditions and at rates that are reasonable and non-discriminatory, and based on a generally available offer. This is similarly governed by the guidelines on interconnection, as previously discussed. Moreover, under RA 7925, PTEs must offer leased line service to VAS providers at the same quality and at a price not higher than the prevailing leased line prices offered by the PTEs to the public. PTEs must not deny requests by VAS providers for leased line service. If a PTE is unable to provide leased line to a VAS provider, said PTE shall inform in writing, copy furnishing the Commission, the requesting VAS provider of the reasons for denial of request. The Commission may require the PTE to further substantiate its denial.[29]

Co-location: Another obligation for a member is to ensure that a major supplier in its territory provides to suppliers of other members in the member's territory physical co-location of equipment for interconnection or access to unbundled network elements based on a generally available offer, on a timely basis, on terms and conditions and at cost-oriented rates that are reasonable and non-discriminatory. If physical co-location is not practicable, the member must ensure that the major supplier provides an alternative solution, on the same terms. Rules on physical co-location are already found in MC 14-7-2000 (Sections 65 and 69).

Access to Poles, Ducts, Conduits and Rights-of-Way: In relation to co-location, each member must also ensure that a major supplier in its territory affords access to poles, ducts, conduits and rights-of-way owned or controlled by the major supplier on the same terms described above. This is again subject to negotiations between the contracting parties. Though no specific detailed guidelines are incorporated in MC 14-7-2000, the principles of reasonableness and non-discrimination are likewise applicable to access to poles, ducts, conduits and rights-of-way. Notably however, agreements as to colocation and access to poles, etc. are internal to the members and are not provided to the public.

Submarine Cable Systems: The TPPA requires that where a supplier in the territory of a member operates a submarine cable system to provide public telecommunications services, that member shall ensure that the supplier accords suppliers of other members reasonable and non-discriminatory treatment with respect to access to that submarine cable system, including landing facilities. This is currently not governed by existing regulations in the Philippines, and is subject to the bilateral negotiations of the submarine cable system owner/operator and the access seeker. However, as this is still under the framework of interconnection, the general principles and/or regulations pertinent thereto should apply.

International Mobile Roaming

TPP members are obligated to endeavor to cooperate on promoting transparent and reasonable rates for international mobile roaming services. Examples of

[29] RA 7925, Section 11.

steps to do so are: (a) ensuring information on retail rates is accessible to consumers; and (b) minimizing impediments to technological alternatives to roaming. Should a member choose to regulate rates or conditions for wholesale roaming services, it must ensure that a supplier of another member has access to the regulated rates or conditions for its customers roaming in the territory of the first member. Also, each member must provide to the other members information on rates for retail roaming services for voice, data, and text messages offered to consumers of the member when visiting the territories of the other members.

The Philippines has no regulations on international mobile roaming services, leaving it to its PTNS to negotiate with its foreign counterparts. There is a lack of transparent and reasonable rates for such services. Rate information can only be accessed by the customers through its service provider and not the NTC.

Competitive Safeguards

Under the TPPA, a member is obliged to maintain appropriate measures to prevent suppliers that, alone or together, are a major supplier in its territory from engaging in anti-competitive practices, including: (1) engaging in anti-competitive cross-subsidization; (2) using information obtained from competitors with anti-competitive results; and (3) not making available to suppliers timely technical information about essential facilities and commercially relevant information that are necessary for them to provide services.

The Philippine Constitution already explicitly provides that the State shall regulate or prohibit monopolies when the public interest so requires.[30] Such emphasis on competition found its way into RA 7925 (Section 4(f)) and, again, in MC 14-7-2000, the NTC stipulates that it can disapprove an interconnection agreement if it is anti-competitive.[31] It may be noted, however, that RA 7925 expressly mandates cross-subsidization to unprofitable local exchange areas to promote telephone density and provide extensive access to basic services.[32] In addition, to give teeth to the Philippines' increasingly difficult battle against anti-competitive acts and practices in various industries and markets, Congress has passed RA 10667, or the Philippine Competition Act (PCA). The PCA prohibits acts that restrict, prevent or lessen competition, such as bid manipulation, controlling production, markets or technical development. Mergers and acquisitions that substantially prevent, restrict or lessen competition are likewise prohibited.[33] It is also conceivable that the Philippine Competition Commission (PCC) that would be created by the PCA could also work with the NTC to address some of the challenges previously discussed to the extent that these unreasonably restricts competition in the sector.

Licensing and Enforcement

The TPPA requires a member to have a telecommunications regulatory body that is separate from and not accountable to any supplier and is able to render impartial decisions. Such body should not hold a financial interest or maintain any operating or management role in such a supplier. The NTC fulfills this function. It is the agency that has jurisdiction over licensing, pricing, adoption of standards of reliability and interoperability, frequency allocation and assessment, dispute resolution and consumer protection.[34] The licensing

[30] 1987 Constitution, Article XII, Section 19.

[31] Memorandum Circular 14-7-2000, Aritcle V, Section 14 (d).
[32] RA 7925, 5(c).
[33] RA 10667 (RA 10667), Section 14 to 15.
[34] Epictetus E. Patalinghug and Gilberto M. Llanto, Competition Policy and Regulation in Power and Telecommunications, *Philippine Institute for*

process of the Philippines is in accordance with the TPPA which requires the same to be made publicly available. The NTC publishes its Rules of Practice and Procedure ("Rules") for public information. Existing permits and/or licenses are publicly available, while the terms and conditions of the licenses can be found in the document issued itself. In the event of denial, the NTC provides the reasons for the same, and any revocation or refusal for renewal undergoes the proper proceedings pursuant to its Rules.

NTC's powers to enforce its mandate can be found in RA 7925 and the Public Service Act or Commonwealth Act No. 146 (CA 146). The sanctions however are not up to par with the TPPA's requirements. The fine imposable by the NTC is only 200 pesos per day for every day during which default or violation continues.[35] This fine was established eighty years ago in the Public Service Act of 1936. It is clearly insufficient to deter anti-competitive behavior. There are no penalties or sanctions provided under RA 7925. The PCA empowers the Philippine Competition Commission to impose significant and non-trivial fines and penalties and the NTC and the Commission could set up such a system.

The TPPA requires a telecommunications regulatory body to resolve the related disputes, including interconnection-related ones. The role of the NTC to preside over a dispute on interconnection charges can be found under RA 7925. The procedure for the proceedings before the NTC is set forth in Rules of Practice and Procedure of the Commission, and is appealable to the Court of Appeals.[36]

Development Studies Discussion Paper Series No. 2005-18, November 2004.

[35] Commonwealth Act No. 146, Section 21.

[36] *See* Rules of Practice and Procedure of the Commission, available at http://www.ntc.gov.ph/info_lawsrulesregulations_ntcmanuals.php; Revised Administrative Circular 1-95.

Allocation and Use of Scarce Resources

Each member is obligated under the TPPA to administer its procedures for the allocation and use of scarce telecommunications resources, including frequencies, numbers and rights-of-way, in an objective, timely, transparent and non-discriminatory manner.[37] Moreover, it must make publicly available the current state of allocated frequency bands, but retains the right not to provide detailed identification of frequencies allocated or assigned for specific government uses. However, when making a spectrum allocation, each member must rely on an open and transparent process, and market-based approaches in assigning spectrum.

Pursuant to NTC Memorandum Circular No. 8-9-95, the radio spectrum allocation and assignment is subject to review in the interest of public service and in order to keep pace with the development in the wireless technology with the end in view of insuring wider access to the limited radio spectrum and the use of cost effective technology.[38] The NTC issues circulars providing for frequency allocations for cellular mobile telephone systems and broadband wireless.[39] Assignments of frequency allocated are not provided for general public information due to security reasons.

Universal Service

The underlying concept of universal service is to ensure that all citizens have access to basic telecommunications services at reasonable charges. The TPPA requires each member to administer any universal service obligation

[37] Article 13.19 (1).

[38] Memorandum Circular No. 8-9-95, Rule 600.

[39] *See* Memorandum Circular Nos. 06-08-2005; 03-03-99; 05-11-88.

that it maintains in a transparent, non-discriminatory and competitively neutral manner and ensure that its universal service obligation is not more burdensome than necessary.[40] The full universal service goal of RA 7925 is met by the State requirement for local exchange carriers to cross subsidize underserved areas. Unfortunately, the traditional approach of cross-subsidization is no longer effective. Cross-subsidies create strong distortions that impede effective competition.

Over the last two decades, other countries have increasingly turned to Universal Service Funds (USFs) to address universal service requirements. USFs operate by having the industry itself finance projects to extend the reach of PTNS, with PTEs typically contributing between 0.5 to 5 percent of their revenues. By applying fees horizontally to the whole sector, relative prices remain steady, and distortions in the economy are minimized.

In summary, a number of legal and policy issues in the telecommunications sector need to be resolved before the Philippines can be considered fully compliant with the requirements of the TPPA:

- Amendments to, or total replacement of the Public Telecommunications Policy Act (RA 7925) are in order, especially with respect to interconnection, unbundling, cross-subsidization, number portability, and the powers of the National Telecommunications Commission (NTC).

- Transparency requirements under the TPPA also need to be addressed. Interconnection agreements of major suppliers must be filed with the country's telecommunications regulatory body and made publicly available. But interconnection agreements between Philippine operators have been mainly withheld from NTC and the public, on the argument that these are trade secrets. Transparency is also an issue in access arrangements and spectrum allocation.

- The TPPA also requires that the telecommunications regulatory body have the authority to compel major suppliers to offer access to network elements on an unbundled basis. Unfortunately, while some guidelines are in place, unbundling has not been implemented as the NTC still has to establish rates and settling procedures. The NTC maintains that it lacks the power to compel PTEs to submit the needed information, and that complexities related to common costs make unbundling extremely difficult.

- Number portability, another requirement of the TPPA, has not been required by NTC in the face of strong opposition from incumbent operators.

- The biggest impediment to TPP compliance in the telecommunications sector is the Constitutional restriction of foreign ownership and participation in public utilities to a maximum of 40 percent. Hence, foreign telecommunications providers cannot be given a legislative franchise to operate in the country and are unable to offer services to the public.

[40] Article 14.15.

RULES OF ORIGIN AND OPERATIONAL CERTIFICATION[41]

To enjoy preferential tariffs accorded to imports from fellow members in an FTA, products must have truly originated from a member country, and not merely transshipped from a non-member country. Rules of origin (ROO) govern the determination of conditions under which traded goods are considered as having originated within the free-trade region.

The de facto Philippine ROO regime is best reflected in its longest running regional FTA membership, with the Association of Southeast Asian Nations (ASEAN). The current ROO regime has evolved to its current state with the implementation of regional FTAs with ASEAN and its Dialogue Partners (DPs).[42] Its features have been adopted and legally incorporated into the ASEAN Free Trade Area Common Effective Preferential Tariff (AFTA-CEPT), and now consolidated into one comprehensive ROO Chapter for the ASEAN Trade in Goods Agreement (ATIGA). The origin criteria adopted, the structure and orientation of application in its product-specific rules (PSRs), and the fundamental principles and procedures for certifying and verifying origin under ATIGA, could best represent the Philippines' preferred ROO approach in reciprocal preferential trade relations.

ATIGA introduced effective amendments to the ROO provisions, PSR annex and operational certification procedures (OCP). The most notable were the reforms made on the origin residual rule of 40% value added content, adoption of comprehensive PSRs for all tariff lines, introduction of a new accumulation concept, application of de minimis rule, new consignment and transhipment arrangements that enabled the

preservation of originating status and tariff preference for an exported product. Later in its implementation, new origin certification arrangements such as self-certification were permitted on a pilot basis among consenting ASEAN member states. After the completion and implementation of the ATIGA ROO Chapter, the Philippines has used it as one of the bases for any regional and bilateral ROO negotiations.

Originating Goods

For goods originating from within the trade grouping (an "originating" good), the TPPA adopts a conceptual arrangement similar to those of AJCEPA, AANZFTA and PJEPA[43]. The Philippines' other FTAs with ASEAN also provide for the same approach for conferring origin, but also applies the "accumulation rule" wherein a product that is produced entirely from materials originating from a member or members of the FTA is considered outright as originating from the member country from which imported. Thus, the Philippines already shares the operating principle, form and substance of the TPPA's concept of what constitutes an originating good.

Regional Value Content

In the TPPA, there are four permitted methods of calculating regional value content (RVC):

- *Focused value method* – where the calculation is based on the

[41] Based on TRADE (2016), "Rules of Origin and Operational Certification: A Philippines TPP Readiness Assessment."

[42] The ASEAN dialogue partners are Australia, China, India, Japan, Korea and New Zealand.

[43] ASEAN-Japan Comprehensive Economic Partnership Agreement, ASEAN-Australia-New Zealand Free Trade Agreement, and Philippines-Japan Economic Partnership Agreement.

value of non-originating materials from a specified list indicated in the product-specific rules
- *Build-down Method* – based on the value of all non-originating materials
- *Build-up Method* – based on the value of all originating materials
- *Net Cost Method* – based on net cost of production

The RVC threshold to be complied with and the method of calculation to be used is indicated at the applicable PSR for a product or tariff line.

The Philippines' FTAs, on the other hand, compute RVC using either build-up or build-down methods based on the FOB price, whereas the TPPA adopts two other RVC computations: net cost (mostly for motor vehicles), and focused value (mostly for processed products with identifiable materials). The RVC thresholds adopted by the TPPA are higher in most tariff lines, ranging from 30% to 55%, with the most common or dominant threshold being 45% (under the build-up method) to 55% (under build-down method).

Accumulation

In the TPPA, members are allowed to fully accumulate the value of all originating materials and to accumulate all value added (even if non-originating) into the manufacture of other materials used to produce the final product. This is regardless of whether the value added by each member in transforming the materials is considered originating or non-originating. In such cases, the competent authority in the importing member country must take into account relevant details of all accumulation instances undertaken to produce the final product. This may only be determined through the verification process, as there is no direct information to readily determine this under the prescribed minimum data requirements for the certification of origin.

Under its existing FTAs, the Philippines implements two types of "accumulation" arrangements: the preferential *diagonal* (regional) *accumulation* in all its ASEAN-based FTAs and the non-preferential *partial accumulation* scheme under ATIGA. The diagonal accumulation scheme grants tariff preference to an originating material from another FTA member and the manufacturer incorporates the full value paid to said accumulated materials to the total value of the final product. Under the non-preferential partial accumulation scheme of ATIGA, the Philippines and ASEAN are allowed to apply the MFN rate to the non-originating materials from another ASEAN country. In the ATIGA CO, it is marked "for accumulation only," and its user/producer is allowed to accumulate the certified originating value of the imported material to the value of the final product.

Product-Specific Rules of Origin

In general, the PSRs adopted under the Philippines' FTAs and TPP are similar for many groups of products. The following are sectors are where there are some deviations: (1) vegetable fats and oils, (2) cigarettes, (3) chemical products, (4) polymer products, (5) fiber, yarn, fabric and apparel products, (6) nuclear reactors, boilers, and machineries, (8) vehicles other than railway and tramway and parts and accessories.

Transit and Transhipment

The TPPA includes applicable consignment rules that must be complied by an exporter when transporting goods to the consignee from the importing member. The TPPA mandates the shipment conditions for two instances: (1) goods transported directly to the importing country without passing through a non-member; or (2) goods that passed through

a non-member territory/customs controlled facilities before their ultimate destination. The consignment rule further requires that, when a shipment necessitates transit to a non-member, the consignment process must demonstrate that the articles did not enter into trade or did not exit customs controlled facilities, and that all operations undertaken (if any) must fall within the nature of specified activities. The rules for transit and transshipment in Philippine FTAs are similar.

Claims for Preferential Treatment

The TPPA empowers the importer to make a claim for preferential treatment based on the certificate of origin (CO) duly accomplished by the manufacturer or exporter, and to determine and declare origin status, provided that the manufacturer or exporter has provided the necessary information on the origin qualification from. The TPPA allows members five years from its entry into force to enact domestic laws and regulations that will enable the full operation of this arrangement. In the interim, members unable to provide for such arrangement will require from all other members exporting originating goods or goods for accumulation purposes to submit signed COs bearing all the required information to the Customs authorities. Under the TPPA, unlike in most FTAs, the CO may be used for multiple shipments if the goods are exported on a schedule and are identical by nature. The importing authority can extend the period if its laws and regulations allow for that.

Unlike the TPPA, the FTAs of the Philippines empower the importer to make a claim for preferential treatment based on the CO issued by the competent authority of the exporting member or the Chamber of Commerce of jurisdiction and for the account of the exporter. The CO is issued after an application, in writing, by the exporter and is printed solely and under authority or regulation by the issuing agency or its private designees, based on an agreed format, containing all required information, and signed and marked accordingly with a seal or stamp. A CO may only be used for for a single shipment, which may be covered by multiple invoices and for multiple items/goods.

A fundamental structural gap exist between TPPA and Philippine FTAs. The TPPA designates and empowers private entities or natural persons to issue a CO, while the Philippines' FTAs, by default, only authorize competent authorities to certify the origin of a product. The Philippine FTAs do not allow importers to issue any certification of origin. There are, however, initiatives in all ASEAN countries to allow self-certification by approved exporters.

The TPPA does provide that members who issue a CO through a competent authority when this Agreement is signed, may implement the TPPA using their current scheme for the issuance of the CO, provided that they notify all other members of its intention to apply this arrangement at the time of the entry into force of the Agreement for the said members. This arrangement may only be used for an initial five year period from the entry into force, extendable for another five years, but will cease effectivity within 12 years.

Waiver of Certification of Origin

The TPPA waives the requirement to present a CO for imported goods from other members, provided that the value of the goods does not exceed USD 1,000 per shipment or any higher threshold allowed by the the domestic laws or regulations of the importing member. Instead, the importer must make a declaration in accordance to the established domestic requirements, that the goods qualify as originating. The TPPA also recognizes the rights of members to waive the requirement for a

CO to any imported goods, in accordance with domestic laws and regulations. Philippine FTAs have similar provisions, but a different threshold (typically USD 200, except AIFTA, which has no such provision).

Record Keeping Requirements

The TPPA mandates members to require importers, persons, and entities acting as exporters to keep, for no less than five years from the date of CO issuance, all relevant documents for the exportation or importation of goods. The TPPA recognizes various storage mediums, including written, electronic, or optical ones. The record keeping requirements ensure readiness to comply with post-export and post-entry verification procedures. In comparison, the FTAs of the Philippines require that the CO issuing authority and exporters, producers, importers, in accordance with domestic laws and regulations, keep records and all relevant documents for no less than three years (or two years under AIFTA).

Verification of Origin

The TPPA origin verification procedures provide that the Customs authority in the importing country can communicate directly with its private sector stakeholders to request information and documents in relation to their current or past claims for preferentiual tariff. The nature of the inquiry may be minor non-origin or non-consignment related verifications, or more complex and technical. Failure by the importer to provide this evidence allows the Customs authority to seek the information directly from the exporter or manufacturer. Further, the Customs authority can also simultaneously initiate onsite verification procedures. All requests for verification visit must be notified as well to the relevant government officials or authorities of the exporting country.

Under the Philippine FTAs, the competent authority of the importing country, for minor and complex and technical concerns, may request relevant information and additional documents from its importer, as well as from the competent CO issuing authority of the exporting member. Further, the Customs authority of the importing country is also allowed to initiate onsite or verification visit procedures, provided that the requests for information and the proposed details and requirements of the verification visit are covered by corresponding formal written request or notice from the Customs authority of the importing member, addressed to the competent authority in the exporting country. The results of the verification visit or the resulting formal determination must be duly notified to all parties (importer, exporter, manufacturer, government counterpart officials) within ten days from its official date of issuance.

In sum, the TPPA and Philippine FTAs both provide for similar procedures that implement retroactive verification and onsight verification visits. However, the timeframe of completion of each action required to a specific member is relatively shorter under the TPPA.

Refunds and Claims for Preferential Tariff Treatment After Importation

The TPP mandates members to process and grant claims for preferential tariff for shipments that have not made such claim at the time of importation. The importer has a year to submit the requirements of the ROO Chapter before the Customs authority in the importing member. The FTAs of the Philippines do not provide for such provision. However, they do not preclude members from implementing domestic laws and regulations that will enable its local importers to benefit from such domestic arrangement.

INVESTOR PROTECTION AND ISDS[44]

Investor-state dispute settlement (ISDS) provisions have traditionally been promoted as a key driver of increased FDI into a host country by: (1) allowing foreign investors the full protection of investments under international law; and (2) by providing foreign investors with the legal mechanisms that allow a government to be called to arbitration when it has purportedly violated the provisions of a Bilateral Investment Treaty (BIT). To strengthen the rule of law and increase foreign investor confidence, the TPPA ISDS provisions afford normative protection to all TPPA investors and grant them the right to collect monetary damages as well as challenge the TPPA host party's conduct, including expropriation measures, through binding arbitration and panel proceedings.

It should be made clear that ISDS provisions are distinct from those for state-to-state dispute settlement (SSDS). While ISDS is a remedy mechanism given to private investors, SSDS allows TPPA states to remedy violations by their TPPA partners. There may be overlap when an ISDS award is not complied with by a state party, as when, for example, a government fails to pay monetary damages. In this case, a TPPA party can be sued via SSDS proceeding.

ISDS Provisions

The TPPA requires members to accord treatment to investors and investments from another member that are no less favorable than what it accords its own investors/investments or those of another member or non-member. These are the essential rules commonly known as most favored nation and national treatment obligations. The TPPA further enhances investor protection by adopting the "minimum standard" in the treatment of investments, that includes the application of customary international law, and the standards of fair and equitable treatment as well as the standard of full protection and security. Specifically included are a definition of expropriation measures and the obligation of all TPP members to exercise this sovereign right only when all of the following requirements are met: (1) public purpose; (2) non-discrimination; (3) prompt, adequate and effective compensation; and (4) due process of law. To round off the investor incentives, the TPPA prohibits any performance requirements on investment (such as preference for domestic goods, restriction of sale within the territory, or technology transfer requirements), and nationality requirements for senior management positions. The TPP does, however, allow the requirement that a "majority of the board of directors" be resident or of a particular nationality[45].

Under the TPPA, an investor may seek direct redress against a state party for any breach of its commitments. The TPPA guarantees a mechanism that is transparent, neutral, and through internationally accepted procedures under ICSID or UNCITRAL. It also provides non-disputing parties an opportunity to be heard through amicus curiae[46] and non-disputing party submissions. To address potential abuse of the remedy, the ISDS provisions prohibit forum shopping by way of requiring a waiver from the disputing party of alterative venues and also requires that, prior to proceedings, every effort is made by the investor and the state to resolve the matter. Claims can be made only when there is a breach of provisions, an investment authorization, or

[44] Based on TRADE (2016), "The Philippines' Readiness for the Trans-Pacific Partnership: Focus on Investor-State Dispute Settlement."

[45] An example of this is the residency requirement in Section 23 of the Philippine Corporation Code.

[46] A non-party to the case, who has information on the case.

an investment agreement, and if said breach incurred loss or damages. The statute of limitations on claims is 3 years and six months from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach.

The arbitration panel consists of three arbitrators, with each disputing party appointing one and the Secretary-General of ICSID selecting the presiding arbitrator, who should not have the same nationality of the respondent or the claimant, unless otherwise agreed upon. It shall be held in a venue agreed upon by the parties, or agreed by the tribunal, under the jurisdiction of a state signatory to the New York Convention.

ISDS is not new to the Philippines, as it has been an integral part of many bilateral agreements. For example, the NAIA Terminal 3 controversy was brought before ICSID by the German investor, Fraport AG, pursuant to the Germany-Philippines BIT.[47] The Philippines also has mature legislation on arbitration. Republic Act No. 9285 (Alternative Dispute Resolution Act of 2004) addresses the recognition of foreign arbitration proceedings, awards, and related enforcement. The Philippines is an original signatory to the New York Convention.

The Philippines, however, would have to revisit the current range of constitutional constraints relating to nationalized industries and service sectors, and adopt policy reforms in selected areas of investment or service sectors (in mass media, private radio networks, advertising; natural resources or mining enterprises, land ownership, public utilities; and education and practice of professions).[48]

In addition, various Philippine measures would be covered by the TPPA prohibition against performance or export requirements and would need to be either amended or reserved. Examples are DND-authorized exceptions to weaponry manufacture for export, preferences for certain infrastructure and government-funded contracts, and export or technology transfer requirements.[49]

Governing Law

While the TPPA is explicit in the use of international law in resolving disputes, it includes, as a footnote, the statement that "[f]or greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent when it is relevant to the claim as a matter of fact." The applicability of domestic law is more explicit if the dispute arises not from a TPPA provision, but from an investment authorization or agreement. In such cases, the TPPA clearly indicates that the applicable laws are the following: (1) the rules of law applicable to the pertinent investment authorisation or agreement, or as the disputing parties may agree otherwise; or (2) if, in the agreement the rules of law have not been specified or otherwise agreed: the law of the respondent, including its rules on the conflict of laws and international law as applicable.

It remains to be seen how this will be reflected in the application of the TPPA's ISDS. It may be noted that under NAFTA, which has similar provisions on environment and investment, there have been disputes where an environmental defense by the state was not recognized by the arbitration panel. For example, in Bilcon of Delaware Inc. et al v. Canada (2015), where Canada denied mining licenses stating that these violate

[47] See generally, https://icsid.worldbank.org/apps/ICSIDWEB/cases/pages/casedetail.aspx?CaseNo=ARB/11/12.

[48] See generally, Executive Order No. 184 (2915) issued 29 May 2015, and related mentioned provisions and issuances, http://www.gov.ph/2015/05/29/executive-order-no-184-s-2015/.

[49] Ibid. at List B, par. 2, citing Republic Act No. 70142/8179.

"community core values," the investor claimed that by encouraging investments in the mining industry, Canada created a reasonable expectation from investors that their licenses will be approved, or at least, that they will be judged based on expected criteria. According to the panel, “community core values” were a form of community referendum and, hence, effectively, new policy. In sum, the decision appeared to interpret that a new policy (the community referendum) could not run counter to the previous policy (encouraging investment) which was already considered by the investor in making preparatory investments.[50] This case is specifically important in the Philippines, where the Supreme Court generally recognizes that licenses are revoked if new poliy requires so.[51]

It is worth noting that such provisions do not create conflicts of laws. The TPPA party is not bound to violate its own policy (and therefore its sovereignty) in order comply with arbitration findings. Awards in the TPPA’s ISDS are limited to monetary damages and restitution of property, but cannot require specific performance or award punitive damages. The panel therefore need not decide on the primacy of domestic law versus the TPPA, as it cannot compel the state to issue a license. It can only ask the State to pay back the investments made, and order the restitution of property if any. An investor is protected by the knowledge that its investments can be returned should state policy no longer support it.

Appeal

Arbitration proceedings are generally final and parties cannot resort to an appeal. The ACIA, AANZFTA and the NAFTA similarly do not provide for an appeals mechanism. However, the TPPA does provide an opening for such a remedy in the future. In the event that an appellate mechanism is developed in the future under other institutional arrangements, the parties must consider whether awards should be subject to that appellate mechanism.

The Philippine Supreme Court has on occasion ruled that parties may not stipulate among themselves the availability or unavailability of an appeal, although such rulings were based primarily on Civil Code provisions on arbitration and compromise prior to the Republic Act No. 9285 (Alternative Dispute Resolution Act of 2004).

Confidentiality

Transparency of arbitral proceedings is widely stipulated in trade agreements. The TPPA includes provisions that arbitral proceedings shall be transparent as a general rule. Confidential information will have to be identified as such by a party before it may be exempted from the transparency provision. In Philippine law however, it is the opposite. Confidentiality is the general rule. Republic Act No. 9285 states that international commercial arbitration proceedings, “shall not be published except (1) with the consent of the parties, or (2) for the limited purpose of disclosing to the court of relevant documents in cases where resort to the court is allowed herein.”

TPPA Exceptions

The TPPA attempts to address criticisms of the tendency of trade agreements to infringe on domestic regulatory supremacy. The TPP allows certain exceptions for broader state government discretion in the areas of environment, labor, and tobacco control. Additionally, the TPPA allows denial of ISDS benefits to investors whose ultimate owners are

[50] In addition, Canada did not carry out its mandate to conduct a “likely significant effects after mitigation” analysis to the whole range of potential project effects, as required by the Canada Environmental Assessment Agency.

[51] See, for example, G.R. No. 101083, 30 July 1993.

non-TPP parties or host state persons or citizens.18

Environment: While the TPPA, as a general rule prohibits indirect expropriation, it explains that this does not preclude party regulations that "protect legitimate public welfare objectives, such as public health, safety and the environment." This appears to address concern particularly from environmental groups that ISDS provisions prioritizes private investments over the right of the state to protect the environment.

Labor: The TPP devotes an entire chapter on labor standards, primarily expressing the parties' commitment to the ILO declaration and universally accepted labor standards such as freedom of association, elimination of forced labor and child labor and the prohibition of discrimination. Importantly, it also contains a "non-derogation clause" which states that it is inappropriate for member states to encourage trade or investment by weakening or reducing the protections afforded in each Party's labour laws. While grounds that can be raised in ISDS are only those found under the chapter on investments, the spirit of this chapter should still hold sway when arbiters decide labor cases, and it is one of raising labor standards over and above profit and investment.

In addition, a common case pointed out by detractors to the TPP's ISDS provision is the case of Veolia Propreté v. Arab Republic of Egypt[52], which is often described as a private corporation suing a sovereign nation because it raised its minimum wage. However, this case relates more to a specific performance under a contract. Should a case be filed against the Philippine government for costs accrued because it raised the minimum wage, the issue would be more of a contractual controversy than a labor controversy. In this situation, the tribunal can only rule whether or not the Philippines has to pay the private company more. It may not rule that the minimum wage should be amended.

It should also be noted that Republic Act No. 9285 states that labor disputes covered by the Labor Code cannot be submitted to arbitration. This essentially covers only disputes between employers and employees and not labor policies. However, should the country sign the TPPA, investors are free to bring suit against the Philippines if it feels that its labor policies have violated its right as an investor under the TPPA.

Last but not least, national senior management requirements under Philippine law may have ISDS repercussions. The TPPA states that "[n]o Party shall require that an enterprise of that Party that is a covered investment appoint to a senior management position a natural person of any particular nationality." The Philippine constitution, on the other hand, states that "the practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law." The exception prescribed by the Labor Code states that en employment permit can be issued to a foreigner only "after a determination of the non-availability of a person in the Philippines who is competent, able and willing at the time of application to perform the services for which the alien is desired."

Notably, the TPPA makes a special case on claims challenging tobacco control measures, where it allows a party to opt out of ISDS or deny benefits of ISDS.

[52] 57 ICSID Case No. ARB/12/15.

INTELLECTUAL PROPERTY: CRUCIAL QUESTIONS[44]

Chapter 18 of the TPPA on Intellectual Property contains a wide range of provisions on the various aspects of intellectual property (IP) protection. This section summarizes only selected topics under the chapter.[54]

In the Philippines, the protection and promotion of intellectual property rights is enshrined in the 1987 Constitution (Article IV, Section 13). In addition, there are a number of laws that govern IP protection and enforcement, including Republic Act No. 8293 (IP Code), enacted to comply with the country's commitments under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and RA 10372, enacted to comply with obligations under the World Intellectual Property Office (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The country is also a member of various treaties administered by World Intellectual Property Organization (WIPO), including the Paris Convention (1965) and the Agreement on Trade Related Aspects of Intellectual Property (1995). The Philippines is also a signatory to several IP-relevant bilateral treaties, and as a member of ASEAN, has entered into various IP related multilateral treaties, including the ASEAN Framework on Intellectual Property (1995), which has yet to enter into force.

Under the IP Code, protection for trademarks, inventions, utility models, and industrial designs is granted upon registration with the Intellectual Property Office (IPO). Well-known, unregistered marks are also protected with respect to identical or similar goods or services.

Both registered and unregistered marks are protected against unfair competition. Civil and criminal remedies are available to IP owners in cases of IP rights violation. Complaints for IP rights violation may be filed with the appropriate regional trial courts (RTC), which may grant provisional remedies such as temporary restraining order and issue warrants for the search and seizure of infringing goods and materials. Various administrative remedies are also available, including through the Bureau of Legal Affaris (for administrative complaints on IP violations), Bureau of Customs (for hold orders on goods suspected of infringement), and the Optical Media Board (to resolve administrative cases and impose administrative sanctions against violators of the Optical Media Act). Cases pending before the BLA and the Office of the Director General (ODG) are referred to the IPO Mediation for voluntary mediation.[55]

Trademarks

Under the IP Code, only visible signs are registrable as trademarks, in line with the TRIPS Agreement. On the other hand, visibility is not a condition for registration (e.g., in cases of sounds and scents) in the TPPA, which also states that trademarks must include collective and certification marks. The TPPA also protects geographical indications (GIs)[56] under the trademark system.

[53] Based on TRADE (2016), "A Study on the Philippines' Readiness For TPP: Focus On Intellectual Property."

[54] A more comprehensive exposition may be found in full paper.

[55] IPO Office Order No. 154, Series of 2010

[56] A geographical indication (GI) is a name or sign used on certain products associated with a specific geographical location or origin (a town, region or country). Use of a GI may act as a certification that the product possesses certain qualities, is made according to traditional methods, or enjoys a certain reputation, due to its geographical origin.

There is no express protection of certification marks in the IP Code, although, in practice, certification marks are registered by the IPO and protected as trademarks. The IP Code lists GIs among the IP rights, but does not expressly protect them. In practice, trademarks containing GI are accepted by the IPO and examined under trademark rules. To be granted registration, however, the IPO requires that GIs be disclaimed and GIs are hence not protected as trademarks. While the TPPA recognizes that GIs may be protected through a trademark or by other means, it does not mandate any particular system, but seeks to prevent GI protections that will risk confusion with existing trademarks or will prevent the use of customary terms. Should the Philippines join the TPP, this may render future agreements with the European Union difficult to achieve if the European Union demands full recognition for its GIs.

The TPPA provides that each member shall make available an appropriate procedure for a non-judicial resolution of domain name disputes, and that each member make available online public access to an accurate database of contact information of domain-name registrants. While cybersquatting is a punishable offense under Republic Act No. 10175 (Cybercrime Prevention Act), the Philippines does not have a system for non-judicial resolution of disputes involving domain names registered by dotPH, although dotPH recognizes the decisions by the WIPO and the Hong Kong Dispute Resolution Center. Should the Philippines join the TPPA, it will be obliged to establish and maintain its own system for non-judicial resolution of domain name disputes.

Patents and Undisclosed Test or Other Data

The TPPA provides that each member shall make patents available for any of the following: new uses of a known product, new methods of using a known product, or new processes of using a known product, a provision that has no equivalent in the TRIPS Agreement. The IP Code prevents patenting of the mere discovery of any new property, or new use for a known substance, or the mere use of a known process unless such known process results in a new product. This is meant to prevent patents from being evergreened (extended continuously) and promote the development of generic drugs, to ensure greater access to cheaper and quality medicines. For the Philippines to join the TPPA may require amendment of the IP Code, the implications of which must be carefully assessed, particularly on wide access to medicines and possible impacts on public health.

A TPP member may exclude from patentability plants other than microorganisms. However, each member confirms that patents are available at least for inventions derived from plants, although the TPPA does not define what this means. The TRIPS Agreement likewise allows exclusion from patentability of plants other than microorganisms. However, the TRIPS Agreement grants members the option of protecting plant varieties by *sui generis* protection or by patents. Republic Act No. 9168 (Plant Variety Protection Act) of 2002 provides *sui generis* protection for plant varieties, in preparation for the Philippines' accession to the 1991 Act of the UPOV Convention (UPOV 1991). Should the Philippines join TPP, the government needs to study the implications of granting additional patent protection for plant varieties beyond that provided under the Philippine Plant Varieties Act, and ascertain the nature and the extent of its impact on food security.

The TPPA provides that a member must, at the request of the patent owner, compensate for delays in issuance of patents, if any. This provision also has no

equivalent in the TRIPS Agreement. The Philippines, nonetheless, should have no problem with this as it issues patents within five years from the date of application, or three years after a request for examination of the application has been made.

With respect to pharmaceutical products, there are a number of differences between the TPPA and the TRIPS Agreement. The TPPA requires that members adjust the patent term to compensate the owner for unreasonable curtailment as a result of the marketing approval process. This will require amendments to the IP Code. An off-patent drug presented as a new indication, a new formulation, a new method of administration, or a new combination is covered by the TPPA data exclusivity provisions, and can delay introduction of generic medicines in a member's market. The Philippines must assess the impact of this provision on access to crucial medicines, and negotiate for flexibilities such as those granted to Malaysia and Peru.

Another TPPA provision that goes beyond TRIPS requires each member to provide a regulatory mechanism that links marketing approval for pharmaceutical products to patent status (e.g., a notice to the patent holder that a person is seeking to market the product, giving applicable time for the patent holder to seek remedies). Public health advocates object to this provision not only because it offers patent holders an advantage not available to patent holders in other areas of technology, but also because patent linkage can create an additional burden on medicines regulators.[57] The United Nations Rapporteur on the Right to Health has accordingly cautioned developing countries against adopting a system of patent linkage[58] as even spurious patents may function as barriers to generic medicine registration. Prior to 2005, the Philippines had in place a patent-linkage system. The Philippines must assess the impact of this provision on access to medicines as well as the administrative and budgetary considerations for its implementation.

Among the most controversial of TPPA provisions are those that protect biologics, which the TRIPS Agreement does not have. Unlike drugs, which are typically manufactured through chemical synthesis and have generally well-defined chemical structures, biologics are mostly very large, complex molecules or mixtures of molecules, formed in a living system such as a microorganism, or plant or animal cells. Most countries do not provide data exclusivity protection for biologics. Where they do, practices vary on the length of data exclusivity protection. Moreover, the TPPA requires countries to apply the provision on biologics to a very broad range of products. The IP Code contains no express provisions on biologics. Should the Philippines join the TPPA, the Philippines must assess the impact of this provision on access to medicines and public health. The Philippines may also negotiate for flexibilities that can mitigate its negative impact, such as those granted to Malaysia and Peru.

Copyright and Related Rights

With the amendment of the IP Code to comply with the provisions of the WCT and the WPPT, most of the TPPA obligations relating to copyright are already provided for under the law. However there are new obligations set

[57] See: The Trans-Pacific Partnership Agreement: Implications for Access to Medicines and Public Health by UNITAID. Available at: http://www.unitaid.eu/en/rss-unitaid/1339-the-trans-pacific-partnership-agreement-implications-for-access-to-medicines-and-public-health

[58] Supra, footnote 28 (UNITAID)

forth in the TPPA that would require further amendments to the IP Code.

First, TPPA provisions on the terms of copyright protection extend copyright terms beyond those in the Berne Convention, the TRIPS Agreement, the WCT and the WPPT (e.g., up to 70 years after the author's death, rather than 50 years). Should the Philippines join the TPPA, it must amend the IP Code to reflect the copyright term extension for works covered by the TPPA.

The TPPA provisions on technological protection measures (TPM) provide stronger protection requiring members to impose civil and criminal sanctions for circumventing such measures, or manufacturing or marketing related products. The TPPA provisions on TPM have no equivalent in the Berne Convention and the TRIPS Agreement, as these agreements predate the rise of these technologies. WCT merely requires the members to provide adequate legal protection and remedies, without providing specific modes for these. The IP Code does not consider the circumvention of TPM as an independent civil or criminal offense from infringement of copyright and related rights. Should the Philippines join the TPPA, relevant IP Code provisions must again be amended. As the TPPA includes pure access controls, this could mean that circumventing or supplying devices for circumvention of TPM, whose only purpose is to control market segmentation for legitimate copyright content, may be considered illegal.

Enforcement

The TPPA reflects the general obligations set out in TRIPS, recognizing the need to both prevent and deter infringement, as well as the need to ensure safeguards against abuse and fairness and equity in all enforcement. Under Philippine laws, including the IP Code, the Electronic Commerce Act, the Consumer Act, the Tarrif and Customs Code, and the Cybercrime Prevention Act, civil, criminal and administrative remedies are available in instances of copyright infringement. These laws were enacted in compliance with the provisions of the Paris Convention, the Berne Convention, the TRIPS Agreement, the WCT and the WPPT, which may have to be amended to comply with the TRIPS-Plus obligations under the TPPA.

The TPPA requires that each member provide for criminal procedures and penalties at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. Criminal penalties are provided for under the IP Code, which was enacted in compliance with the TRIPS Agreement. A shift to the TPPA interpretation of the phrase (commercial scale) will have a significant impact on the enforcement of these IP rights. The TPPA also requires criminal procedures and penalties in cases of importation and exportation of labelling and packaging, bearing trademarks without authorization of the trademark owner, and for the unauthorized copying of cinematogaphic work. Penalties for the latter are provided for in Republic Act No. 10088 (Anti-Camcording Act). The first provision has no equivalent in the TRIPS Agreement, but the IP code provides criminal penalties for acts of trademark infringement. The IP Code does not provide criminal penalties for aiding and abetting trademark infringement, as required by the TPPA. However, the IP Code imposes criminal liability against not only the person who directly commits copyright infringement, but also the one who benefits from the infringing activity of another person.

Per the TPPA, each member must ensure that persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to or used by others without consent. While the IP Code discusses the protection of undisclosed information, it does not define

trade secrets. Trade secrets were defined by Supreme Court precedent in the case of *Air Philippines Corporation vs. Penswell, Inc.* There are also laws that prohibit the revelation of trade secrets such as the Consumer Act, the Cybercrime Prevention Act, the Electronic Commerce Act, and the Revised Penal Code, in certain cases.

Internet Service Providers

The TPPA requires members to ensure that legal remedies and monetary remedies are available for copyright infringement in the online environment. However, the ISP who removes or disables access to infringing material in good faith shall be exempt from any liability, provided that it takes reasonable steps in advance or promptly after to notify the person whose material is removed or disabled. The TPPA does not require, but allows a system of counter-notices, which allows the ISP to restore the material subject of the counter-notice, unless the person giving the original notice seeks judicial relief within a reasonable period of time. The TPPA also requires members to provide judicial or administrative procedures that enable a copyright owner, which has made a legally sufficient claim of copyright infringement, to obtain expeditiously from the ISP information in the provider's possession identifying the alleged infringer. Should the Philippines join the TPPA, it must ensure that the implementation of this provision is consistent with the provisions of the Data Privacy Act.

While Section 30 of the Electronic Commerce Act[118] provides for the instances where an ISP shall not be civilly or criminally liable for acts defined in Section 5[119] thereof, the Act does not contain the take-down requirement provided for in the TPPA to avoid culpability. Should the Philippines join the TPPA, the Electronic Commerce Act must be amended to comply with the TPPA obligations, such as providing legal incentives for ISPs to cooperate with copyright owners, to deter or to take action to deter the unauthorized storage and transmission of copyrighted materials

SERVICES SECTOR: SCHEDULING MODALITIES[59]

TPP goes well beyond liberalizing trade in goods, and seeks higher level commitments for opening the services sectors across the member countries. Most of the world has been accustomed to negotiating services sector commitments under the positive list approach of WTO GATS, wherein the country lists the sectors that it offers to liberalize, while other sectors remain restricted. The TPPA adopts the more aggressive negative list approach, whereby the country lists sectors for which it will maintain restrictions, while all other sectors are opened without restriction to investors from other members. In theory, one can achieve the same liberalization outcome using either approach.

The GATS positive list approach was intended to facilitate "progressive liberalization" in future rounds. It was developed in a multilateral context, with numerous negotiating partners of varying levels of development and differing attitudes toward economic openness. A negative list approach, as adopted in the NAFTA, provides a greater sense of completeness and transparency, and most countries have opted for it over the past two decades. The approach is seen to facilitate participation in global value chains, as it encourages a holistic view of investment and trade, thus better taking into account the integrated nature of today's cross-border production networks. Future adherence to the TPPA will require producing a negative list schedule.

Positive List Approach

The positive list approach is familiar to most countries because of the GATS. In the GATS framework, the approach is adopted with respect to the choice of service sectors to be covered by commitments and the modes of supply within these sectors.[60] Where commitments are made, modes of supply may be subject to either partial or full commitments to remove restrictions. When commitments are partial, the limitations on the commitments can be scheduled at a level more restrictive level than actual practice.

In such GATS-style commitments, restrictions that affect all sectors, such as on foreign investment and the temporary movement of persons, are inscribed as limitations in the horizontal section of the schedule. At one extreme, these horizontal restrictions can largely negate openness to foreign supply of services in individual sectors under Modes 3 or 4, regardless of commitments at the individual sector level. At the other extreme, a very liberal horizontal entry means that the sector-level commitments will determine the relevant access for investors or workers. In general, the horizontal entries that are important, as they codify the existing Investment Law and Labor Law in force in a given country.

The following are arguments in favor of the positive list approach:

- It is most familiar to the Philippines as it was the basis of its commitments in the Uruguay Round under the GATS, as well as under the ASEAN AFAS and the

[59] Based on TRADE (2015), "Modalities for Scheduling Services Commitments: Considerations For The Philippines."

[60] There are four "modes of supply" of services: Mode 1: cross-border trade, when the service itself is sent across the border (as in business process outsourcing); Mode 2: consumption abroad (as in tourism); Mode 3: commercial presence, when a firm carries out investment in another country in a service sector; and Mode 4: movement of natural persons, when a natural person goes abroad to supply services in a foreign location and is remunerated.

other free trade agreements since that date.[61]

- It allows the government the flexibility to gradually open the service sectors it wishes at the speed it finds appropriate. Many developing countries do not have sufficient knowledge of their service sectors and it is difficult to liberalize sectors if the implications on domestic stakeholders are not known. Altternatively, if the regulatory regimes for various services are under-developed, the government should proceed with caution in allowing foreign entrants into the market.
- There is often a fear that the negative list approach will reduce the government's ability to regulate, flexibility to tailor future measures to the needs of specific sectors, and "space" to pursue domestic policy objectives.

On the other hand, the following are arguments against the positive list approach:

- It is considered appropriate for a larger, multilateral setting, but not for a regional agreement among like-minded trading partners.
- It does not provide an accurate picture of existing measures to those engaged in services trade. The commitments do not have to be scheduled at the level of application of existing laws or regulatons. Agreements generally provide a partial coverage of measures and service sectors. Regulations change over time, but there is generally no provision to have measures updated and the agreements go out of date quickly unless they are regularly renegotiated.
- The positive list approach is generally not accompanied by strong discipline on either market access or national treatment, rendering such agreements ineffective.

Negative List Approach

The structural innovation of the negative list approach is to separate cross-border services (Modes 1 and 2) from the supply of services under Modes 3 and 4. Hence there are separate chapters on cross-border services, investment, and the temporary movement of persons. The investment chapter provides extensive investor protection for investment in both goods and services and adopts a broader definition of investment than just FDI, including in intangible assets. The chapter on temporary movement also deals with visitors that are not necessarily providing services, but may be operating in the goods sector, allowing for an integrated approach to production and investment decisions on the part of firms.

The negative list approach requires that all members respect the core disciplines for all service measures and sectors and specify the restrictive measures they wish to retain in annexes as of non-conforming measures. The core disciplines of the cross-border services chapter are: (1) most-favoured nation treatment; (2) national treatment; (3) market access; and (4) no local presence (not to oblige service providers to carry out an investment in a given market). In the investment chapter, the last core disciplineis replaced by: (4) no performance requirements (no requirement for firms to conform to any output undertakings, such as sourcing a certain percentage of inputs from the local market or directing a certain percentage of final production to export); and (5) senior

[61] This is notwithstanding the fact that the general foreign investment policy of the Philippines, especially in reference to manufacturing investments, has been defined on a negative list approach, as embodied in the Foreign Investments Act of 1991.

management and key personnel (to allow firms undertaking an investment to bring in a certain number of their own high-level staff).

A notable feature of the negative list approach is the inclusion of separate chapters on financial services and telecommunication services. Separate chapters could in theory be developed on any number of individual sectors signalled out for special or more in-depth treatment under a negative list approach, and this has been the case in recent trade agreements with chapters on electronic commerce and environmental services.

The following are arguments in favor of the negative list approach:

- This approach is most conducive to facilitating business operations and trade. Its structure is closer to the reality of business, where firms undertake investments, production, and trade in an integrated manner. It brings about greater stability for services investors and exporters as well as greater transparency. Firms can easily see existing restrictions. It also brings about a more comprehensive coverage of service trade flows since all sectors are included within the agreement. Since many service sectors are inputs into other services and goods, this comprehensive approach also facilitates trade.
- The core disciplines appy across the board and any deviation must be scheduled in lists of non-conforming measures, with an accompanying reference to the applicable law or regulation in effect. This means that the measures are grounded in reality and at the level of actual law / practice and cannot be made more restrictive in the future. There is effectively a standstill commitment to any measure that is not liberalized. A degree of dynamism is incorporated into trade agreements in the form of the "ratchet clause," whereby any regulation relaxed after the agreement comes into force is automatically bound at the new level of openness. The ratchet clause avoids renegotiating and extends future liberalization to all partes to the agreement.
- Sensitive measures and/or sectors can be placed an "Annex of Future Measures" to allay the fear of limiting the "policy space" and ability to regulate. If aspects of the regulatory regime are under-developed, it is possible to include a commitment for future opening within a negative list framework, so that the government can proceed with caution in allowing foreign entrants into the market.
- The major argument in favor of the negative list is its greater simplicity and its greater transparency. The annexes of non-conforming measures present a clear and unambiguous picture of the country's regulatory regime.

The following are arguments against the negative list approach:

- It is often stated that the negative list requires full liberalization of all measures affecting services trade. While this is a generally widespread view, it is incorrect. There is fear that the negative list approach will interfere with the right to regulate. This fear is unfounded. The right to regulate is fundamental and set out prominently in negative list agreements, as under any trade agreement covering services. Governments also fear that they may miss out on key measures affecting services trade. This fear

can be allayed by adequate preparation. Armed with an exhaustive compendium of measures affecting trade in services, it should be possible for negotiators to adequately schedule non-conforming measures.

- The negative list approach automatically extends to new services and would effectively prevent a government from regulating new services in a discriminatory manner. However, it would not prevent them from adopting non-discriminatory regulations. A government would also have the option of excluding new services from the purview of the agreement if it chose to do so.
- It is argued that negotiating on a negative list basis requires more resources than negotiating on a positive list basis. This is actually not the case. Negotiating services under any approach should require careful preparation and as much knowledge as possible about the domestic services economy and the regulatory measures in place.

The "Hybrid" Approach: Negative List for National Treatment, Positive List for Market Access

The "hybrid" approach was developed and adopted by the participants in the TiSA or Trade in Services Negotiations in Geneva.[62] The approach is a compromise in the multilateral context that hopes to broaden acceptance and participation. Under the approach, a positive list scheduling of market access commitments allows for a choice with respect to the sectors for inclusion in the agreement, just as in the basic GATS framework. This is combined with a negative list aproach for national treatment, so that the commitments applying to the included sectors are scheduled at the level of actual regulatory practice. Effectively, this requires a standstill discipline with respect to all measures affecting services in the included sectors. The proposed approach in the TiSA will also be accompanied by a "ratchet" mechanism.

The hybrid approach sets out commitments in a GATS-style format and has the advantage of allowing countries, whose main or only experience has been under the GATS framework, a familiar presentation. The substance of the commitments is, however, rendered much more meaningful by the adoption of a negative list approach to key obligations. The disadvantage of the hybrid approach (though an actual draft schedule to date is pending, as the negotiations are ongoing) is that the resulting schedules will be extremely lengthy.

Philippine Experience

The Philippine Government may consider which of the above three negotiating approaches best suits its needs and ambitions. It is worth noting that the Philippines already has some level of familiarity with the concept and use of the negative list approach. The schedule of the ASEAN Comprehensive Investment Agreement (ACIA) is based on negative listing and the Philippines submitted a list of investment non-conforming measures under the ACIA. The Philippines Foreign Investment Act itself has mandated the regular issuance of the "Regular Foreign Investment Negative List" (though its coverage is limited to foreign equity restrictions). The ASEAN-Australia New Zealand FTA (AANZFTA) has likewise adopted this approach.

No matter which approach is selected by Philippine officials, it will be imperative to advance preparations as thoroughly as possible, with adequate training and

[62] *See* ICTSD, Trade in Services Agreement (TISA): Public Information Session and Discussion, 30 Apr. 2014, http://www.ictsd.org/themes/global-economic-governance/events/trade-in-services-agreement-tisa-public-information-session.

coordination. It will also be necessary to develop an inventory or compendium of measures affecting trade in services for all of the service sectors in the Philippines, an exercise that will serve both as a review of existing regulations and as an essential guide to develop informed negotiating positions.

OTHER KEY TPPA PROVISIONS OF INTEREST

Summarized below are selected TPPA provisions that would be of particular interest and significance for the Philippines, apart from those examined more closely above.

Textile and Apparel Trade

A number of textile and apparel goods will become duty free upon entry in force of the TPPA (e.g., cotton shirts and cotton sweaters, dresses, skirts and bags made of textiles). The tariffs for others will initially be reduced by a third, then phased out over 10 years (knit apparel) or 12 years (woven apparel). Certain product-specific rules apply, such as for hand-made or traditional handicrafts. For most apparel, the "yarn-forward" rule for preferential treatment requires that products be made using yarns and fabrics sourced from within the TPPA. Some goods are subject to the "cut-and-sew" rule (e.g., synthetic baby garments, handbags), which allows the use of yarn or fabric from non-TPPA members provided that the cutting and sewing occurs in the TPPA region. Certain yarns and fabrics that are not widely available in the TPPA region may be sourced from non-TPPA members without affecting preferential tariff treatment (e.g., fabrics for swimwear, denim, outer wear).

Safeguards under the TPPA allow the importing country to suspend tariff reductions or temporarily increase the tariffs on certain goods if a surge in imports causes injury on or threatens domestic producers. However, such action may not be maintained beyond four years or beyond the transition period, and no such action may be taken against any particular good more than once. Upon termination of the action, the importing country must subject the good to the tariff that would have been in effect if not for the action, and must compensate the exporting member through tariff concessions.

None of the Philippines' current FTAs have a separate chapter on textiles and apparel. Prevailing tariff rates on these products are 9.1% on textiles and 14.8% on apparel. Product specific rules similar to those of the TPPA are provided under many of its existing FTAs.

Sanitary and Phytosanitary (SPS) Measures

SPS measures aim to protect human, animal or plant life or health, via the adoption of international standards and guidelines. The TPPA affirms the rights and obligations under the WTO SPS Agreement, but also imposes additional commitments (described as WTO+), particularly with respect to regionalization, equivalence, and science and risk analysis. The obligations include (1) application of equivalence[63] to a group of SPS measures; (2) cooperation in recognizing areas that are free from or have low prevalence of pests or disease; and (3) ensuring that SPS measures either conform to the international standards, or are based on documented, objective, scientific evidence and encourage the use of risk communication techniques and information sharing.

The TPPA promotes audits to assess another country's food safety regulatory system, institutes communication between countries regarding the requirements and procedures for audits, implements a consultative mechanism between agencies to find science-based solutions to SPS issues, and requires publication of SPS regulations for public comment. TPPA also ensures that SPS certificates require only information on SPS issues, SPS checks are based on the actual

[63] This refers to the mutual acceptance of another country's SPS measure that has an equivalent effect even if it differs on how it is being administered.

potential risk, and importers or exporters are informed, within seven days, if a shipment entry is being prohibited or restricted. Countries may take SPS emergency measures deemed necessary, but must disclose the scientific basis for them.

While existing Philippine FTAs also reaffirm WTO rights and obligations, the TPPA includes additional obligations to ensure that SPS measures are not applied as barriers to trade. Republic Act No. 10611 puts in place stronger food safety regulations; facilitates market access for local food and food products; and provides for science-based risk analysis, transparency, equivalence to a certain extent, a rapid alert system, and emergency measures, among others. It does not, however, cover two of the WTO+ provisions, namely, rapid notification and audits of the exporting country's food safety regulatory system.

Technical Barriers to Trade (TBT)

Highlighted in the TPPA are trade barriers in wine and distilled spirits (labelling and certification); ICT products (proprietary protection where cryptography is used); pharmaceuticals, cosmetics, and medical devices (transparency in regulations); proprietary formula pre-packaged foods and food additives (confidentiality of formulas); and organic products (consistency in regulations on production, processing, or labelling). Countries are required to cooperate to avoid creating unnecessary obstacles to trade, accept testing and certification performed by another country, engage stakeholders in the development of technical regulations, and provide for reasonable time between publication of regulations and their entry into force.

Investment & Services

Each member's treatment of foreign investors and investments must be no less favorable than that for its own or of any other country's foreign investors or investments. A "minimum standard of treatment" is required, including: (1) allowing the transfer of funds (but permitting non-discriminatory temporary measures); (2) protections against denial of justice and failure to provide police protection; (3) the prohibition of performance, local content, and technology transfer/localization requirements; and (4) allowing neutral, international arbitration. If a member expropriates an investment, it must do so for a public purpose, in accordance with the law, and subject to prompt, adequate and fully realizable and transferable compensation. Investors must have the ability to appoint senior managers without regard to nationality. Benefits to "shell companies" – which may take advantage of treaty rights but lacks substantial business activity in the country – are denied.

Similar provisions apply to trade in services, ensuring fundamental obligations as in the WTO and other agreements, such as national treatment, most favored nation, market access and free transfer of funds, without delay, for the cross-border supply of services. Specific provisions for Express Delivery Services address the unique challenges private providers face when competing with national postal entities. A framework that would facilitate voluntary negotiations of mutual recognition agreements (MRAs) between countries is included.

Similar provisions also apply to financial services, including portfolio management advice, electronic payment card services, and insurance by postal insurance entities, among others. The TPPA permits other countries' financial institutions to supply the financial services that the country would permit its own financial institutions, without adopting new legal provisions. Member countries are not required to allow access to financial information of individual customers, or any confidential information that would impede

law enforcement, damage public interest, or prejudice legitimate commercial interests of particular firms. Where conflicts of financial regulations arise in investor-state disputes, those can be resolved via state-to-state arbitration. Important exceptions include the ability of countries to use measures to promote financial stability and the integrity of their financial systems.

In the Philippines, Constitutional restrictions on foreign equity and professional services will be inconsistent with TPPA requirements. The Philippines may also have to address issues on: (i) definition of "covered investments"; (ii) investor-state dispute settlements, where the Constitution requires a prior written consent fpr legal action against the State; and (iii) the way the Philippines maintains measures that may remain but may contradict the core obligations. Under the TPPA, such measures cannot become more restrictive than they already are.

Electronic Commerce

A legal framework for e-comerce is provided, consistent with the principles of the UNCITRAL Model Law on Electronic Commerce 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts. The TPPA aims to ensure free flow of global information and requires that electronic transmissions not be subject to customs duties. Internal taxes, fees or other charges may be imposed if consistent with the agreement. The legal framework must protect consumers against fraudulent and deceptive commercial activities online and institute measures to stop unsolicited commercial messages ("spam"), prevent the spread of 'forced localization' of technologies and servers, and promote paperless trading between businesses and the government.

The TPPA also aims for cooperation on policies regarding personal information protection, online consumer protection, and cybersecurity threats and capacity. Prohibited under the agreement are requirements that force suppliers to share valuable software source code with foreign governments or commercial rivals.

In the Philippines, RA 8792 of 2000 provides the framework for electronic transactions and documents, while RA 10172 of 2012 is the Philippines' first data privacy law. The latter has remained unimplemented inasmuch as the National Privacy Commission, which should draft the corresponding regulations, has not been created. RA 10175 of 2012 identifies a number of punishable cybercrimes. RA 7394 provides the basic framework for consumer protection, but needs to be more robust not only to promote consumer confidence on e-commerce, but also to deter improper e-commerce practices.

Government Procurement

Member countries are allowed to access each other's government procurement market for covered procurement activities (i.e., those that each TPPA country has agreed to cover). In addition, TPPA requires timely publication of procurement information, including on the procuring entity, the specific procurement, the time frame for submission of bids, and the conditions for supplier participation. Sufficient time should be allowed for suppliers to obtain the tender documentation and submit a bid, and tenders should be treated fairly, impartially, and confidentially, and awards made solely on the basis of the stated evaluation criteria. Technical specifications must focus on performance and functional requirements rather than design or descriptive characteristics, be based on international standards where available, and not create unnecessary barriers to trade.

In the Philippines, RA 9184 of 2003 explicitly specifies preferential treatment towards domestically-produced and manufactured goods and to domestic

bidders, which appears inconsistent with TPPA requirements.

State-Owned Enterprises (SOEs)

The TPPA provisions apply to all SOEs principally engaged in commercial activities, designated monopolies, and SOEs under delegated authority. The TPPA aims to ensure that: (1) SOEs operate solely on the basis of commercial consideration (unless mandated otherwise) and in a non-discriminatory manner; (2) SOEs are not given undue advantage, for instance, through preferential financing or regulation; (3) government control and support to SOEs are transparent; and (4) non-commercial assistance to SOEs does not have adverse effects on other members. Some exceptions are allowed, such as where there is a national or global economic emergency. The TPPA also aims to provide courts with jurisdiction over the commercial activities of foreign SOEs in their territory.

In the Philippines, SOEs are defined under Presidential Decree No. 2029. In August 2010, according to the Commission on Audit, there were 604 SOEs (financial institutions, public utilities, industrial, area development, agricultural, trading, promotional, social, cultural, and scientific; 446 were operational water districts). RA 10149 of 2011 (1) requires that SOEs maintain a website and provide for unrestricted public access: performance scorecards and strategy maps; government subsidies and net lending; and audited financial and performance report, among other information; and (2) creates the Governance Commission for Government Owned or Controlled Corporations (GCG), tasked to evaluate the performance and determine the relevance of SOEs. It cannot be readily ascertained from these laws whether there is sufficient basis to comply with the TPPA.

Labor

Internationally recognized labor principles are promoted in the TPPA, particularly those in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. Examples include the right to freedom of association and collective bargaining; the elimination of child, forced or compulsory labor; the elimination of discrimination in employment; and the need for acceptable work conditions, such as minimum wages, working hours, and occupational health and safety. The TPPA encourages voluntary adoption (at the company level) of related corporate social responsibility initiatives and discourages the importation of products of forced or child labor (or goods with such inputs), regardless of origin. Countries cannot undermine these clauses, even to promote trade or investment. The TPPA provides for dispute settlement procedures in cases of non-compliance. Commitments are fully enforceable, subject to the TPPA's dispute settlement procedures and backed up by possible trade sanctions.

The Philippines' Labor Code addresses worker rights, especially regarding hiring procedures, working conditions, and labor relations with employers. In terms of the latter, the Labor Code: (i) promotes free collective bargaining and negotiations; (ii) promotes free trade unionism; (iii) provides an adequate administrative machinery for the expeditious settlement of disputes; and (iv) ensures the participation of workers in decisions affecting their rights, duties and welfare. The National Labor Relations Commission has the exclusive jurisdiction regarding: unfair labor practice cases; termination disputes; cases involving wages, rates of pay, hours of work and other terms and conditions of employment; legality of strikes and lockouts; and all other claims arising from employer-employee relations (except claims for employee compensation, SSS, Medicare and maternity benefits). Importantly, per labor

laws: (1) Filipinos between the age of 15-18 can be employed in a non-hazardous environment; (2) foreign employers cannot hire Filipinos directly except through entities authorized by DOLE; (3) overseas Filipino workers are required to remit a portion of their income to their families/dependents in the Philippines; (4) the minimum wage varies from region to region; and(5) employers have the right to terminate an employee due to: serious misconduct, neglect of duties, and crime.

Environment

Enforcement of environmental laws and policies is upheld by the TPPA, which encourages high levels of environmental protection. It eliminates tariffs on environmental goods, facilitates trade in environmental services, and cooperates to address related non-tariff barriers. It also promotes public awareness and corporate social responsibility. To address global challenges, the TPPA includes: (1) commitments to combat illegal fishing, logging, and wildlife trade; (2) provisions that recognize the importance of the conservation of biodiversity and the marine environment, sustainable forest management, wild flora and fauna conservation, and the ecological integrity of specially protected natural areas, such as wetlands; (3) provisions that recognize the importance of addressing climate change and combatting invasive alien species, and (4) provisions that enhance transparency related to subsidy programs, and refrain from new subsidies that contribute to overfishing or overcapacity. The TPPA also affirms commitments made under multilateral agreements, including the Montreal Protocol on Substances that Deplete the Ozone Layer, the International Convention for the Prevention of the Pollution from Ships (MARPOL), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The TPPA also establishes an independent, binding, and enforceable dispute-resolution process to address compliance questions.

The Philippines has numerous laws on the environment and is also a party to the Multilateral Environmental Agreements, the Montreal Protocol on Ozone Depleting Substances, the International Convention for the Prevention of Pollution from Ships, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Thus, it is likely to be already compliant with the requirements of the TPPA in this area.

Small and Medium Enterprises

The TPPA provides for a publicly accessible website containing information relevant to SMEs and the TPPA, to be linked to the websites of the other member countries. It also establishes the Committee on SMEs, meant to be the platform on which TPPA members will identify ways to assist SMEs to maximize benefits from the TPPA, exchange best practices and experience in developing SMEs, and explore opportunities for capacity building to facilitate SME integration into the global supply chains.

In the Philippines, the number of laws pertaining to SMEs reflect the importance that the country puts on the development of SMEs. Among these are the Micro, Small, and Medium Enterprise Development (MSMED) Plan 2011-2016 and Republic Acts 10644 (Go Negosyo Act), 9178, 9501, 6977, and 7882. The basic, and perhaps most immediate, requirement of the TPPA is a dedicated website for SMEs. The aforementioned laws have provisions for information dissemination, monitoring and evaluation, and knowledge management for SME programs. The *www.gonegosyo.net* website appears to satisfy the TPPA requirement.

Regulatory Coherence

Under the TPPA, regulatory measures

must be defined and made publicly available and regulatory agencies must coordinate to avoid conflicting and duplicative regulations. Good regulatory practices are envisioned – ones that are clear, concise, well-organized, and easy to understand, publicized in advance of adoption, and include impact assessments of their economic or other impact. A Committee on Regulatory Coherence is to oversee this. Each country must submit a notification of implementation within two years from the entry into force of the TPPA for that country and at least once every four years thereafter.

While the quality of regulations and regulatory management systems in the Philippines remains weak, this is not seen to be a major obstacle for the country's TPP membership.

Other Provisions

A number of other provisions are included in the TPPA aiming to ensure predictable and transparent customs procedures, and procedures for the temporary entry of business persons; reaffirm WTO rights and obligations with regard to trade remedies such as anti-dumping, countervailing, and global safeguard measures; bolster competition and prohibit anti-competitive and fraudulent business practices; and facilitate member cooperation and capacity-building activities to enable countries to implement and take full advantage of the TPPA.

In addition, the TPPA aims to ensure that laws, regulations, and administrative rulings related to any matters covered by the TPPA are publicly available and subject to notice and comment and seeks to ensure the expeditious resolution of disputes.

SUMMARY AND CONCLUSIONS

In many respects, the Philippines already has in place many of the domestic laws and regulations that would be needed if it is to become a party to the TPPA. It has also already instituted a number of necessary internal mechanisms and procedures to comply with its obligations under the WTO and other existing FTAs, thereby equipping itself to be in compliance of the TPPA as well. Nonetheless, should the Philippines join the TPP, additional commitments will be needed and selected revisions to existing laws, regulations, and procedures will need to be implemented.

For example, the Philippines would have to reduce tariffs for imports from TPP members over and above what its current FTAs provide, including for goods normally protected from tariff cuts such as glass, plastics, iron and steel, and motor vehicles. Telecommunication legislation may require changes with respect to interconnection, unbundling, cross-subsidization, number portability, and the powers of the National Telecommunications Commission (NTC). Additional transparency measures will have to be taken regarding spectrum allocation and the interconnection agreements of public telecommunications. The Philippines will also have to implement importer-based certificates of origin and raise the amount for certificate of origin waivers. While intellectual property (IP) rights in the Philippines are protected by a number of laws and international and treaties, many of the TPPA provisions go well beyond those of current laws and treaties. The current legal framework for IP will need amendments to provide additional protection for specific IP rights and to ensure infringement is recognized and enforced.

Additional obligations are required by the TPPA to ensure that SPS measures are not applied as barriers to trade. Republic Act No. 9184 or the Government Procurement Reform Act, which explicitly specifies preferential treatment towards domestically-produced and manufactured goods and to domestic bidders, is contrary to the TPPA. Also contrary to the TPPA are labor laws whereby: (1) Filipinos between the age of 15-18 can be employed in non-hazardous environments; (2) foreign employers cannot hire Filipinos directly except through entities authorized by DOLE; (3) overseas Filipino workers are required to remit a portion of their income to their families/dependents in the Philippines; and (4) the minimum wage varies from region to region. While Republic Act No. 7394 (the Consumer Act) provides the basic framework for consumer protection, it needs to be made more robust not only to promote consumer confidence on e-commerce, but also to deter improper business practices related to e-commerce. But perhaps the biggest hurdle to TPP accession is the Constitutional provision restricting foreign ownership and participation in Philippine businesses (e.g., in public utilities and other services).

Even as it is already “TPP ready” in many key respects, pursuing TPP membership will demand of the Philippines further significant adjustments in the policy environment, as embodied in administrative measures, laws, and the Constitution itself. The Philippine government must take full stock of such adjustments being called for, and carefully weigh their public welfare implications, in order to equip itself with negotiating positions that will help it ensure that eventual TPP membership, once achieved, would indeed redound to the greatest good for the greatest number of Filipinos.

ANNEX

Chapters of the TPP Agreement

1. Initial Provisions and General Definitions
2. Natl Treatment & Market Access Goods
3. Rules of Origin
4. Textiles & Apparel
5. Customs Administration & Trade Facilitation
6. Trade Remedies
7. SPS Measures
8. Technical Barriers to Trade
9. Investment
10. Cross-Border Trade in Services
11. Financial Services
12. Temporary Entry of Business Persons
13. Telecommunications
14. Electronic Commerce
15. Government Procurement
16. Competition Policy
17. State-Owned Enterprises (SOEs)
18. Intellectual Property
19. Labour
20. Environment
21. Cooperating & Capacity Building
22. Competition & Business Facilitation
23. Development
24. Small- and Medium-Sized Enterprises
25. Regulatory Coherence
26. Transparency & Anti-Corruption
27. Administrative & Institutional Provisions
28. Dispute Settlement
29. Exceptions
30. Final Provisions

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