

RATIFICATION OF TRADE TREATIES

PROF. ROMMEL J. CASIS

PROF. ROMMEL J. CASIS: Thank you very much Johaira – my former student, who had a very high grade in my class. Honorable Justice Adolfo Azcuna, Honorable Chief State Counsel Ricardo Paras, Assistant Secretary Eduardo Malaya, Ambassador Claro Cristobal, Undersecretary Manuel Antonio Teehankee, deans, professors, lawyers, students of law, colleagues in government, and friends in the private sector, good morning.

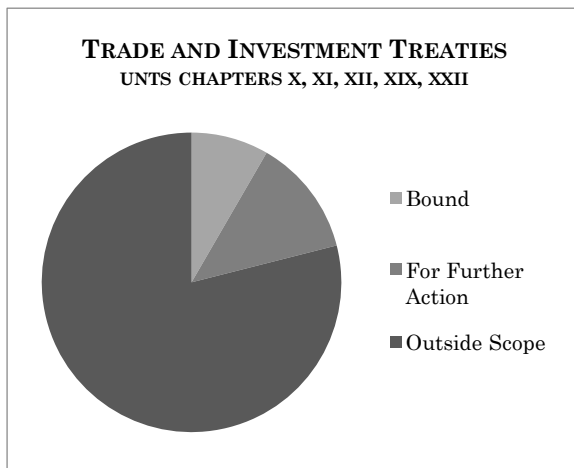
As the third and definitely the least among our eminent speakers today, I have endeavored to keep this presentation short. In keeping with today's general theme of identifying opportunities and challenges for the advancement of Philippine foreign policy priorities, especially those that may often be overlooked, I have been tasked to speak on the topic of international law, and trade and investment facilitation. What I will be presenting to you today is the result of preliminary research by the Institute of International Legal Studies of the U.P. Law Center. We will begin by explaining the methodology we employed in reviewing the Philippines' current, possible and potential obligations under international agreements, which, in turn, became the starting point of our preliminary recommendations.

The first step was to review all 648 multilateral treaties deposited with the United Nations Secretary-General. From these treaties, we identified those falling under certain subject headings, which could potentially enhance trade and investment. These subject headings are *trade, transport and communication, navigation, commodities, commercial arbitration*. From these subject headings, we identified 347 treaties. These treaties, in turn, were checked to confirm which of them were signed and ratified, signed but not ratified, or not signed by the Philippines. For the treaties that have not been signed, we also determined whether they were still open for accession. From this group of treaties, we compiled a list of those that are recommended for further action by the Philippines.

List of Treaties Recommended for Further Action

TREATY OR AGREEMENT	SIGNED	RATIFIED
1. Convention on the Limitation Period in the International Sale of Goods, 1511 U.N.T.S. 3.	No	No
2. United Nations Convention on Contracts for the International Sale of Goods, 1489 U.N.T.S. 3	No	No
3. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 2169 U.N.T.S. 3.	No	No
4. Charter of the Asian and Pacific Development Centre, 1321 U.N.T.S. 203.	Yes (15 Dec 1982)	No
5. United Nations Convention on the Use of Electronic Communications in International Contracts, 2898 U.N.T.S.	Yes (25 Sep 2007)	No
6. Amendments to the Charter of the Asian and Pacific Development Centre.	No	No
7. United Nations Convention on International Bills of Exchange and International Promissory Notes.	No	No
8. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade.	Yes	No
9. Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific.	No	No
10. International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, 221 U.N.T.S. 255.	No	No
11. Customs Convention on the Temporary Importation of Commercial Road Vehicles, 327 U.N.T.S. 123.	No	No
12. Agreement on Special Equipment for the Transport of Perishable Foodstuffs and on the Use of such Equipment for the International Transport of some of those Foodstuffs.	No	No
13. Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP), 1028 U.N.T.S. 121.	No	No
14. Convention on the contract for the international carriage of passengers and luggage by road (CVR), 1774 U.N.T.S. 109.	No	No
15. United Nations Convention on the Carriage of Goods by Sea, 1695 U.N.T.S. 3.	Yes (14 June 1978)	No
16. International Convention on Maritime Liens and Mortgages, 2276 U.N.T.S. 39	No	No

TREATY OR AGREEMENT	SIGNED	RATIFIED
17. Agreement establishing the International Pepper Community, 818 U.N.T.S. 89.	No	No
18. Agreement establishing the International Tea Promotion Association, 1128 U.N.T.S. 367.	No	No
19. Agreement establishing the Southeast Asia Tin Research and Development Centre, 1075 U.N.T.S. 3.	No	No
20. Terms of Reference of the International Copper Study Group, 1662 U.N.T.S. 229.	No (Signed 10 Sept. 1993, withdrew membership in 1996)	No
21. International Tropical Timber Agreement, 1393 U.N.T.S. 67.	Yes (29 Sept. 1995)	No
22. Grains Trade Convention, 1882 U.N.T.S. 195.	No	No
23. International Cocoa Agreement, 1245 U.N.T.S. 221.	No	No
24. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.	No	No



If we look at this pie chart, we can see that of the 347 treaties under the said subject headings possibly related to trade and investment, 29 are agreements to which the Philippines is already bound, or those which it signed and ratified. On the other hand, 247 of these agreements are those to which the Philippines is not bound, not open for signing and accession, or unrelated to trade

and investment. The remaining 44 agreements are those possibly open for signing or accession, and relate to trade and investment facilitation. Of this later group, 24 are recommended for possible action.

We were provided with a list of treaties or agreements submitted for concurrence by the Senate, as prepared by the 17th Congress. This was last updated on August 30, 2017. We can imply from this list the areas of priority for the

government. Thus, the absence of a particular agreement in this list would show that such agreement is not a priority. We noted that none of the 24 agreements we have identified for possible action are in the Senate list. Therefore, our preliminary observation is that some important trade related treaties might have been overlooked. But it is also entirely possible that the executive department, or the Senate, at some point, decided not to become a party to any of these treaties—maybe because these treaties are currently incompatible with current policy. There may be many reasons why these treaties have not been identified in the Senate list. Determining the exact reason for the inattention to these treaties would require further research and assistance from the government agencies concerned and is beyond the scope of this presentation.

Treaties/Agreement Submitted for Concurrence by the Senate

(As of August 30, 2017²)

TITLE	DATE SUBMITTED TO THE SENATE	DATE (ORDER OF BUSINESS)	COMMITTEE REFERRAL	DATE TRANSMITTED TO THE COMMITTEE	STATUS
1. Articles of Agreement of the Asian Infrastructure Investment Act	Oct. 20, 2016	Nov. 7, 2016	Foreign Relations	Nov. 10, 2016	SRN-241, Adopted as Res. No. 33 Dec. 5, 2016
2. Agreement between the Government of the United States of America and the Government of the Republic of the Philippines to Improve International Tax Compliance and to Implement the FATCA (Foreign Account Tax Compliance Act)	Dec. 7, 2016	Dec. 7, 2016	Foreign Relations	Jan. 10, 2017	Pending in the Committee
3. Convention on Cybercrime which was signed on 23 November 2001 in Budapest, Hungary	Dec. 15, 2016	Jan. 16, 2017	Foreign Relations	Jan. 19, 2017	Pending in the Committee
4. Arms Trade Treaty (ATT) which was adopted on 2 April 2013 at the United Nations General Assembly	Jan. 19, 2017	Jan. 23, 2017	Foreign Relations	Jan. 25, 2017	Pending in the Committee

² *Treaties/Agreements Submitted for Concurrence by the Senate*, Prepared by the Indexing, Monitoring, and LIS Section, LEGISLATIVE BILLS AND INDEX SERVICE, 17th Congress, as of August 30, 2017, available at https://www.senate.gov.ph/17th_congress/treaties_17thcongress.asp.

TITLE	DATE SUBMITTED TO THE SENATE	DATE (ORDER OF BUSINESS)	COMMITTEE REFERRAL	DATE TRANSMIT- TED TO THE COMMITTEE	STATUS
5. Agreement between Japan and the Republic of the Philippines on Social Security which was signed on 19 November 2015 in Manila	Jan. 19, 2017	Jan. 23, 2017	Foreign Relations	Jan. 25, 2017	SRN-283, Adopted as Res. No. 38 Feb. 13, 2017
6. Agreement Establishing ASEAN+3 Macroeconomic Research Office (AMRO) which was signed on 10 Oct. 2014, in Washington D.C., United States of America	Jan. 12, 2017	Jan. 31, 2017	Foreign Relations	Feb. 1, 2017	Pending in the Committee
7. Convention between the Government of the Republic of the Philippines and the Government of the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income which was signed on 21 June 2013 in Manila, Philippines	Jan. 13, 2017	Jan. 31, 2017	Foreign Relations	Feb. 1, 2017	Pending in the Committee
8. Agreement between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia concerning the Delimitation of the Exclusive Economic Zone Boundary	Feb. 23, 2017	Feb. 27, 2017	Foreign Relations	Feb. 28, 2017	Pending in the Committee
9. Agreement on Social Security between the Republic of the Philippines and the Kingdom of Sweden	Mar. 1, 2017	Mar. 1, 2017	Foreign Relations	Mar. 7, 2017	Pending in the Committee
10. Agreement between the Republic of the Philippines and the the Federal Republic of Germany on Social Security	Mar. 1, 2017	Mar. 1, 2017	Foreign Relations	Mar. 7, 2017	Pending in the Committee
11. Paris Agreement	Mar. 1, 2017	Mar. 1, 2017	Foreign Relations	Mar. 7, 2017	SRN-320, Adopted as Res. No. 42 Mar. 14, 2017
12. Framework Agreement on Partnership and Cooperation between the European Union and its	Mar. 13, 2017	Mar. 14, 2017	Foreign Relations	Mar. 14, 2017	Pending in the Committee

TITLE	DATE SUBMITTED TO THE SENATE	DATE (ORDER OF BUSINESS)	COMMITTEE REFERRAL	DATE TRANSMITTED TO THE COMMITTEE	STATUS
Member States, of the One Part, and the Republic of the Philippines, of the Other Part					
13. Convention between the Government of the Republic of the Philippines and the Government of the Democratic Socialist Republic of Sri Lanka for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income	Mar. 15, 2017	May 2, 2017	Foreign Relations	Apr. 3, 2017	Pending in the Committee
14. Agreement between the Government of the Republic of the Philippines and the Government of the United Mexican States for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fiscal Evasion	Apr. 6, 2017	May 2, 2017	Foreign Relations	May 3, 2017	Pending in the Committee
15. International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 (AFS 2001 Convention)	May 29, 2017	May 30, 2017	Foreign Relations	June 1, 2017	Pending in the Committee
16. Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service	May 31, 2017	May 31, 2017	Foreign Relations	June 7, 2017	SRN-454, Adopted as Res. No. 58 Aug. 14, 2017
17. Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS Protocol 88)	July 26, 2017	July 31, 2017	Foreign Relations	Aug. 7, 2017	Pending in the Committee
18. Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto	Aug. 22, 2017	Aug. 22, 2017	Foreign Relations	Aug. 23, 2017	Pending in the Committee
19. Protocol of 1978 relating to the International Convention for the Safety	Aug. 23, 2017	Aug. 29, 2017	Foreign Relations	Aug. 30, 2017	Pending in the Committee

TITLE	DATE SUBMITTED TO THE SENATE	DATE (ORDER OF BUSINESS)	COMMITTEE REFERRAL	DATE TRANSMIT- TED TO THE COMMITTEE	STATUS
of Life at Sea, 1974 (SOLAS Protocol 78)					
20. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas	Aug. 23, 2017	Aug. 29, 2017	Foreign Relations	Aug. 30, 2017	Pending in the Committee
21. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing	Aug. 23, 2017	Aug. 29, 2017	Foreign Relations	Aug. 30, 2017	Pending in the Committee

Notwithstanding these considerations, we can, at this point, choose a sampling of some of these recommended treaties for initial analysis. We offer three agreements for your consideration. First, the United Nations Convention on Contracts for the International Sale of Goods or the CISG. Second, the United Nations Convention on the Use of Electronic Communication in International Contracts or ECC. Third, the Framework Agreement on the Facilitation of Cross-border Paperless Trade in Asia and the Pacific or the FA. We will analyze each of these agreements in the context of the following guide questions: First, “What is the background and the rationale for this agreement?” Second, “What issues related to trade and investment may it address?” Third, “What are the actions needed to comply with this particular agreement?” And fourth, “What are the policy considerations for the DFA in connection with these agreements?”

Let us take a look at the CISG. The CISG was prepared by the UNCITRAL, adopted in Vienna on April 11, 1980, and entered into force on January 1, 1988. As of June 16, 2017, the Convention has been signed by 87 countries,³ the latest being Fiji in 2017, Azerbaijan in 2016, and Vietnam in 2015.

³ The list of Contracting States, subject to declarations when applicable, are as follows: Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belarus, Belgium, Benin, Bosnia-Herzegovina, Brazil, Bulgaria, Burundi, Canada, Chile, China (PRC), Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Guyana, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Macedonia, Mauritania, Madagascar, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Congo, Republic of Korea, Romania, Russian Federation, Saint Vincent & Grenadines, San Marino, Serbia,

The Philippines is currently not a signatory. Among ASEAN Member States, only Singapore and Vietnam are parties to the Convention.

The purpose of the Convention is to provide a uniform framework for contracts of sale of goods between parties whose places of business are in different states. By doing so, it seeks to remove legal barriers in international trade and promote predictability in international trade law, thus reducing transaction costs.⁴ The CISG applies only to international sales contracts, and therefore the domestic laws still apply to domestic sales contracts. Under the treaty, international transactions are defined as “contracts of sale of goods, between parties, whose places of business are in different States: (a) when the States are contracting states; or (b) when the rules of private international law lead to the application of the law of a Contracting State.”⁵ It also applies only to sales of goods, subject to certain exceptions, and not to sales of services. Moreover, the CISG applies only to sales to businesses, not to sales to consumers. Under Article 2 of the CISG, it is inapplicable to the following: sale of goods for personal use, sale by auction, sale by execution or authority of law, sale of stocks, shares, securities, negotiable instruments and money, sale of ships, vessels, hovercraft or aircraft, and sale of electricity.⁶

Among the benefits of the CISG, as far as trade and investment is concerned, is the provision of a uniform set of rules for international sales of goods. A uniform set of rules may help alleviate some issues in conflict of laws. Given the uniformity, the enforcement of contracts will be easier as the governing law will generally be synchronized across jurisdictions. The CISG also allows parties to opt out of its stipulations in certain cases and specify other laws to govern, which allows it to be flexible.

Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Turkey, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Vietnam, Yugoslavia, Zambia. See Status, UN Convention for the International Sale of Goods, at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited 16 Jun 2017).

⁴ Introduction, UN Comm’n on Int’l Trade Law, Digest of Case Law on the UN Convention on Contracts for the International Sale of Goods (2016 ed.), www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf, at ix.

⁵ Convention on Contracts for the International Sale of Goods, *opened for signature* 11 April 1989, 1489 U.N.T.S. 3, (entered into force 1 January 1988) [hereinafter CISG].

⁶ CISG. art. 2.

Cross-border trade will likewise be aided, as transaction costs will be lessened, especially in markets where firms have not yet established experience and expertise. The TMF Group, a consulting body, stated that two of the top challenges of doing business in the Philippines are “trading across borders” and “enforcing contracts.”⁷ The CISG may help address these problems and business uncertainties for firms in new markets.

Moreover, the exporting industry believes that the CISG may reduce barriers to trade and boost exports.⁸ This is because there are opportunities for growth and expansion for global supply chain players that can adapt well to international trade rules. To note, the top destinations for Philippine exports – Japan, United States, China and Singapore – are parties to the CISG.⁹

Aside from these economic benefits, becoming a party to the CISG may also enrich contract law reform. I guess, as an academic, this is something that I find encouraging. Philippine contract law, even those not specifically related to the international sale of goods, may be informed by CISG provisions. On a personal note, I am part of a group of Asian contract law scholars. We meet bi-annually to come up with a harmonized set of rules for contract law in Asia. One of the things I have noticed is that our version of contract law is not in any way updated or consistent with these international rules, whereas my counterparts from other ASEAN countries are able to converse and compare their contract law provisions with the CISG. Unfortunately, when I speak of the Philippine law on the matter, I often have to admit that our rules have not yet been updated to comply with international standards. Furthermore, the CISG comes with a set of tools, such as commentaries and jurisprudence, which will also be available once the Philippines becomes a party to it.

Aside from ratifying the treaty, an option to incorporate the CISG in Philippine law is to amend the Civil Code provisions on sales. Another option is to create a special law or set of rules for transactions covered by the CISG since the Convention does not apply to all kinds of sales. However, we believe that an

⁷ Top 10 challenges of doing business in The Philippines, TMF GROUP, *available at* <https://www.tmf-group.com/en/news-insights/business-culture/top-challenges-philippines/>.

⁸ *PH accession to UN Convention on CISG to boost exports* – PhilExport, MANILA TIMES, May 29, 2017, <http://www.manilatimes.net/ph-accession-un-convention-cisg-boost-exports-philexport/329806/>.

⁹ The top export destinations of the Philippines are Japan (\$11.7B), the United States (\$8.67B), Hong Kong (\$6.58B), China (\$6.19B) and Singapore (\$3.7B). <https://atlas.media.mit.edu/en/profile/country/phl/>.

amendment to the Civil Code is not necessary since the CISG only applies to a specific set of transactions – international sales of goods by business. An implementing legislation may nonetheless be a good idea to avoid confusion. There is also no need for the creation of an implementing agency since the existing government agencies tasked to monitor foreign agreements and trade should suffice. Additionally, the provisions of the Convention do not require reporting obligations for its member states.

In light of the benefits, and the fact that there are a large number of parties to the treaty, we recommend that the executive branch support the accession and ratification of the Philippines to the CISG. Moreover, in the signing and ratification process, further research should be done on the provisions which the Philippines may submit a reservation to, as the CISG allows for reservations. Finally, since the agreement relates to international trade, it would be prudent to engage agencies, such as the Department of Trade and Industry, to assist in the policy-making, signing and ratification process.

The second convention I will be discussing is the United Nations Convention on the Use of Electronic Communications in International Contracts or ECC. It was adopted by the UN General Assembly in 2005. The Convention then entered into force eight years after, on March 1, 2013. The ECC applies to electronic communication in the formation or performance of a contract between parties whose respective places of business are in different states.¹⁰ “Electronic communications” refer to any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, made by electronic, magnetic, optical, or similar means in connection with the formation or performance of a contract.¹¹ The treaty is intended to be applied broadly, even for arbitration and other legally binding agreements not traditionally considered as “contracts”.¹² Moreover, it excludes certain contracts, such as those for personal purposes, foreign exchange transactions, interbank payment systems, promissory notes, and negotiable instruments, among others.¹³ The ECC does not seek to prescribe a particular form, nor does it require everyone to use or accept electronic communications. It merely provides for rules in case such electronic commu-

¹⁰ Convention on the Use of Electronic Communication in International Contracts, *opened for signature* 16 January 2006, 2898 U.N.T.S., (entered into force 1 March 2013) [hereinafter ECC].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

nications are used in contracts. These provisions, however, may be subject to change by national legislation or by the contract itself. The rules embodied in the ECC are considered “neutral” rules based on the principle of technological neutrality. This means that they do not depend on or presuppose the use of particular types of technology and that they should be applied in the communication and storage of all types of information.

The Philippines signed the ECC on September 25, 2007, but it has yet to ratify it. The ECC recognizes the necessity to provide a legal framework for online contracts, considering the role of electronic communications in accelerated economic growth. Transactions done through the Internet relate to increased firm level productivity,¹⁴ increased Internet access, and facilitate small and medium-sized enterprises, or SMEs, creating more jobs, with digitization generating six million jobs annually.¹⁵ In fact, by 2020, it is projected that about twenty percent (20%) of all jobs will be contracted online.¹⁶ The ECC seeks to address questions of validity of electronic contracts under the principle of functional equivalence. It aims to facilitate paperless means of communication by offering criteria under which they can be functional equivalents of paper documents. It also provides for legislation on electronic communications to those states that have none, or have partial and insufficient provisions.

For the Philippines to comply with the ECC, it may be necessary to amend the current law, Republic Act No. 8792 or the Electronic Commerce Act. The amendments may include updating the rules on the time and place of dispatch of electronic documents, and take into consideration other provisions mentioned in the Convention—but not discussed in our law—such as invitation to make offers, availability of contract terms, and error in electronic communications. Aside from amending the law, it may also be possible to simply update its implementing rules, or issue a new Administrative Order to address the implementation of the ECC. This requires further study and should involve the agencies implementing the law, as well as other stakeholders. For the DFA, we recommend that it consider

¹⁴ *The Development Dimension of E-Commerce in Asia: Opportunities and Challenges*, ASIAN DEVELOPMENT BANK (2016), <https://www.adb.org/sites/default/files/publication/185050/adbi-pb2016-2.pdf>.

¹⁵ *Id.*, citing McKinsey Global Institute, *Internet Matters: The Net’s Sweeping Impact on Growth, Jobs, and Prosperity* (2011), <http://www.mckinsey.com/industries/high-tech/our-insights/internet-matters>.

¹⁶ *Id.*, citing *The World Development Report 2013: Jobs*.

supporting the ratification of the ECC in order to update Philippine law on electronic commerce and other contracts created, perfected, and performed in cyberspace.

Finally, the third convention is the Framework Agreement on the Facilitation of Cross-border Paperless Trade in Asia or FA. This was developed as part of the implementation of ESCAP Resolution 68/3 entitled *Enabling Paperless Trade and Cross-border Recognition of Electronic Data and Documents for Inclusive and Sustainable Inter-Regional Trade Facilitation*. The United Nations Economic and Social Commission for Asia and the Pacific, or ESCAP, as the regional development arm of the United Nations for the Asia-Pacific Region, endeavors to overcome some of the greatest challenges in the region by providing results-oriented projects, technical assistance, and capacity building for its 53 Member States and 9 Associate Members.¹⁷ The Framework Agreement is not yet enforced, but was open for signature from October 1, 2016 until 30 September 2017 to all ESCAP members. The objective of the Framework Agreement is to facilitate cross-border paperless trade among willing ESCAP member states by providing a dedicated intergovernmental framework to develop legal and technical solutions.

“Cross-border paperless trade” is trade in goods, including their import, export, transit, and related services, taking place on the basis of electronic communications, including the exchange of trade-related data and documents in electronic form.¹⁸ Most of the provisions of the Framework Agreement center on measures for promoting cross-border paperless trade, not on detailed and specific mechanisms for engaging in cross-border paperless trade. The Framework Agreement covers government-to-government, and government-to-business cross-border data exchange. To illustrate, the Framework Agreement encourages the State Parties to establish a national policy framework for paperless trade, to create an enabling law in their respective national legal systems, and to establish the respective national committees to promote a legally enabling domestic environment for exchange of trade-related data and documents in electronic form. It differs in its nature and coverage from other regional initiatives, such as those of ASEAN and APEC. Compared with ASEAN, which is focused on developing

¹⁷ *About ESCAP*, <http://www.unescap.org/about>.

¹⁸ Duval, Yann and Kong Mengjing, *Paperless Trade in Regional Trade Agreements*, ESCAP TRADE, INVESTMENT AND INNOVATION DIVISION (TIID), WORKING PAPER SERIES NO. 02 (2016).

an ASEAN single window, a specific mechanism, the Framework Agreement provides a framework for States to follow through paperless trade, and not a single system. Moreover, ASEAN is limited to its 10 members, but the Framework Agreement is open to all 53 Member States of the ESCAP. As compared with APEC, whose activities are conducted on the basis of non-binding commitments, the Framework Agreement is a binding UN Treaty. APEC covers only 21 States and there exists no initiative among them for a regional agreement for cross-border paperless trade.

	FA	ASEAN Single Window	APEC
▪ Trade regulation sought to be implemented	Facilitation of paperless trade involving trade in goods and exchange of trade-related data	Facilitation of trade through electronic exchange of cargo clearance data in a synchronized environment	Various trade commitments
▪ Nature of agreement	Binding UN Treaty	Binding only among ASEAN Member States	Non-binding
▪ Area of implementation	53 Member States	10 Member States	21 Member States

On the other hand, the Framework Agreement is complementary to the WTO Agreement on Trade Facilitation (TFA). Implementing the Framework Agreement will support ESCAP member States in easily meeting the requirements of many provisions of the WTO TFA, including those on formalities and trade of goods, release and clearance of goods, and border-agency cooperation. The Framework Agreement addresses the necessity for a bilateral or sub-regional intergovernmental approach since this encompasses all 53 states of the region. It also provides a solution to high trade costs. According to implementation reports, the potential total direct cost savings across all trade would be approximately US\$1 billion annually for partial reform and US\$7 billion annually for full implementation.¹⁹ It also aims to shorten the time consumed by facilitating trade and therefore boosts trade.

¹⁹ *Estimating the Benefits of Cross-Border Paperless Trade*, UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC 24 (2014), <http://www.unescap.org/sites/default/files/Benefits%20of%20Cross-Border%20Paperless%20Trade.pdf>.

There had been issues regarding parties that have different implementation levels and levels of readiness for trade facilitation. The Framework Agreement affords flexibility according to the level of readiness while allowing its objectives to be met.

As recommended by the Framework Agreement, the Philippines will have to enact an enabling law that would allow cross-border paperless trade with other States. Once the international standards on trade have been identified, they must be adopted and incorporated in the enabling law. Most likely, these standards will refer to periods for data exchange, as well as the data that will have to be exchanged, and forms of contracts and documents evidencing such data. Since the Framework Agreement applies to both government-to-government and government-to-business transactions, cooperation between public and private sectors must also be developed.

For policy direction, we recommend that the DFA facilitate the signing and ratification of this agreement. To implement the FA will, however, entail a huge endeavor. It requires an enabling legislation and the formation of committees and other bodies. Pursuant to the process of ratification, we also recommend that all the relevant government agencies be involved.

In conclusion, our purpose here today is to make an initial assessment of trade-related treaties the Philippines may want to consider ratifying. We cannot offer at this time an in-depth discussion of these treaties. We merely provide a sampling of what may be available for consideration. It seems that there are a number of treaties that are currently being considered by the Government, possibly for a variety of reasons. We, at the Institute of International Legal Studies, believe that the situation merits further study to ensure that we are not missing out on opportunities for growth. Thank you very much for listening.

ATTY. WAHAB-MANANTAN: Thank you, Professor Casis. Our next speaker is a well-known expert on international economic and trade law. He is currently the Undersecretary of Foreign Affairs for International Economic Relations. In 2012, he was awarded the DFA Distinguished Service Award for his diplomatic service as Permanent Representative of the Philippines to the World Trade Organization in Geneva from 2004-2011. He also served as Chair of the WTO's Committee on Trade and Environment from 2007-2011.

He served as Undersecretary of the Department of Justice and Acting Government Corporate Counsel. He has appeared before the Philippine Supreme Court, the WTO Dispute Settlement Body in Geneva, the Iran-US Claims Tribunal in The Hague, and several *ad hoc* tribunals governed by UNCITRAL, ICSID, ICC and SIAC rules.

As a private practitioner, he has also represented clients as foreign counsel. He lectures as a Professor of Public and Private International Law at the Ateneo Law School, the Foreign Service Institute, and at various conferences and seminars. He ranked 1st among the 2,455 examinees in the 1984 Philippine Bar and was also admitted to the New York State Bar in 1987.

Colleagues, we are honored and pleased to have with us today, Undersecretary Manuel Antonio Teehankee of the DFA Office for International Economic Relations.

COMMENTARY BY UNDERSECRETARY MANUEL ANTONIO J. TEEHANKEE

USEC. MANUEL ANTONIO TEEHANKEE: Justice Leonen: Justice Azcuna, my good friend from DOJ days Chief Paras, of course, Asec. Ed, fellow traveler in this never ending push for international law interest group in the Philippines; dear friends, magandang hapon sa inyong lahat.

Since we are trying to push forward the open forum, I do have some brief remarks and reports, but is Attorney Raul Angeles here already? Is there a representative from the Board of Investments (BOI)? Any volunteer for the BOI? Anyway, I will briefly report and I thought we are following this forum style, so I will ask Professor Casis not to be so far away since there are only two of us in the open forum. Well, we are trying to follow international practice and make it very interactive, so with the absence of one speaker, we will have more time, especially with the presence of our justices here and all of you to interact. Since I have been in OUIER, I am very pleased to report some developments in international economic law. I really am very, very pleased that I am speaking after Professor Casis, since this is one of our subjects to have an inventory of treaties pending ratification or pending signature. Since I am also very pleased to only be dealing with economic, I am also very happy that we are speaking after the excellent presentation of the political treaties and agreements in the first session.

So, definitely, one of our very positive experiences with OLA and OUIER in the DFA is really the importance of getting treaties in force. And this is the big issue: how to get the treaties in force especially since a lot of legal time, billable hours if you were in private practice, but government bureaucratic time, which is also very important, is put into the negotiation process. And sometimes, negotiations can literally take years. And so when, after several years of work, the treaty is indeed signed, and so for it to be enforced, you have to proceed to having it ratified by the President, and having it concurred in by the Senate. However, as pointed out by the main presenter, some treaties are sitting there for many years. So we do have a proposal that it is very, very important, that the private – the international law interest group such as the academe present here, government, and also the private practitioners, get into the picture. Because in order to get a treaty in force, it requires a whole set of departmental concurrences. You cannot imagine the amount of rush work we had to get for the very positive passage of the following. At least over the last year and a half of my time in OUIER, OUIER is just the acronym for the Office of the Undersecretary for International Economic Relations, and OLA is the acronym for Ed's department. And of course we are very, very happy that Ed is back because he is an academic scholar and actually, theoretically should be permanently checking on OLA, with all due respect to our OLA colleagues here.

So, over the last year through some personal and senatorial or departmental prodding and reminding, we did get completion of the ITA, that's the Information Technology Agreement Supplemental Protocol. So that's in the WTO. As pointed out, we did work on the ratification of the Trade Facilitation Agreement which entered into force just this February this year. And so, I see of course the tight commission of friends. It really requires a whole set of governmental activation of the bureaucracy to get all these departmental concurrences, get them into a package care of OLA, then get them to the Office of the President. You must do the follow-up because, as what happened with the Paris accord, it was already at the Office of the President, but without follow-up, the election happened and then, guess what? We had to redo all the Cabinet concurrences, you cannot imagine. So it was already ready in the Office of the President, they didn't, thanks to Senator Legarda, who you all know is an advocate, we got things done and we had to follow-up in each Department. So that's the second one that was rushed and followed up, the Paris accord. So the Philippines was caught up and is part of the Paris accord.

Then we had also another economic treaty, the Asian Infrastructure Investment Bank (AIIB) Agreement which was also, the impetus of course, was that the President was going to China. We had reservation subscription, we were given VIP treatment, we own one percent (1%) of AIIB. The money was all set, a hundred million dollars, it's all set. So can you imagine if we did not get the full ratification, the set aside hundred million dollars will lapse because we offer it now on post-PDAF requirements of strict COA requirements and that would have lapsed, and the money would have not been used and then we would have to go through a whole appropriation process. So that was also good news, fast, and we are priority one percent (1%) owners of the AIIB, not, in the World Bank and other financial institutions. We have very, very tiny optionalities but the good part is, because we sent the money in, we ratified, we are a major stockholder.

We also have this Apostille Convention, good news from OLA, because that is very important for our economic agreements as pointed out per OLA. It is pending at the Office of the President already. Of course, it took Ed Malaya's attention and intergovernmental, because in government we all have to help each other, so it is a good collegiality of working with other government offices. Do not nag them, just friendly follow-up, eventually they will deliver. Because it is all really very collegial in the government service. We have signed the EFTA, which is the second free trade agreement of the Philippines, the first being with Japan. This one is technically a free trade agreement but with four non-EU countries, emphasis non-EU, so it is not a controversy, Switzerland, Lichtenstein, Norway, and Iceland. So this is also almost done, again thank you to OLA, because it's a whole legal process, you know how lawyers are, of assembling a package for Malacañang and that is pending now for the President's ratification, similar to the Apostille Convention. And after that you must follow-up at the Senate and make sure that the Senate Foreign Relations Committee, that's its job, and you have contact with the Senators, and then the report must be put out for the full session concurrence. So we are watching out for two very positive developments – EFTA and Apostille for monitoring with the Senate. And of course, you know that the Senate operates in various sessions and so you must make sure the ratification, I'm sorry the concurrence, must occur within a certain time frame.

Going back to practicality, I think, I can only give my 300% support to the idea of an annual Colloquium such as this because it gives the DFA the opportunity to interact with the academe, other government agencies, and private international law practitioners to push forward indeed what are very current events happening in the international law area, and which are time sensitive,

especially in the international economic field. Most international economic agreement or treaties have the so-called momentum effect of, once signed, it generates investments and trade, and new deals within a span of two to three years. And that's why in the economic front, we work closely with DTI on ensuring ratification within a relatively short time, because in the international economic field, the momentum for new investment and new trade is very close to the date of the deal. Of course, Apostille Convention, digital paper and all that, we should push for more, but that is why we need – it is not as time sensitive but it is important that the private sector does, and the other agencies in the academe.

So we do have a kind of rating proposal wherein the importance of the pending treaty should be scaled on a one to ten basis with three factors. The first factor, is of course, whether the Philippines has already signed, and the years pending. So if it is signed like the 2007 ECC, signed and already pending for eight years, ten years, so ten years and already signed – of course, if there's any controversy, that's minus 5, okay. So on a scale of 1-10, assuming that it is non-controversial, assuming this is non-controversial, it gets a ten or one-third, three, three point three (3.3).

Then, the second one is whether it is accepted already. There is an overall international consensus among the international law practitioners. So I suppose there are two examples – one, it gets a really high priority, but on the digital one, which is only open for signature, of course, it gets already, it is not signed so it does not get points in the A Level. But on the second one, one Convention is higher, higher priority because of the consensus. For example, the Apostille Convention gets a very, very high score because it has reached international level of acceptance. And of course, to the international law experts in the room, a level of customary international law, while there is instant custom, there is still the general acceptability of international acceptance of a custom.

The third factor that we would recommend for our monitoring during our Colloquium is the status of the endorsement and what sector is involved. And here I think while the government is sometimes behind, we have the A and B, but in C, it is very important that the treaty that is pending for signature or concurrence or ratification receives the endorsement of the international law interest groups, which of course we are trying to make sure are Philippine Society of International Law, all the international law centers are more active, so we really need positive championing by the sector involved. And of course, this includes, for example, the DTI if it is a trade agreement, if it is intellectual property we

need the endorsement of the Intellectual Property Office and the DOST. So in the third factor, we really need the private practitioner groups who are supporting that particular Convention. I can report the very, very positive influence of the Philippine Chamber of Commerce and Industry. They have been following up on the Apostille Convention, so that is both the Chamber of Commerce and private practitioners. They are also following up on the Islamabad Convention. So very important to, kind of adopt, adopt your treaty or adopt your Convention, so that they can be put forward in the priority list. So without much further ado, I am very glad to give you that partial report in the economic area. So, congratulations and I hope this will continue on an annual basis. Then we can have the University of the Philippines provide a clear matrix with some priorities. They gave us plenty of treaties right away to follow up on. I am sure that your office will be very upset given the amount of work your office has to do to compile documents for a treaty. Maraming salamat po.

OPEN FORUM

ATTY. WAHAB-MANANTAN: Thank you very much Usec. Teehankee. Now we proceed to the Open Forum. As usual, we request you to please identify yourself and the office that you come from for the proceedings. Yes, sir?

COMMISSIONER ALBANO: To just follow through on Amb. Teehankee's presentation. I am Commissioner Albano of the Tariff Commission. I observed that we have so many things in the process and my observation is that there has to be a personal champion of a certain treaty, like the IPA where to because there is this person who really saw to it that it gets through the process. Like even this Convention on Intellectual Property. Is there somebody, a person, who is championing it? That's very important. As I observed, the way we got things done many times in the economic field is that there is a personal champion of this particular treaty that has to go through the bureaucracy. So that is just in addition to the comment that has been made by Amb. Teehankee. Thank you.

ATTY. CEMBRANO-MALLARI: Okay, so we can have two or three more questions and then the panel will answer them. Yes Ma'am?

MS. ROSARIO LABORTE-CUEVAS: Good morning. I'm Rosario Laborte-Cuevas from the Department of Justice. I would like to commend and thank Professor Casis for his in-depth presentation, especially on the CISG and the ECC. I am interested in these two Conventions because the Office of the Chief State Counsel is also working closely with the UNCITRAL Regional Center for Asia and the Pacific. And we have been pushing for the Philippines to sign the CISG. As early as 2009, the Department has already endorsed it to the DFA UNIO for the Philippines to sign the CISG.

PANELIST: Bakit sa UNIO (Why UNIO)?

MS. LABORTE-CUEVAS: Kasi po ang UNIO ang nag-request (Because it was UNIO that requested) for the Department to make a comment and its recommendations on the CISG. And in 2013, actually the UNCITRAL Regional Center Representatives, even came in and gave a seminar to the agencies of the Department. And the conclusion of that forum is that everybody is for the Philippines to sign the CISG. And we are only waiting for the DFA. Sorry for that information, Sir. But we are awaiting the action of UNIO on that. And because of our close coordination with the Department of Trade and Industry (DTI)-Export Management Bureau, during the last meeting with the UNCITRAL ARCAP in BPI this year, we were advised by DFA to revive the push for the CISG. With regard to ECC, because it is also an instrument under the UNCITRAL, the DOJ is in close coordination with the DTI E-Commerce of DTI and they have also been following up with the DFA for the ratification. Because, yes, we have signed it in 2007 and as per the DTI E-Commerce Office, they have been following it up with DFA on the ratification. Apparently, because of the change of administration, I think the papers for the ratification are missing. So maybe we can just revive the process for its ratification.

ATTY. CEMBRANO-MALLARI: Thank you very much, Ma'am. One more question please or one more comment?

PROF. ROMMEL CASIS: Okay, just a quick response to the comments. I agree that we need champions to continue the follow-up. But I think instead of just having a person being the champion, I think we really need an institution that is continuous. Because we have expiration dates so it would be best to have an institutional memory and continuity. And I am sure the DFA-OLA under

Ambassador Malaya is committed to this. He has been very dynamic and energetic discussing with us. And also I guess to commit the Institute of International Legal Studies, also of the U.P. Law Center. Perhaps, also working with the IBP to continue working on this by coming up with I guess what Ambassador Teehankee also mentioned, a database, a list to make sure that no treaty falls through the cracks and by acting as a coordinating body or arm to help our already overworked colleagues in government service. Just to give them gentle reminders of certain things that remain pending. And we are glad to support our colleagues in government in that way.

USEC. TEEHANKEE: So, on the CISG, I still remember this from my law school days, that it was positively endorsed in so many legal articles. So I think the colloquium today passes by acclamation of hands that we should sign it. Yes, can we hear a sound of yes?

AUDIENCE: Yes!

USEC. TEEHANKEE: Okay so the next question is, in all these treaties, there has to be a lead department. Is there a lead department? Baka DOJ? Anyway, that's the big question always in the ratification process. In climate change, DENR was head together with a senator and they were reminding each other. But I think for CISG, do we have a lead? Is it DOJ? Chief Paras, DOJ ba 'yon? Okay, so all we will need is a joint signed letter from the two cabinets—secretaries addressed to Sec. Cayetano. Because this is a signature, it is not a ratification, CISG's signature. We need to sign it. So it is not a simple thing for OLA to receive. So good news for OLA here, hindi kayo ang taya. Because for signature, you need special powers and there has to be a lead cabinet minister who will sign the CISG. So we will expect that application for special powers to be sent to our office, and if that is done, we will definitely fully endorse. But that one process for signature is a slightly different process and then for ratification and concurrence, we definitely will just need a follow-up endorsement together with the COC from the Department. Now, if the one following up is a private academe, they have to get the follow-up with the lead cabinet because, first and foremost, the certificate of concurrence of that lead cabinet department must be in place. Then we will send out requests for COCs from all other cabinets. So I think maybe as a project, since it is for signature and it is the initial colloquium of the DFA-OLA, maybe CISG could be the first project for a signature process because I think it is really overdue *ang* CISG so I think that can be a benchmark. Thank you.

ASEC. EDUARDO MALAYA: Atty. Celeste, if I may just add something to what Usec. Dondi had mentioned. It was mentioned by our friend from the DOJ that the DOJ was working with DFA UNIO on the CISG and so just to have additional collaborators on this matter, I would recommend that when there are communications on international economic treaties, please rope in the office of Usec. Dondi Teehankee. It is their office which has the primary competence on the subject. And with respect to the Electronic Commerce Convention, when we signed it in 2007 there was already a consensus to join in. So it is a matter of doing the necessary follow-through.

And in fact, I am surprised that we have not done the follow-through, and I think that this matter underscores the value of our Colloquium. Most of us are meeting for the first time as a group and comparing notes and exchanging recommendations. This validates the important role that this Colloquium is doing and can do moving forward.

I also would like to mention an update on the Apostille Convention which Professor Beth, Justice Azcuna, and Usec. Dondi Teehankee referred to—very simple convention and yet so crucial in facilitating the recognition of foreign documents. DFA-OLA prepared the ratification papers and submitted them to the Office of the President months ago, and we are hopeful that the President would sign it soonest. We hope to see a lot more of these low-hanging fruits just by working together.

ATTY. CEMBRANO-MALLARI: Not only is this an opportunity for us to learn from our speakers on the state of international law in relation to our foreign policy priorities, but also is a platform to widen and strengthen partnerships among law and foreign service practitioners who work on these issues. Thus, it is the organizers' hope that today's activity will spur continued engagements and perhaps even the institutionalization of such engagements in the future as a means to enforce the Philippines' position in shaping international law. To facilitate the attainment of this goal, we have asked key persons from various institutions and organizations engaged in international law and Philippine foreign policy issues to introduce their groups and discuss their work. We now invite them on the stage for their brief presentations. Kindly come up to the stage as your names are called. Atty. Romel Bagares of the Philippine Society of International Law, Atty. Andre Palacios of the newly established International Law and International Affairs Committee of the Integrated Bar of the Philippines, and Atty. Jeremy Gatdula from the University of Asia and the Pacific to discuss the work of the Philippine Council on Foreign Relations.