enforcement agencies. This is the reason why only few of the traffickers are caught and few of the victims are recovered.[78]

The problems of implementation, weak law enforcement, and corruption are, by no means, a monopoly of these two countries. These are realities experienced in most countries where trafficking remains a low-risk, high-profit enterprise.

Countries of destination usually approach the problem of trafficking differently. Although Korea has a trafficking law, it has, in the past, refused to take any responsibility in solving the problem, and still has the tendency to avoid the issue.[79] Singapore and Malaysia both regard the issue of trafficking within the context of illegal migration, and prefer to address it as a serious social and security problem.[80]

CONCLUSION

Whichever way the problem is viewed, be it within the context of trafficking or within the context of illegal migration, the fact remains that treating women and children as commodities, as if they were ordinary objects of commercial transactions between people, is absolutely deplorable. This atrocity, by whatever name or designation, strikes at the very core of human dignity.

It is quite obvious that the problem of trafficking in women and children has been in existence even before all the international legal instruments were adopted. Over the years, not only has the problem grown in size, it has also developed into a more scheming, vile and depraved practice. All the States must take the existing legal frameworks in the international, regional and national levels seriously, so that these instruments and laws can catch up with the fast growth of trafficking. Only by a serious commitment by the community of nations can an effective response be achieved in addressing this problem. Thus, all countries which vowed to uphold the inherent dignity of every human being when they adopted the UDHR and other standard-setting instruments, should bear in mind that the responsibility in preserving and improving the norms established for the just and humane treatment of people rests on each of them, as members of the international community.

78. BANGLADESH CEDAW REPORT (Apr. 1, 1997), *available at* http://www.uri.edu/artsci/wms/ hughes/catw/banglad.htm.

79. UNITED VOICE [HAN-SO-RI] FOR THE ERADICATION OF PROSTITUTION IN KOREA (2000) (responding to and included in the 2000 National Report of the Republic of Korea on the Asia Regional Initiative Against Trafficking in Women and Children).

80. DERKS, *supra* note 66, at 57-58, 60.

Revisiting the Philosophical Underpinnings of Philippine Commercial Laws

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I. PREFATORY STATEMENTS

In today's digital world of international commerce and globalization, the stage of economic development of a country determines the extent by which its people are able to achieve a realization of the "good life," and the role that its government and the captains of its commerce and industries would play in influencing world events. The commercial and economic homogenization of the world is coming about in clearly concerted efforts by powerful governments and international organizations, through international and regional groupings and alliances, and through the global networking of corporations and associations. The inevitable pervasiveness of the facilities of the internet and other international electronic highways will continue to effectively defy national boundaries and state regulations, and will provide commercial, social and political penetration in all important corners of the world in the most pervasive and individual way than anything ever before devised by man.

The inescapable economic and commercial inter-dependence of countries around the world, and the rise of multinationals as truly international creatures of commerce, no longer allows a people and its leaders, especially in "small" countries, to determine their own fate in an insular way. Unless small countries are able to develop the economic and commercial agility to be effective players in the world market, then they will inevitable fall prey to the exploitative consequences and commercial avarice that accompany the workings of world commerce.

The Philippines today is truly a diminutive member of the emerging world older. Although touted in the 1950s as a country that showed the greatest promise at economic development, it is today considered one of the poorer countries in the world. This is exacerbated by the fact that neighboring Asian countries that started under less auspicious circumstances now far outstrip the Philippines in economic, financial and commercial developments. The Filipino has been marginalized in the world stage. He has practically reduced his international relations to one of mendicancy; and in its national desperation, has seen many of his countrymen become the nannies, household helpers, laborers, and entertainers of the world. The Philippine experience from the late twentieth century has truly been one of *diaspora*.

Why is the Filipino in such supplicant state today, despite centuries of tutelage under Western world powers? Truly, the salvation of the Filipino must lie in knowing what went wrong in his economic and commercial quest to bring a better quality of life throughout this archipelago.

In this attempt to understand the underlying philosophical approach of Philippine society to commercial laws, two main approaches have been undertaken in this essay. The first is by looking at the constitutional writ to divine where we have come from and where we are headed, and second, by

comparing this with the effects and consequences of developments in salient areas of Philippine commercial law, to understand and flesh out the work that is cut-out for the Filipino as a nation.

The aim of this essay is to understand the philosophical heart of Philippine commercial laws as it responds to the emerging economic philosophy, where it has been, how it figures in today's emerging globalization of world commerce, and what likely shape it will take in the near future.

II. Coverage of "Commercial Law"

Although there are contentions as to the proper coverage of "commercial laws," for purposes of this paper, the term shall be broadly construed to encompass that branch of private laws that provide for the rules governing the rights, obligations, and relations of persons engaged in commerce or trade, which necessarily includes the purchase, sale, exchange, traffic or distribution of goods, commodities, productions, services or property, tangible or intangible,[1] including the instrumentalities and agencies by which they are promoted and the means and appliances by which they are carried on.[2] Likewise, the term includes both concept of laws relating to *trade,* which is the business traffic within the limitations of a state, and *commerce,* which covers the intercourse with foreign states.[3]

The field of commercial law is said to be "a monument...to man's ingenuity and inventiveness in fashioning the fine legal tools which he utilizes to attain more efficiently his economic ends and to expand more effectively his economic activities,"[4] and that "[t]he demands of modern business necessitate constant changes in statutory provisions to meet new conditions. . . [and] requires flexibility in legislation...."[5]

Consequently, based on international standards, commercial law is characterized as: (a) *universal*; (b) *progressive*; and (c) *equitable.*[6]

Commercial law is *universal* or international because it exist in every civilized society; *progressive* because with the passage of time, commercial law accumulates new ideas and keeps abreast with contemporary developments;

1. Moreno's Law Dictionary 81 (2000); *see also* 15 Am Jur 2d *Commerce* §3 321-22 (1938).
2. Black's Law Dictionary 93 (6d ed. 1998).
3. Philippine Legal Encyclopedia 141 (1986).
4. Agueda F. Agbayani, *Preface* to Commentaries and Jurisprudence on the Commercial Laws of the Philippines (1975).
5. Teodorico C. Martin, *Preface* to Commentaries and Jurisprudence on the Philippine Commercial Laws (1961).
6. *Id.* at 1, *citing* Del Viso, Derecho Mercantil 30; Gopengco, Mercantile Law Compendium 509 (1983).

and *equitable* since commercial transactions involve the exchange of values or consideration.[7]

Since the impetus of commercial law is the pursuit of business and the generation of profits, there are postulates that apply uniquely to Commercial laws. The first postulate is that *commercial transactions generally arise from the element of repetition.* Thus, the Code of Commerce stresses the need for habituality.[8]

As an example, a stipulation in a bill of lading that the owner of the vessel would not be liable for the negligent acts of the crew would be invalid if the underlying contract is a commercial transaction as that of a common carrier. However, if the vessel was specially chartered for an isolated transaction, there being no element of habituality, the stipulation will be enforced since the provisions of the Code of Commerce will be deemed inapplicable.[9] In a case, the sale by a person of his capital in an unregistered partnership was deemed not to make him a merchant within the meaning of the law governing "merchant," on the basis that a single commercial act does not make one a merchant, and that in contemplation of the Code of Commerce and other laws dealing in commerce, a merchant is one who executes various acts of commerce.[10]

The other postulate is that *time is the essence of all Commercial law transactions,* and that every debtor to a commercial contract would be in *mora* when he fails to meet the stipulated deadline, without need of formal demand from the other party (*mora ex re*).

It would be important then, in the Filipino quest to be a player in the world market, that his Commercial laws, and the underlying principles that govern them, are consistent with such international standards.

7. Jose Nolledo, Commercial Law Reviewer 2 (1991).

   Nolledo adds two more characteristics not cited by other authors: *customary* because commercial law rules are followed from time to time or are involved in everyday transactions; and *uniform* because within a country, a commercial act or contract is governed by the same rule.

8. *See* Code of Commerce, art. 1: "For purposes of this Code, the following are merchants: Those who, having legal capacity to engage in commerce, *habitually devote* themselves thereto..."

   Article 3 similarly provides that "[t]he legal presumption of habitually engaging in commerce shall exist from the moment the person who intends to engage therein announces through circulars, newspapers, handbills, posters exhibited to the public, or in any other manner whatsoever, an establishment which has for its object some commercial operation."

9. Home Insurance Co. v. American Steamship, 23 SCRA 24 (1968).
10. *See* Boada v. Juan Pasada, 58 Phil. 184 (1933).

III. Constitutional Declarations on Economic and Commercial Principles

The aegis by which to understand the philosophical basis of Philippine Commercial law, both in internal trade and international commerce, would be the declarations of the 1987 Constitution governing the economic and commercial principles applicable to the Philippines, and the wealth of Supreme Court decisions that have addressed these constitutional provisions, but more importantly, the "directions" that those decisions seems to take..

A. The Paternalistic Stance of Constitution

There is no intention in this section to "discover" or "analyze" the underlying doctrine covering the issue on the extent by which the Supreme Court may exercise its power of judicial review to make economic pronouncements. In fact, many authoritative papers have been published covering the various issues relevant thereto.[11] This paper takes the position that the Supreme Court, by its leading decisions, has clearly shown that it has, in the exercise of its power of judicial review, a constitutional mandate to make economic pronouncements consistent with the declarations contained in the 1987 Constitution. As the Court has held: "Indeed, the Court will always defer to the Constitution in the proper governance of a free society; after all, there is nothing so sacrosanct in any economic policy as to draw itself beyond judicial review when the Constitution is involved."[12] In another decision, the Supreme Court seemed to give a definitive stance:

> We hold that the power and obligation of this Court to pass upon the constitutionality of laws cannot be defeated by the fact that the challenged law carries serious economic implications. . . The Constitution gave this Court the authority to strike down *all* laws that violate the Constitution. It did not exempt from the reach of this authority laws with economic dimension. A 20-20 vision will show that the grant by the Constitution to this Court of this all important power of review is written without any find print.[13]

The declaration of Justice Holmes that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizens to the state or of laissez-faire,"[14] does not apply to our constitutional system, since our Constitutions have always declared a preferred paternalistic economic system.

Unlike other modern nations whose constitutions are framed by a people who have gained independence and therefore define their hard-earned status as a people in order to project into the future, our first national constitution, the 1935 Constitution, was drawn-up by a nation still under the tutelage of a western power. Thus, it was used as a means to balance the demands of such colonial power, and as a legal document by which we could stake our claims, either as to territories, or as to commercial and property rights. Subsequently, our 1973 Constitution was drafted at a pretense of a dictator attempting to show great statesmanship, and lacked a sincere basis. Our present 1987 Constitution, resulted from a fear of the strength of the various sectors and power bases of the country, and an accommodation of the various interests groups in our society that suddenly found a voice in the void created by the fleeing Marcos dictator.

The Filipinos are therefore a very "constitutional" nation. They consider it to be the "prescription" by which national ills shall be cured, the civic "gospel" by which to transform the "national soul" towards the virtuous, and the "writ" by which to seal their importance as a people in the world stage. As a Catholic nation, the Filipinos believe in miracles and the almost daily expectation of divine intervention in the big and small matters in their individual lives. They look upon their Constitution as the greatest promise they make to themselves as a nation: a talisman by which salient evils shall be cured, and the key to a life of peace and prosperity.

In essence, our constitutional declarations on commercial and economic matters reflect our past experience, indicate our current dualism and may, depending upon its treatment, as the keystone to a cherished economic panacea.

11. Levy Edwin C. Ang, Supreme Court Decisions of Economic Impact Revisited (1998) (unpublished J.D. Thesis, Ateneo de Manila University School of Law) (on file with the Ateneo Professional Schools Library); Emereviana Arcellana, *Supreme Court and the Constitution Judicial Review of Political Articles*, 67 PHIL. L.J. 322 (1993); Abad Santos, *The Role of the Judiciary in Policy Formulation*, 40 PHIL. L.J. 567 (1966); Pacifico A. Agabin, *Judicial Review of Economic Policy*, 72 PHIL. L.J. 186 (1997); Adrian S. Cristobal Jr., *The Supreme Court and Judicial Policy-Making*, 36 ATENEO L.J. 57 (1991); Florentino P. Feliciano, *On the Functions of Judicial Review and the Doctrine of Political Questions*, 48 PHIL. L.J. 457 (1964); Perfecto Fernandez, *Judicial Overreaching*, 67 PHIL. L.J. 332 (1993); Jonell B. Goco., *Judicial Review of Economic Measures*, 14 LAW. REV., June 30, 2000, at 6; Ricardo J. Romulo, *Supreme Court and Economic Policy: A Plea for Judicial Abstinence*, 67 PHIL. L.J. 348-353 (1993); Ma. Lourdes Sereño, *The Power of Judicial Review and Economic Policies Achieving Constitutional Objectives*, submitted as part of the PHILIPPINE JUDICIAL ACADEMY PROJECT ON LAW AND ECONOMICS in cooperation with AGILE-USAID; Solomon R.B. Castro & Martin Israel L. Pison, *Economic Policy Determining Function of the Supreme Court in Times of National Crisis*, 67 PHIL. L.J. 354 (1993); Frances Yuyucheng, *An Analysis of the Supreme Court*, 39 ATENEO L.J. 219 (1994).

12. Manila Prince Hotel v. GSIS, 267 SCRA 408, 447 (1997).

13. Tatad v. Secretary of the Department of Energy, 282 SCRA 337, 347-49 (1998).

14. Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J. dissenting).

B. Constitutional Policy on National Economy and Commerce

1. Nationalization of Natural Resources and Public Utilities

i. Nationalization of Natural Resources

Economic Protectionism was the battle-cry of the nationalists in the Convention for the 1935 Constitution,[15] especially in the debates on Natural Resources. The nationalization of the natural resources of the country was intended: (1) to ensure their conservation for Filipino posterity; (2) to serve as an instrument of national defense, helping prevent the extension into the country of foreign control through peaceful economic penetration; and (3) to prevent making the Philippines a source of international conflicts with the consequent danger to its internal security and independence.[16]

a. Ensuring the Conservation of Natural Resources for Filipino Posterity

At the time of the framing of the 1935 Constitution, Filipino capital had been known, even then, to be rather shy. Filipinos hesitated as a general rule to invest a considerable sum of their capital for the development, exploitation, and utilization of the natural resources of the country.[17] This general apathy, the delegates knew, would mean the retardation of the development of the natural resources unless foreign capital would be encouraged to come in and help in that development.[18] Despite this undeniable fact, the delegates still chose to impose the strict nationalization restrictions that would become the progenitor of the 1987 Constitution's own restrictions. Delegate Aruego, one of the foremost authorities on the 1935 Constitution, explained that:

> [T]here was a general feeling in the Convention that it was better to have such a development retarded or even postponed altogether until such time when the Filipinos would be ready and willing to undertake it, rather than permit the natural resources to be placed under the ownership or control of foreigners, in order that they might be immediately developed, with the Filipinos of the future serving not as owners, but at most as tenants or workers under foreign masters. By all means, the delegates believed, the natural resources should be conserved for Filipino posterity.[19]

b. Nationalization of Natural Resources as an Instrument of National Defense

The nationalization of the natural resources was also intended as an instrument of national defense. The committee on nationalization of land and other

15. 2 JOSE M. ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 658 (1949).
16. *Id.* at 604.
17. *Id.* at 605.
18. *Id.*
19. *Id.*

natural resources stated in its report that to permit alien ownership or control of the natural resources would weaken national defense. In support of this argument, the committee began its report by pointing out the experience of the Mexicans that led them to place serious limitations on the right of aliens to hold lands in Mexico. Before the Mexican Constitution contained such limitations, the government of Mexico offered free land to settlers in Texas to secure rapid settlement and development in the territory. Due to the influx of American settlers, this proved to be the cause for the revolt against Mexican rule and eventual American annexation.[20] Delegate Aruego agreed with the committee that the Filipinos should profit from Mexico's experience.[21]

c. Prevention of International Conflicts

Aside from these considerations, the nationalization of the natural resources was also believed to prevent the Philippines from becoming a source of international conflicts, with the consequent danger to its internal security and independence. It was primarily for these reasons that the Convention approved readily the proposed principle of prohibiting aliens to acquire, exploit, develop, or utilize agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines.[22]

The Convention, however, took a different stand when it came permitting aliens to acquire an interest in the natural resources of the country as component elements of corporations and associations. The purpose of the committee on nationalization and preservation of land and natural resources was to enable Filipino-controlled corporations and associations to encourage aliens to join their technical and managerial staff by giving them a part interest in the same. The maximum interest which an alien could legally hold was subject to much debate. Originally, the extent of alien ownership was pegged at only twenty-five *per centum* of the capital. but it was increased to forty *per centum*. The final version of the Constitutional provision relating to the nationalization of natural resources provided that a corporation or association with at least sixty *per centum* of its capital by Filipino citizens may participate in the disposition, exploitation, development, or utilization of the public domain and the natural resources.[23] The change was made on the ground that the Philippines would gain more by permitting foreign capital to a certain extent to help in the development of the natural resources.

20. *Id.* at 606. *Citing* the Preface of the committee report.
21. *Id.*
22. *Id.* at 606.
23. PHIL. CONST. art. XIII, §1(1935).

A contemporary reader cannot help but realize that the factual basis on which such strong nationality restrictions were instituted does not exist anymore. The said restrictions are in fact injurious to a modern and globalized economy. However, the nationalization of natural resources would return again and again.

Moving forward to the 1973 Constitution, Section 9 of Article XIV, which *Filipinizes* the "disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines," merely reproduces a portion of section 1, Article XIII of the 1935 Constitution.[24] Thus, the rationale in 1935, which had since been ascertained by the Supreme Court in *Republic v. Quasha,* remained valid, at least implicitly, for the 1971 Convention delegates:

> It should be emphatically stated, that the provisions of our Constitution which limit to Filipinos the rights to develop the natural resources and to operate the public utilities of the Philippines, is one of the bulwarks of our national integrity. The Filipino people decided to include it in our Constitution in order that it may have the stability and permanency that its importance requires. It is written in our Constitution so that it may neither be the subject of barter nor be impaired in the give and take of politics. With our natural resources, our sources of power and energy, our public lands, and our public utilities, the material basis of the nation's existence, in the hands of aliens over whom the Philippine Government does not have complete control, the Filipinos may soon find themselves deprived of their patrimony, and living as it were, in a house that no longer belongs to them.[25]

The second sentence of section 9, however, was new. It provided that:

> [t]he Batasang Pambansa, in the national interest, may allow such citizens, corporations, or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, development, exploitation, or utilization of any of the natural resources.

The original idea behind these provisions was to authorize the government, not private entities, to enter into service contracts with foreign entities. As finally approved, however, a citizen or private entity may be allowed by the National Assembly to enter into such service contract. The prior approval of

24. Parenthetically, it may be observed that despite extensive deliberation and numerous proposals for change, the 1973 Constitution, at least in this area of Constitutional law, was hardly innovative, as the basic law on the nationalization of both natural resources and public utilities remained recalcitrant. *See generally* Minutes of the Meetings of the Committee on Agriculture and Natural Resources of the 1971 Constitutional Convention, which met on one hundred fourteen occasions from August 16, 1971 to May 19, 1972; Minutes of the Meetings of the Committee on Franchises and Public Utilities of the 1971 Constitutional Convention, which met on fifty-nine occasions from August 20, 1971, to April 27, 1972.

25. 46 SCRA 160, 170 (1972) (The Supreme Court quoted, with approval, from the rationale of Vicente G. Sinco).

the National Assembly was deemed sufficient to protect the national interest.[26] This provision would be reproduced substantially in the 1987 Constitution, with the original intent of having only the government enter into such service contracts with foreign entities restored.

The debates and discussions on National Economy and Patrimony in the 1986 Constitutional Convention were primarily a struggle between two groups: one adhering towards a liberal economic policy balanced by a concern for social justice and the other desirous of a more protectionist constitution because of distrust for foreign and local business magnates.[27] The primary provision concerning the development of natural resources under the 1987 Constitution is section 2, article XII. The first two sentences of the said section are uncontroversial. They merely reproduced the traditional Regalian doctrine, which had existed in previous constitutions:[28] the first sentence vested ownership of all natural resources in the State,[29] and the second made a distinction between alienable and inalienable resources.[30]

While earlier Constitutions had prescribed that the inalienable portions of the public domain could be explored, developed, or utilized only by license, concession, or lease, which could be granted only to Filipino citizens or Filipino corporations,[31] the new constitution, introduced unfamiliar language:

> The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens.

As would be expected, a provision of such importance invited a number of amendments.[32] One of the proposed amendments was from Commissioner Davide, which moved for the harmonization of the said provision with the desire of the approved Preamble "to preserve and develop the national patrimony for the sovereign Filipino people and for generations to come," by limiting the participating corporations those "wholly owned" by Filipinos.

26. JOAQUIN G. BERNAS, S.J., PHILIPPINE CONSTITUTIONAL LAW 739 (1984), *citing* Session of Nov. 25, 1972 [hereinafter BERNAS].

27. JOAQUIN G. BERNAS, S.J., THE INTENT OF THE 1986 CONSTITUTIONAL WRITERS 799 (1995) [hereinafter BERNAS INTENT].

28. *Id.* at 811-12.

29. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State.

30. With the exception of agricultural lands, all other natural resources shall not be alienated.

31. BERNAS INTENT, *supra* note 27, at 812.

32. An excellent summary of the debates of the 1986 Constitutional Convention, including the varied amendments proposed leading up to the present provision, can be found in BERNAS INTENT, *supra* note 27, at 810-28.

Commissioner Villegas defended the said provision by insisting that the required minimum Filipino capitalization in the participating corporations, would guarantee the protection of the Filipino interests, and that requiring full Filipino ownership would be prejudicial because of the shortage of domestic capital.[33] Upon a vote, the Davide amendment lost 16-22.

Commissioner Davide then immediately followed this with another amendment to read: "The governing and managing bodies of such corporations shall be vested exclusively in citizens of the Philippines."[34] The intent was to strip foreign stockholders of the right to sit in the board of directors. Due of this, Commissioner Romulo argued that this would be unfair to foreign stockholders.[35] Commissioner Padilla added that refusing them a voice in management would make "co-production, joint-venture and production sharing illusory."[36] This Davide amendment also failed, 14-20.

Other attempts were also made to change the proportion. Commissioner Garcia moved that foreign participation be limited to twenty-five *per centum*. This was defeated 16-18.[37] Commissioner Foz followed with a limit of one-third foreign ownership. This too was lost 17-20.[38]

A long and drawn-out debate also ensued on the exact meaning of the word "capital," i.e. whether it referred to subscribed or paid-up capital. In the end, it was understood that the basis for determining the capital requirement would be subscribed, not paid-up capital.[39]

The second paragraph of the proposed section,[40] which was to become the present fourth paragraph of section 2, art. XII of the 1987 Constitution,[41]

33. RECORD OF THE CONSTITUTION 358-59 [hereinafter RECORD].

34. *Id.* at 362.

35. BERNAS INTENT, *supra* note 27, at 818.

36. RECORD, *supra* note 33, at 362-63.

37. *Id.* at 364.

38. *Id.* at 365.

39. *See* RECORD at 583-84; 590-91.

40. As proposed, this originally read: "The President with the concurrence of congress, by special law, shall provide the terms and conditions under which a foreign-owned corporation may enter into agreements with the government involving either technical or financial assistance for large-scale exploration, development, and utilization of natural resources."

41. §2(4), reads: "The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development, and use of local scientific and technical resources."

became the object of intense attention. It dealt with the possible role of foreign corporations who were otherwise excluded from the exploration and development of natural resources.

The main reason for opening up such agreements with foreign corporations, that is, corporations owned by foreigners, was the current scarcity of capital.[42] Despite this apparent change of heart by the Commission towards foreign corporations, however, Commissioner Davide introduced an amendment which limited the allowability of service contacts only to the exploitation of minerals, petroleum and other mineral oils. The Committee accepted this proposal.[43]

d. Nationalization of Public Utilities.

The nationalization of the public utilities, together with that of the natural resources of the country, was one of the earliest propositions planned to be included in the 1935 Constitution.[44] The deliberations of the Constitutional commission leave little doubt that the same arguments advanced for the nationalization of our natural resources led to the concomitant nationalization of public utilities as well.[45]

Through separate recommendations, the Committee on Franchises[46] and the Committee on Nationalization of Public Utilities'[47] reports served as the basis for the first draft of the Constitution on public utilities, which read:

> No franchise for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or other entities organized under the laws of the Philippines fifty-one per cent of the capital of which is owned and held by citizens of the Philippines, nor shall such franchises be exclusive in character or for a longer period than fifty years.

The provisions of the first draft were slightly amended in the course of the deliberations of the Convention. Most important for purposes of this study was

42. BERNAS INTENT, *supra* note 27, at 818.

43. *Id.* at 819.

44. ARUEGO, *supra* note 15, at 667.

45. *See* discussion on Public Utilities under the 1935 Constitution, *infra*.

46. As is relevant to this study, that Committee's report to President Quezon dated September 27, 1934 recommended the incorporation of the following provision to the Constitution:

> No franchise of public utility shall be granted except to citizens of the Philippine Islands or of the United States or to corporations, companies, or other entities, at least fifty-one per cent of the capital of which is owned by citizens of the Philippine Islands or of the United States or both.

47. The Committees' relevant recommendation was: "[t]hat the lawmaking body shall nationalize such means of transportation or communication as the national defense, the national security, or the public welfare may require."

the increase in the required Philippine equity from fifty-one percent to sixty percent, a requirement that continues to this day.

There was an overwhelming sentiment in the Convention in favor of the nationalization of public utilities.[48] As revised by the Special Committee on Style after the second reading, and as they were approved by the Convention with the adoption of the 1935 Constitution, the provisions on public utilities read:

> No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or other entities organized under the laws of the Philippines, sixty *per centum* of the capital of which is owned and held by citizens of the Philippines, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. No franchise or right shall be granted to any individual, firm, or corporation, except under the condition that it shall be subject to amendment, alteration, or repeal by the National Assembly when the public interest so requires.[49]

The 1973 Constitution did not vary the rules established by the 1935 Constitution in any fundamental way. It remained consistent with the rule that public utilities shall be granted only to citizens of the Philippines or to corporations or other utilities organized under Philippine Laws, whose capital must be at least sixty percent owned by Filipino citizens. It may therefore safely be presumed, that the 1971 Constitutional Convention delegates did not see the necessity of prevailing rules, and continued to be gripped by the spirit of Nationalism which so influenced the Constitutional Convention of 1935.[50]

One change that did occur, however, was the inclusion of a new sentence in section 5. The last sentence of that section stated: "[t]he participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in the capital thereof." This provision, which allowed foreign investors to participate in the management of public utilities to the extent of their proportionate share in the capital, is a reversal of the Filipinization trend which had found support in *King v. Hernaez*[51] and *Luzon Stevedoring Co. v. Anti-Dummy Board*.[52] In *Luzon Stevedoring* the Supreme Court held that under the Anti-Dummy Law:[53]

> [T]he alien stockholder who owns 40% of the capital stock of a public utility corporation or association cannot elect an alien director, much less demand the employment of aliens in the management, operation, administration and control of the corporation or business whether as officer, employee, or laborer, with or without just compensation. If the Corporation Law can be invoked to justify the employment of non-American aliens in public utilities, then the Anti-Dummy Law, as amended, would be a useless attempt to penalize violations of the nationalization laws, and the constitutional provision reserving the operation of public utilities to Filipino citizens or Filipino dominated corporations or associations, would be nullified as a consequence.[54]

48. ARUEGO, *supra* note 15, at 668.

49. PHIL. CONST. art. XIV, §8 (1935).

50. *See* BERNAS, *supra* note 26, at 725.

51. 4 SCRA 792 (1962).

52. 46 SCRA 474 (1972).

53. An Act to Punish the Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges, Commonwealth Act 108 (1936).

Article XII, Section 11 of the 1987 Constitution contains the substance of the Constitution's limitations on foreign capital on public utilities.[55] The proposed text[56] of what was to be section 11, however, was very different both from previous constitutions, and from the final text itself. The proposal departed from section 5, Article XIV of the 1973 Constitution in four respects: (1) it spoke of two-thirds capitalization instead of sixty percent; (2) it said nothing about foreign participation in the management; (3) it proposed no time limit to the life of a franchise or certificate; and (4) the franchise could be exclusive in character.[57]

As with the provision concerning the exploration and development of natural resources, various controversial amendments were introduced to the proposal. The most important amendment was presented by Commissioner Jamir with a view to reducing Filipino participation from two-thirds to sixty percent. The impassioned debates that would follow provide interesting insight into the psyche of the framers on this provision.

Commissioner Jamir sought to reduce the equity participation of Filipinos from two-thirds to the more familiar sixty percent in order to, *inter alia*, harmonize the provision with other sections, which fixed Filipino equity to

54. *Luzon Stevedoring*, 46 SCRA at 492.

55. Sec. 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philipines at least sixty *per centum* of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all executive and managing officers of such corporation or association must be citizens of the Philippines.

56. The proposed section read: "No franchise, certificate, or any other form of authorization for the operation of public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least two-thirds of whose voting stock or controlling interest is owned by such citizens. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public."

57. BERNAS INTENT, *supra* note 27, at 850.

sixty percent. Also, increasing the equity proportion of Filipinos would compel public utilities, to the tune of billions of pesos, to pay off foreign equity holders, and "instead of paying foreign equity holders, why do we not keep the money instead and invest it in some other profitable undertaking for the welfare of the Filipinos? That is the reason for this amendment."[58]

Commissioner Romulo, an eminent business lawyer, presented the side of Philippine corporations engaged in the telecommunications industry in his support for the amendment.[59] Romulo enumerated their arguments, *inter alia*: First, Philippine Telecommunications carriers reject the argument that the international telecommunications industry is controlled by their foreign partners because such proposition is based on the gratuitous assumption that they are either dummies or spineless. If so, giving them another six and two-thirds percent will not remedy the situation.[60] Second, and more importantly, firms such as the Ayala Group, "honestly believe that we need our foreign partners now more than ever during this time when international telecommunication is undergoing fast and comprehensive modernization, requiring technology transfer, technical training abroad, equipment upgrade and capital assistance. To reduce the foreign participation now, would entail divestment and could very well result in a disincentive for our foreign partners to make their invaluable contribution in technology and advancement. In short, we believe that this proposed change in the equity ratio will do more harm than good for the industry."[61]

In support of retaining the proposed two-thirds minimum participation of Filipinos, Commissioner Braid, and others to follow, exhibited an almost palpable distrust for foreign capital, fearing that such would result in the exploitation of the Philippines, or worse, threaten our national security. Describing the public utilities environment in 1986, she said: "In effect, our international cable facilities are controlled not by Filipinos, but foreign multinational compan(ies) (sic). This is a serious threat to our national security and to our sovereignty as a nation."[62] Going even further, she claimed: "Under modern technology, is the monitoring of communications text possible? Yes, it is possible particularly when foreigners control the country's telecommunications. During a national emergency, such as war or revolution, our international communications may be subject to tapping, monitoring or eavesdropping by foreign multinationals because foreign interests may be

58. RECORD, *supra* note 33, at 650.

59. *Id.* at 650-51.

60. *Id.* at 651.

61. *Id.*

62. *Id.* at 652.

involved."[63] Commissioner Braid seems to forget, of course, that because international communications pass through systems located in more than one country, no local telecommunications firm, however "nationalistic," can absolutely control such possible "eavesdropping."

Commissioner Garcia summarized the arguments of the oppositors. He said, first, that public utilities must be viewed as public services and not as profit-oriented enterprises; second, they were a strategic industry; third, they involved national security; and fourth, should forty percent be a solid block, it would be tantamount to control.[64]

When put to a vote by a show of hands, the Jamir amendment was approved 20-19. The body then, upon motion, went into nominal voting, the result of which was approval again, 21-19. The proposed provision was then amended into the present 60-40 capital structure.

Thus, all told, the 1987 Constitution did not present a fundamental departure from its predecessors, whether pro-protectionist or pro-global. It continued to charter a largely protectionist national economy for the Philippines, the effects of which continue to be felt today.

With the opening section of Article XII on *National Economy and Patrimony*, our present 1987 Constitution maps out in broad details the national goal and the role of commerce and economy in the national life, thus:

> SECTION 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the Nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.
>
> The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.
>
> In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop, private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership.

Fr. Bernas[65] enumerates the three (3) constitutional directions mandated by the section:

> First, it sets the dual goal of dynamic productivity and a more equitable distribution of what is produced.

63. *Id.*

64. BERNAS INTENT, *supra* note 27, at 856, *summarizing* RECORD, at 654.

65. 2 JOAQUIN G. BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES (1988) [hereinafter 2 BERNAS]; *see also* BERNAS INTENT, *supra* note 27, at 807.

> Second, it seeks complementarity between industrialization and agricultural development.
>
> Third, it is protective of things Filipino.[66]

Commissioner Villegas, who introduced the section during the proceedings, admitted that equity has been placed in first order, and economic growth being the last,[67] to "serve as constitutional guidelines for the various branches of the government for the promotion of the common good in the economic sphere."[68]

The "economic nationalism" under Section 1, Article XII, is complemented by Sections 19 and 20, in Article II on *Declaration of Principles and State Policies*, thus:

> SECTION 19. The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.
>
> SECTION 20. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.

Sections 19 and 20 are said to represent "two of the pillars of the economic policy of the Constitution,"[69] and together with Section 1 of Article XII, circumscribe the evolving Philippine economic policy by which Filipino businessmen and entrepreneurs may fasten the support they can expect from their Government, and by which foreign investors may determine the legality and viability of their investments within Philippine territory.[70] The same "flagship provisions"[71] of the 1987 Constitution also provide the framework upon which the actions taken the Executive Department, or the laws enacted by the Legislative Department, all these with a bearing on Philippine Commercial law, may be adjudged as a solid basis upon which one may proceed with an investment opportunity in the Philippines.

66. 2 BERNAS, *supra* note 65, at 415 (quoted section reformatted to an enumerative presentation).

67. RECORD, *supra* note 34, at 252.

68. *Id.*

69. 2 BERNAS, *supra* note 65, at 58.

70. Art. II and art. XII of the Philippine Constitution have been held in Tañada v. Angara, 272 SCRA 18, 54 (1997) as "not intended to be self-executing principles ready for enforcement through the courts," and are to be "used by the judiciary as aids or as guides in the exercise of its power of judicial review, and by the legislature in its enactment of laws." Nevertheless, in Manila Prince Hotel v. GSIS, 267 SCRA 408 (1997), the Court held that §10 of Article XII as self-executing and became the basis to enforce a right under the Filipino-First Policy.

71. The term used for such provisions in Tañada v. Angara, 272 SCRA 18, 54 (1997).

ii. National Hierarchy of Values

The Filipinos believe in being a nation that cares first and foremost for its masses, rather than emphasizing the "individualistic" rights to property and livelihood. This point is well-conceded in Sections 9 and 10, Article II of the 1987 Constitution, in our *Declaration of Principles*, thus:

> SECTION 9. The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.
>
> SECTION 10. The State shall promote social justice in all phases of national development.

In constitutional language, we declare that, above all else, equitable distribution of wealth and opportunities should be the main goals of society, and all activities, resources and equity shall be deployed to achieve such ends; that economic progress, although important, when it benefits only the few would be a less-desirable boon.

This socialist spirit of preferring the greater good versus individual rights is reinforced in many other provisions of the 1987 Constitution. This is really in stark contrast to the underlying philosophy of the free enterprise system, that business left to its own selfish end would eventually work out well to the greater good of society by raising the standards of living. Thus, although we recognize the institution of private ownership and property rights and "the indispensable role of the private sector,"[72] we nevertheless declare that property "bears a social function, and all economic agents shall contribute to the common good," and is always "subject to the duty of the State to promote distributive justice and to intervene when the common good so demands."[73]

The underlying tone is that even when selfishness does no particular harm to others, it is by its very nature still harmful to society as a whole. We have effectively rejected the principle of *laissez faire*[74] and adopted the principle of solidarity,[75] which if allowed to go so far would foster the "crab mentality" that may already pervade our society, under the belief that "if we are not all going up, then no one is going up." We therefore emphasize in our society the spiritual oneness that the members of our society must achieve; that material

72. PHIL. CONST. art. II, §20.

73. *Id.* art. XII, §6.

74. Antamok Goldfields Mining Company v. Court of Industrial Relations, 70 Phil. 340 (1940); Edu v. Ericta, 35 SCRA 481, 491-92 (1970).

75. 2 BERNAS, *supra* note 65, at 438.

blessings must be pursued not for individual ends but as a contribution of what is "good" for the nation as a whole.[76]

The emphasis on spiritual good over material blessings is, therefore, the signet of our society. Whereas, the determination of what is "successful" in a mercantile society is easily verifiable from the bottom lines of financial statements, what is the "common good" and the measure of achieving the "public interests" are difficult to verify and often fluid in their meaning and coverage. This therefore makes it difficult to pinpoint with a certain degree of reliability the guideposts in the "playing field" upon which businessmen and investors make their business decisions.

When taken together with other provisions of the Constitution having to do with economic and commercial matters, the Constitutional declarations are a forthright admission of the existing poverty and privation that pervades present Philippine society, the inability of most of its people to fend for themselves, the distrust they bear against local elite and foreign business interests, and the pivotal role of Government and its agencies, to be the main agent to effect such goals, and the bulwark against otherwise resultant exploitation of the great majority of the Filipino people.

iii. A National Psyché of Distrust

From a commercial point of view, the Constitutional declarations betray three "burning beliefs" that Filipinos bear as a nation:

Firstly, primarily based on their historical experience, Filipinos blame the local elite and foreign elements of society for the poor condition of the great majority. Therefore, there is no confidence that when left to their own devises, the local elite and businessmen would help the great majority from their hardships and privations, but rather that they would take advantage of every business opportunity given. Filipinos trust foreigners less, and expect them to take every advantage they can in our country to the detriment of the majority of the Filipinos.

Secondly, the Filipino leadership do not trust its suffering people to be able to help themselves, and must therefore tilt the balance in their favor. There seems also to be no trust that local elite and businessmen will be able to compete successfully against foreign competitors.

76. The "Philippine formula" for "progress" may be inefficient, but perhaps in the correct direction. In an Asian survey conducted by the *Far Eastern Economic Review* of who were the happiest people in Asia, it was noted that the countries which had the highest material progress, like Japan, South Korea and Singapore, their population were comparatively the saddest; while in the Philippines, which was near the bottom of the economic ladder, the population though generally poor, were the happiest, and the survey adjudged the Filipinos to be "the happiest people in Asia."

Thirdly, Filipinos do not believe that commercial and economic forces when left on their own would work for the betterment of the majority, and therefore must be "bent" towards being employed as tools for social re-engineering. In essence, there is no trust in the liberating effects of the free market system; and in fact believe there is fear of its exploitative consequences when left unbridled in the hands of businessmen, whether local or foreign.

To illustrate, Section 7, Article II of the 1987 Constitution provides that: "[t]he State shall pursue an independent foreign policy. In its relations with other States the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination." The need to state in a fundamental document what seems to be the obvious, is actually an acknowledgment that in its history, the Filipino leaders have not acted for the best interest of the country as a sovereign nation, that the nation has in fact become an international beggar, from which it has to wean itself from.

This *regime of distrust* is repeated often through other provisions of our Constitution governing economic and commercial doctrines, and also reflected in our statutory laws, and would explain to a great extent the psychological shackles that bind our economic and commercial philosophy. Unless the thrust of our constitutional economic and commercial doctrines are re-directed, they will continue to stunt the economic growth of the Philippines and its people, for a nation that lives in fear and distrust would merely squander opportunities and resources.

iv. Lack of Faith in Our Political and Business Leaders; Recognizing the "Supplicant" Filipino

We can attribute the length and comprehensiveness of our 1987 Constitution as resulting from the attempt by its framers, as much as it was possible, "to leave nothing to chance or man;" in other words, to a lack of faith in our national fate and our leaders. As Dean Agabin wrote:[77]

> The... present constitution, aside from re-enacting the policies laid down in the 1935 Constitution, went on to add several more policies on the national economy and patrimony, on social justice and human rights, including labor, agrarian and natural resources reforms, urban land reform and housing, health, women, role and rights of people's organization, and education, science and technology, arts, culture, and sports, and even the family. Indeed the critics of this constitution have called it "verbose" and "long-winded" and one of the longest constitutions in the world. The prolixity of our present constitution can be equated only by the brevity of the American constitution.[78]

77. Pacifico A. Agabin, *Judicial Review of Economic Policy*, 72 PHIL. L.J. 186 (1997).

78. *Id.* at 181-82.

> The 1987 Constitution follows the modern trend. It is not made out of the same mold as the American federal constitution. While the latter is almost silent on government intervention in the economy, our constitution is replete with provisions for regulation of the economy and of the state's positive obligation to promote social justice. As its framers like to put it, our present constitution is "pro-people, pro-poor, and pro-Filipino."[79]

We would not leave to our Executive and Legislative Departments an entirely free hand to determine how best to serve the interest of the great majority.

This is best exemplified by the report of the Preparatory Commission on Constitutional Reform which recommended amendments to the 1987 Constitution, when it held that policies on equity participation, ownership in economic enterprises and factors of production are dynamic and therefore, must not be carved in stone. These questions are better addressed by electorally accountable bodies of government, which must decide these questions after weighing the costs and benefits flowing from such decision. It is important that Congress be given the flexibility to adopt economic policies that answer to the requirements of the environment, restricting or liberalizing them as the needs arise and as opportunities present themselves. Invariably the mode of regulation by all the countries is by legislative action rather than by constitutional mandate.[80]

The recommendation of the Preparatory Commission for constitutional amendments amounts to an assessment of the present import of the language of the 1987 Constitution, thus: that Congress and the Executive Department do in fact have very limited flexibility to conjure on their own what may be the best economic policies to implement based on evolving circumstances facing society. The Constitution therefore dictates that Congress develop the economic framework to be pursued by the Executive and Legislative Department, based on the belief that without such economic framework cast in constitutional stone, our political departments would not do right by our people.

It may seem absurd that our 1987 Constitution would provide detailed provisions on such areas as social justice, human rights, sanctity of family life, youth, women, health, ecology, education, science and technology, arts. culture, and sports, labor, rural development and agrarian reform, indigenous cultural communities, sectoral organizations, communications, political dynasties, graft and corruption, government transparency, classification of lands of the public domain, forests and national parks, ancestral lands, social character of property, etc., almost encompassing all the "evils that must be avoided" and

79. *Id.* at 183-84.

80. Summary of the Report of the Preparatory commission on Constitutional Reforms 11 (1999).

all the "good that must be done," in our society. But we would appreciate such absurdity only when we realize that the "detailedness" and seeming "all-encompassingness" of the Constitution is a clear affirmation that the Filipinos do not trust well enough their Executive, their Legislature, and their leaders, to think of what is best for the people, and there is a need for such constitutional writ to make sure they do not forget, and would be a basis upon which it can legally demand of them.

This rather macabre outlook of the subliminal meaning in provisions and declarations of the 1987 Constitution seems to have been affirmed in *Manila Prince Hotel* (itself not a very good medium), thus:

> As against constitutions of the past, modern constitutions have been generally drafted upon a different principle and have often become in effect extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments, and the function of the constitutional conventions has evolved into one or more like that of a legislative body. Hence, unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption now is that all provisions of the constitution are self-executing. If the constitutional provisions are treated as requiring legislation instead of self-executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law. This can be cataclysmic.... [81]

Apparent in all these, is the lack of faith of the constitutional writers in the ability of the Filipino electorate to elect good leaders who would serve the common good. There is an attempt to achieve in the Constitution a "package deal" by which all the good shall be done and all the evils avoided, by following the constitutional manual.

v. Filipino First Policy and Nationalization Provisions

The Philippines has two ways with dealing with the "foreign threat" to its national economic life: either through preference for Filipinos in almost all aspect of commercial activities, or by nationalizing key sectors in our society.

Sections 10 and 12, Article XII have enshrined in the 1987 Constitution the *Filipino First Policy*, thus:

> SECTION 10. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or association at least sixty *per centum* of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.
>
> In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.
>
> The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.

81. Manila Prince Hotel v. GSIS, 267 SCRA at 431-32 (1997).

> SECTION 12. The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive.

The policy is bolstered in Section 19, Article II on the "*Declaration of Principles and State Policies,*" which provides that "the State shall develop a self-reliant and independent national economy effectively controlled by Filipinos."

We therefore believe that by citizenship *per se*, preference in commercial undertakings shall be accorded to Filipinos.[82] As Fr. Bernas has aptly stated, the Filipino First Policy, which originally applied to government contracts,[83] "can extend beyond Filipino-first in government transactions and into private transactions."[84]

Although the constitutional provision embodying the policy provides that the State shall "adopt measures that help make them competitive," this seems to be treated merely as an expression of hope rather than being part of the directive embodied in the Filipino First Policy. This was amply demonstrated in the application of the provision in *Manila Prince Hotel v. GSIS*,[85] which involved the sale of GSIS's 51% equity in the corporation that owned Manila Hotel, where a foreign business group that submitted the highest bid. The Supreme Court held:

> The Filipino First Policy enshrined in the 1987 Constitution, i.e., in the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos ... [found in] Sec. 10, par. 2, Art. XII of the 1987 Constitution *is mandatory, positive command which is complete in itself and which needs no further guidelines or implementing laws or rules for its enforcement. From its very words the provision does not require any legislation to put it in operation. It is per se judicially enforceable....*

82. The issue of whether citizenship is a legal and valid ground for classification was affirmatively decided in Smith Bell & Co. v. Natividad, 40 Phil. 136 (1920), where the validity of Act No. 2761 of the Philippine Legislature was in issue, because of a condition therein limiting the ownership of vessels engaged in coastwise trade to corporations formed by citizens of the Philippines Islands or the United States, thus denying the right to aliens. It was held that the Philippine Legislature did not violate the equal protection clause of the Philippine Bill of Rights, because the Legislature in enacting the law had as an ultimate purpose the encouragement of Philippine shipbuilding and the safety for these Islands from foreign interlopers, and that citizenship may constitute a legal basis for classification in the exercise of police power.

83. The Filipino-First Policy was originally expressed in various statutory language in Commonwealth Act No. 138, (1936), giving native products and domestic entities preference in government purchases; Republic Act No. 912 (1953), (prescribing the use of Philippine-made materials); Republic Act No. 5183 (1967), (governing procurement contracts of the government;) as well as the Flag Law (Republic Act No. 912), (giving Filipino contractors a fifteen percent advantage in government contracts); BERNAS INTENT, *supra* note 27, at 864.

84. 2 BERNAS, *supra* note 65, at 456.

85. 267 SCRA 408 (1997).

> In the instant case, where a foreign firm submits the highest bid in a public bidding concerning the grant of rights, privileges and concessions covering the national economy and patrimony, thereby exceeding the bid of a Filipino, there is no question that the Filipino will have to be allowed to match the bid of the foreign entity. And if the Filipino matches the bid of a foreign firm the award should to the Filipino. It must be so if we are to give life and meaning to the Filipino First Policy provision of the 1987 Constitution. For, while this may neither be expressly stated nor contemplated in the bidding rules, the constitutional fiat is omnipresent to be simply disregarded. To ignore it would be to sanction a perilous skirting of the basic law.[86]

The aspect of making Filipino businessmen "competitive" had no strong consideration in the decision of the Supreme Court in *Manila Prince Hotel.* Filipino businessmen and entrepreneurs, by the fact alone that they are Filipinos in a certain transaction opposed to foreign competitors, and not by the higher quality of their goods or service, would be accorded preference.

The Court acknowledged that the enforcement of the policy may discourage foreign investors, but that since the Constitution and laws of the Philippines are always open to public scrutiny, such factors must always be considered by foreign investors when venturing into business in the Philippines, since "[a]ny person therefore desiring to do business in the Philippines or with any of its agencies or instrumentalities is presumed to know his rights and obligations under the Constitution and the laws of the forum."[87]

In essence, *Manila Prince Hotel* has enunciated our attitude under the Filipino First Policy and the role of the Supreme Court in enforcing such policy, thus:

> The Filipino First Policy is a product of Philippine nationalism. It is embodied in the 1987 Constitution not merely to be used as a guideline for future legislation but primarily to be enforced; so must it be enforced. This Court as the ultimate guardian of the Constitution will never shun, under any reasonable circumstance, the duty of upholding the majesty of the Constitution which it is tasked to defend. It is worth emphasizing that it is not the intention of this Court to impede and diminish, much less undermine, the influx of foreign investments. Far from it, the Court encourages and welcomes more business opportunities but avowedly sanctions the preference for Filipinos whenever such preference is ordained by the Constitution....
>
> Nationalism is inherent in the very concept of the Philippines being a democratic and republican state, with sovereignty residing in the Filipino people and from whom all government authority emanates. In nationalism, the happiness and welfare of the people must be the goal. The nation-state can have no higher purpose. Any interpretation of any constitutional provision must adhere to such basic concept. Protection of foreign investments, while laudable, is merely a policy. It cannot override the demands of nationalism.[88]

86. 267 SCRA 408, 425, 436 [emphasis supplied].

87. *Id.* at 444-45.

88. *Id.* at 447-48.

What is most curious in *Manila Prince Hotel* is the admission that although the Filipino First Policy may not make good business sense, our laws answer not primarily to the demands of business, but to a more spiritual calling in this country, thus:

> Privatization of a business asset for purposes of enhancing its business viability and preventing further losses, regardless of the character of the assets, *should not take precedence over non-material values.* A commercial, nay even a budgetary, objective should not be pursued *at the expenses of national pride and dignity. For the Constitution enshrines higher and nobler non-material values.*"[89]

As a nation seeking to be the best people they can possibly be, Filipinos should be careful to what extent they employ the Filipino First Policy. Taken from an objective point of view, such policy affirms a feeling of inferiority as a people, or a reinforcement of the belief that Filipinos can never be equal to, or up to the challenge of foreigners. To illustrate, the Constitution provides that the State, through its Legislature, shall reserve to Filipino citizens and corporations, certain areas of investments, and encouraging "the formation and operation of enterprises whose capital is wholly owned by Filipinos;" ensuring that "in the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos;" ruling against the free-flow of foreign investments in our shores by mandating that the "State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities;"[90] and evincing a xenophobic attitude by declaring that "the State shall develop a self-reliant and independent national economy effectively controlled by Filipinos."[91]

Although the Constitution would recognize "the vital role of communications and information in nation-building,"[92] which effectively can only be sourced and funded from foreign investments and technology, it is nevertheless a constitutional mandate, that Congress cannot overcome, to preserve public utilities to Filipinos and Philippine corporations.[93]

Although the Constitution would declare the value of knowledge for democracy and the promotion of freedom, it is also a constitutional mandate that the State shall "provide the policy environment for the full development of Filipino capability and the emergence of communication structures suitable to the needs and aspirations of the Nation and the balanced flow of information into, out of, and across the country, in accordance with a policy

89. *Id.* at 446-47 [emphasis supplied].

90. PHIL. CONST. art. XII, §10.

91. *Id.* art. II, §19.

92. *Id.* art. II, §24.

93. *Id.* art. XII, §11.

that respects the freedom of speech and of the press."[94] Also, even if the free flow of information across international borders can no longer be curtailed with modern media (especially with satellite coverages and the Internet), the Constitution would declare that mass media shall be limited in equity and management only to Filipino citizens and domestic corporations 100% owned by Filipino citizens.[95]

The Constitution also contains the Filipino's fears of the effects of advertising on the national habit that we limit such activities to Filipino citizens, and domestic corporations whose equities are at least 70% owned by Filipinos,[96] although by the rise of satellite and cable television, our youth are bombarded daily with foreign advertisements. In addition, the practice of professions is reserved exclusively to Filipino citizens,[97] and would therefore make inaccessible to our countrymen the leading technological practices coming from abroad.

Apart from the fact that Filipino investors are given priorities over foreign investors in areas where they do compete, in other areas where Filipino businessmen do not compete, it is not clear from the constitutional language how to treat foreign investments as an element of growth in our society. It is declared under the third paragraph of Section 10, Article XII of the 1987 Constitution that "The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities."

The worst demonstration of our cavalier attitude towards foreign investment is in the decisions rendered by the Supreme Court in *Garcia v. Board of Investments.*[98]

The Court, in its original decision in *Garcia*, held that it

> [i]s not concerned with the economic, social, and political aspects of this case for it does not possess the necessary technology and scientific expertise to determine whether the transfer of the proposed BPC petrochemical complex from Bataan to Batangas and the change of fuel from naphtha only to 'naphtha and/or LPG' will be best for the project and for our country.[99]

Nevertheless, on the basis of Section 10, Article XII o the 1987 Constitution covering the duty of the State to "regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with

94. *Id.* art. XVI, §10.

95. *Id.* §11(1).

96. *Id.* §11.

97. *Id.* art. XII, §14.

98. 177 SCRA 374 (1989) *reconsidered in* 191 SCRA 288 (1990).

99. *Garcia*, 177 SCRA at 382.

its national goals and priorities," and Section 19, Article II thereof, mandating the development of a self-reliant and independent national economy effectively controlled by Filipinos," the Court subsequently prevented the transfer to Batangas from being effected, brushing aside the "right to final choice of plant site" of the foreign investor thus —

> Every provision of the Constitution on the national economy and patrimony is infused with the spirit of national interest. The non-alienation of natural resources, the State's full control over the development and utilization of our scarce resources, agreements with foreigners being based on real contributions to the economic growth and general welfare of the country and the regulation of foreign investments in accordance with national goals and priorities are to explicit not to be noticed and understood. x x x
>
> The Court, therefore, holds and finds that the BOI committed a grave abuse of discretion in approving the transfer of the petrochemical plant from Bataan to Batangas and authorizing the change of feedstock from naphtha only to naphtha and/or LPG for the main reason that *the final say is in the investor all other circumstances to the contrary notwithstanding*. No cogent advantage to the government has been shown by this transfer. This is a repudiation of the independent policy of the government expressed in numerous laws and the Constitution to run its own affairs the way it deems best for the national interest.
>
> One can but remember the words of a great Filipino leader who in part said he would not mind having a government run like hell by Filipinos that one subservient to foreign dictation. In this case, it is not even a foreign government but an ordinary investor whom the BOI allows to dictate what we shall do with our heritage."[100]

One will notice in both the *Manila Prince Hotel* and *Garcia* decisions, that "national pride" and "national interest" against a private foreign investor was the motivating factor why the Supreme Court would meddle into government contracts.

In sum, the constitutional declarations and principles which constitute the framework upon which we pursue our economic progress seem to be ill-motivated by xenophobia, a mistrust or lack of trust upon our leaders and businessmen, a patronizing attitude towards our own people, and an acute sense of national pride. Such attitudinal shortcomings are not a good basis upon which to do national and international business.

IV. Assessment of Developments In Philippine Commercial Laws

The primary issue to be resolved therefore is how the Filipinos would be able to progress and move forward from the historical and psychological baggage that confronts its constitutional framework. By looking at the developments in three important commercial law areas, this paper seeks to determine the evolving "trend".

100. *Garcia*, 191 SCRA at 296-97.

C. The Premise to Start From

The Philippine situation is best described as a truly "young" nation involved in a "great experiment" to craft together a social and economic system based on what its leading members believe are the right priorities, but employing Western economic values and systems which have been the earliest exposure, and which pervade the world economic arena today.

By remaining focused on what is believed to be a great formula enshrined in our 1987 Constitution on "economic nationalism," there can be no doubt that the system places the Supreme Court as the ultimate arbiter in Philippine society of how the final results of the economic infrastructure would look like and the principles by which it shall evolve. Even if the Supreme Court candidly admits that it does not have the competence to make economic decisions, nevertheless, being the interpreter of the constitutional manual, its imprimatur becomes the benediction upon which the final system would look like, or indicate general directions where there are possibilities of major developments. Nevertheless, because it does not posses the necessary technical competence, the Supreme Court must rely upon the handiwork of both the Legislative and Executive Departments in determining whether the aspects presented conform with the constitutional formula. Of course, the Court must still make its own decision, based on what society as a whole feels, which is borne out of the fact that its decisions on the matter are the result of justiciable controversies.

In essence therefore, the success of the Philippine experiment would depend largely on the critical cooperation between the three branches of Government.

The "cooperative" mechanism required under their constitutional set-up would require that as the Filipinos mature in their struggle to put together a working economic system, they should be able to turn away from what seems to be a regime of distrust, to one of trust.

Three (3) major movements demonstrate how we are still in the midst of maturing as a progressive member of the modern world namely: (a) The process of transplanting and imbibing, which the writer would term the "civilization" of commercial laws; (b) Jurisprudential tempering based on contemporary developments; and (c) the "internationalization" of Philippine economic and commercial structures.

D. "Civilization" of Commercial Laws

In the field of commercial law, because perhaps there was little actual commercial basis to build upon, during the last decades of the Spanish colonial rule as part of the reform movement to pacify the reformation movement, there began a practice of transplanting whole-stock western commercial laws as a means to encourage commercial development in the Philippines. Such system

of enacting laws to inspire commerce has since become one of the impetus of commercial "development" in the Philippines. It is in line with the belief that if a legally viable commercial system is built, the location and movement of commerce and investments into the country would be encouraged.

What has become a familiar pattern in our legal system is to look at "modern" statutory models, usually from the United States of America, and transplant such complicated system into what is still a listless commercial situation in the Philippines. The history of our commercial law confirms such movement.

1. Brief Legal History of Philippine Commercial Laws

Although parts of the Philippine archipelago were within the trading areas of China and the Sri Vijaya empire,[101] there are very few surviving written laws, rules or regulations pertaining to pre-Hispanic native commerce that can be the basis of study today.[102] In any event, the natives of the archipelago were never a great trading and commercial nation at the time the Spaniards arrived.[103]

The second oldest known written code of the natives, the *Code of Kalantiaw*, consisting of eighteen orders (*sugo*), constituted more as a penal code and had very little commercial aspects.[104] Except when trading with Chinese and Arab ship merchants, our pre-Spanish *barangays* did not have great commercial traditions, for when they put down in writing the laws, most pertain to family and religious matters. In any event, the so-called "*Code of Kalantiaw*" has been dubbed a fake document, on the basis of existing records and the language used.[105]

The Spanish Code of Commerce of 1885, which was modified by the *Comision de Codificacion de las Provincias de Ultramar*, was extended to the Philippines by Royal Decree of August 6, 1888, and took effect as a law in the Philippines on December 1, 1888.[106] Not long thereafter, however, the American forces occupied the Philippines, and many of the provisions of the Code of Commerce were repealed by special laws.

2. Movement From Unfamiliar/Mistrust to Familiar/Integration

There eventually evolved a dual approach to Philippine Commercial law development.

Firstly, the American occupation began the almost wholesale importation and transplanting into Philippine soil of common-law based commercial statutes.

At the beginning of the American regime in the Philippines, there was almost a separate growth of Commercial laws of the Philippines in that the American sponsored Philippine Government took into quick succession the promulgation of American-based commercials laws in the Philippines, while keeping intact "private civil laws," and basically not altering the Civil Law provisions governing persons, family relations, property and succession.[107]

For example, the provisions of the Corporation Law ensured that the Spanish-like juridical vehicle of *sociedades anonimas* under Book Two of the Code of Commerce would eventually be phased out of Philippine jurisdiction.

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101. TEODORO AGONCILLO, HISTORY OF THE FILIPINO PEOPLE 23-24 (8d ed. 1986).

102. JOHN LEDDY PHELAN, THE HISPANIZATION OF THE PHILIPPINES 7 (1959).

The pre-Hispanic natives of the Philippine archipelago "had an alphabet of their own consisting of seventeen letters, three of which were vowels and the rest consonants. . . Pre-Hispanic literature, however was scant. Only a few historical fragments have come down to us, and there is little evidence to suggest that the Spaniards deliberately destroyed Philippine manuscripts. The Filipinos had an alphabet, but evidently they did not often use it for literary purpose. Their literature was largely oral." PHELAN, at 18.

103. SHIRLEY JENKINS, AMERICAN ECONOMIC POLICY TOWARDS THE PHILIPPINES 1 (1954).

"'All the natives lived in their villages, applying themselves to the sowing of their crops and the care of their vineyards, and the pressing of wine; others planting cotton, or raising poultry and swine so that all were at work; moreover the chiefs were obeyed and respected, and the entire country well provided for.' The Philippine earth is good, and the climate is kindly. Then as now, food came easily and population pressure was unknown. Economics played a minor role in the business of living." JENKINS at 1, *quoting* E.H. BLAIR AND J.A. ROBERTSON, THE PHILIPPINE ISLANDS 1493-1898 87.

104. The Code is said to be written by Raja Kalantiaw in 1433 A.D. and submitted to his overlord Raja Besar. The provisions that have commercial significance pertain to: (a) payment of debts to the chiefs, which when large and not paid would be punished by immersion of the debtor's hand in boiling water three times; second offense means the debtor will be put to death by blows; (b) bartering of food, non-compliance would involve being whipped for an hour; and second offense would be punished by placing the culprit among ants for one day; (c) indication of medium of payment in honey or gold; and (d) the protection of crops, whereby slavery for one year would be the penalty for one who sets fire on another's crops.

105. *See* W.H. SCOTTS, LOOKING FOR THE PRE-HISPANIC FILIPINO (1993)

106. Macariola v. Asuncion, 114 SCRA 77 (1982); I ARTURO TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE COMMERCIAL LAW OF THE PHILIPPINES 1-2 (6d ed., 1951); AGBAYANI , *supra* note 4, at 2-3.

107. W. CAMERON FORBES, THE PHILIPPINE ISLANDS 73 (1945).

President McKinley's letter of instructions was for the Civil Commission "should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical view, but for the happiness, peace, and prosperity of the people of the Philippine Islands, *and the measures adopted should be made to conform to their customs, their habits, and even their prejudices*, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government." FORBES, at 71.

Harden v. Benguet Consolidated Mining Co.,[108] gave a vivid description on the background on the enactment of the Corporation Law into Philippine jurisdiction:

> When the Philippine Islands passed to the sovereignty of the United States, the attention of the Philippine Commission was early drawn to the fact that there is no entity in Spanish law exactly corresponding to the notion of the corporation in English and American law;... the Philippine Commission entered upon the enactment of a general law authorizing the creation of corporations in the Philippine Islands. This rather elaborate piece of legislation is embodied in what is called our Corporation Law (Act No. 1459 of the Philippine Commission). The evident purpose of the commission was to introduce the American corporation into the Philippine Islands as the standard commercial entity and to hasten the day when the *sociedad anónima* of the Spanish law would be obsolete. That statute is a sort of codification of American corporate law.[109]

Within a few decades, the American authorities were able to enact or cause to be enacted within Philippine jurisdiction important pieces of commercial legislation, often copied wholly from American statutory models, thus:

Corporation Law, Act No. 1459 (1 April 1906)

Chattel Mortgage Law, Act No. 1508 (1 August 1906)

Insolvency Law, Act No. 1956 (20 May 1909)

Negotiable Instruments Law, Act No. 2331 (2 June 1911)

Warehouse Receipts Law, Act No. 2137 (5 February 1912)

Insurance Law, Act No. 2427 (1 July 1915)

Salvage Law, Act No. 2616 (4 February 1916)

Usury Law, Act No. 2655 (1 May 1916)

Copyright Law, Act No. 3154 (6 March 1924)

Law on Monopolies and Combinations, Act No. 3247 (1 Dec. 1925)

Business Names Law, Act No. 3883 (14 November 1931)

General Bonded Warehouse, Act No. 3892 (1 January 1932)

Bulk Sales Law, Act No. 3952 (12 December 1932)

Carriage of Goods by Sea Act, Comm. Act No. 65 (22 April 1936)

Public Service Act, Comm. Act No. 146 (7 November 1936)

Securities Act, Comm. Act No. 83, (1 January 1937)

Law Creating the SEC (Comm. Act No. 287 (3 June 1938)

108. 58 Phil. 141 (1933).

109. *Id.* at 145-46.

The impetus for such movement was primarily focused on providing a familiar commercial law system by which American corporations, businessmen and entrepreneurs could with great familiarity and reliability, take advantage of the business and investment opportunities in the Philippine colony. The large-scale importation of American commercial laws into the Philippine legal system therefore was consistent with the philosophy of "law-first-to-inspire-commerce" and to a great extent was necessary to attract American investments into the country.

Many of those commercial laws, which had their origin from the common law system of the United States characterized by individual initiatives and empowerment and reinforced in court rulings initiated by the private society, were made to operate within the Spanish civil law system of the Philippines, which was characterized by great policies, laws, rules and regulations emanating from superior authority, usually the Legislature, and which did not accept the idea that the Judiciary could be a source of laws.

It would be true that the same commercial laws were available to the Filipino businessmen and entrepreneurs to take advantage of; but that was only an ideal since the Filipinos were just "liberated" from the Spanish tutelage and as a nation there were no leading "businessmen" who would compete effectively with the American businessmen, nor with the entrenched Chinese merchants.

Consequently, from the Philippine psychological point of view, commercial laws were "outward looking," tools used to provide a better environment mainly for foreign business interests in the country, and therefore viewed locally as being "anti-Filipino" and consequently being "anti-poor."

To a great extent, such tradition continues today. With the United States of America being the biggest and most powerful economy in the world in contemporary times, the practice has continued such that any new legislation to be enacted on any commercial field would first and foremost require consideration of the applicable American statute as a model or basis.

Secondly, during the early years of the Republic, there began a "counter-movement" to forge together into one Civil Code, both private persons and family laws and commercial laws which have grown in acceptance and broadly pervaded into Philippine society. In promulgating the Civil Code of the Philippines, there was a clear attempt to embody in one code both private civil laws and commercial laws, "in conformity with Filipino customs, ideals, and in keeping with the progressive modern legislation."[110] Otherwise, new commercial laws were promulgated in the form of "codes" in an attempt to make them operate as the Civil Code.

110. Executive Order No. 48 (1947).

The movement towards engrafting certain commercial laws into our Civil Code comes from an impetus to bring commercial laws within the grasp and understanding of majority of the Filipinos, and to imbibe such laws as part of their daily life as much as the laws relating to persons and family relations. Such counter-movement comes only when certain fields of commercial laws have become so engrafted into "common" or "familiar" societal dealings. Thus, it is a movement from mistrust or unfamiliarity of something "foreign" or "imported" and that years of using and dealing with it makes it familiar and therefore ready for engrafting into our private civil laws. Such consequence was inevitable (and continues to be so today as we play catch-up) since the legal framework was always established ahead of the underlying mature market system it is supposed to govern.

Specifically, the passage of the New Civil Code[111] in 1949 repealed provisions in Partnership, Agency, Sales, Loan, Deposit and Guaranty in Book Two of the Code of Commerce.[112]

Today, the only provisions of the Code of Commerce which are still in force are the following:

a. Book One provisions pertaining to merchants and commerce in general, and general provisions relating to commercial contracts except such portions thereof as have been repealed or modified by the New Civil Code of the Philippines and other legislations;

b. Book Two provisions governing joint accounts, transfers of non-negotiable credits, commercial contracts on transportation overland, bills of lading, charter party, loans on *bottomry* and *respondentia*, letters of credit and provisions on crossed-checks; and

c. Book Three provisions governing maritime commerce but not those relating to marine insurance.

From its applicable provisions, there is very little justification to refer to the Code of Commerce as a "code." Consequently, with many important commercial laws embodied in the Civil Code, and others scattered in individual "codes", we do not have in this jurisdiction a unifying "Commercial law Code" that should include general principles that govern such an important field in Philippine society. Instead, we have Constitutional declarations which provide for a unifying commercial law philosophy. This may be treated as the foremost "Code" in Philippine jurisdiction.

Under Philippine tradition, perhaps derived from its legacy from Civil Law traditions, the edification of a legal discipline is borne out by integrating it into a "Code." Our beliefs as a Nation have been codified into the Philippine

111. Republic Act 386 (1999).

112. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE] art. 2270.

Constitution, and our rights as a people and community have been codified into the New Civil Code of the Philippines, and enhanced by the Family Code.

In Commercial laws, Philippine tradition began with the Spanish Code of Commerce, eventually moving towards the fragmentation thereof into special sub-disciplines and expressed as special statutes; and eventually with those commercial areas effectively imbibed into operative principles within Philippine society, becoming integral parts of the Civil Code, or evolving into mini-codes.

3. Effects of "Civilization" of Commercial Laws

The importation and eventual "civilization" of commercial laws in the Philippine legal system presents a clear movement within the Philippine experiment, to import the "best" from abroad, even if initially not best suited for the local setting, and eventually "Filipinize" a set of commercial laws that will best be suited for Philippine temperament. For example, the Law on Agency is primarily considered as one of the two basic constituents of the general law of Business Organizations. It is therefore primarily a Commercial law subject,[113] and yet it is treated under the Civil Code of the Philippines. Partnerships are essentially commercial enterprises their "purpose be to engage in some business enterprise, and the other, that there be joint control or management of such business."[114] Yet, they are governed by Civil Code provisions.

"Commercial sales" used to be governed by the Code of Commerce and defined "as a sale of personal property for the purpose of resale, either in the same form or in a different form, with the intention of deriving profit in the resale."[115] Traditionally, Philippine jurisprudence considers "sale" or "purchase and sale" as being synonymous to "commerce".[116] But at present, sales contracts, whether the sale is for profit, or where the purchase of goods was for the consumption of the buyer or his principal, are both governed under Book IV, Title VI of the Civil Code.

113. PHILIP MECHEM, MECHEM OUTLINES AGENCY §21 (4d ed. 1952).

114. ESTEBAN BAUTISTA, TREATISE ON PHILIPPINE PARTNERSHIP LAW 4 (1995).

"A partnership is organized to carry on a business. A business has been defined as a series of acts directed in a certain manner toward a definite end. It is characterized by a measure of habituality in the performance of acts of a particular kind for a sustained period." — *Id* at 28.

115. CODE OF COMMERCE, art. 325.

116. The Compania de Ultramar v. Anacleto Reyes, 4 Phil. 2 (1904); Compania General de Tabaco v. Sebastian Victor Molina, 5 Phil. 142 (1905).

With the engrafting of key commercial provisions into the Civil Code (*i.e.*, Partnership, Agency, Guaranty, Loan, Sales, Deposit), the imperative "doctrines" applicable under Commercial laws have practically been set aside.

To illustrate, while in commercial law "*time is the essence of all commercial law transactions*," the general rule in the Civil Code is the mere non-compliance of an obligation at the designated time or period would not constitute default,[117] for liability to attach under the Civil Code by reason of delay. As a general rule, there must be demand, whether judicial or extra-judicial.[118] One of the exceptions to this rule is that demand by the creditor shall not be necessary in order that delay may exist if time is of the essence of the contract.[119] The fixing of a date for the performance of an obligation does not necessarily mean that time is of the essence in the contract. Under Civil Law, time is not of the essence, as a general rule.

Another area would be the manner by which commercial contracts are deemed perfected. Under Article 54 of the Code of Commerce, "[c]ontracts entered into by correspondence shall be perfected from the moment an answer is made accepting the offer or the conditions by which the latter may be modified." Since time is of the essence in commercial transactions, the acceptance in the normal course are perfected by following the mode defined by law.

However, under Article 1319 of the Civil Code, the rule is that when the acceptance of an offer has been made by letter or other form of communications, then the sale is perfected upon knowledge by the offeror of such acceptance, thus: "Acceptance made by letter or telegram does not bind the offerer except from the time it came to his knowledge."

The other commercial law postulate is that "*commercial transactions generally arise from the element of repetition*" so that the Code of Commerce stresses the need for habitualness.[120] Such commercial law feature in transactions is now wholly irrelevant to commercial contracts that are now governed by the Civil Code of the Philippines.

117. CIVIL CODE, art. 1169.

118. *Id.* art. 1169.

119. *Id.* art. 1169(2).

120. CODE OF COMMERCE, art 1: "For purposes of this Code, the following are merchants: ..., Those who, having legal capacity to engage in commerce, *habitually devote* themselves thereto."

CODE OF COMMERCE, art 3: "The legal presumption of habitually engaging in commerce shall exist from the moment the person who intends to engage therein announces through circulars, newspapers, handbills, posters exhibited to the public, or in any other manner whatsoever, an establishment which has for its object some commercial operation." *See also supra* note 8 and accompanying text.

Consequently, in important "civilized" commercial laws (Partnership, Agency, Guaranty, Loan, Sales, Deposit), the commercial law postulate that "time is of the essence" no longer applies, and the impetus to have commercial contracts perfected based on normal commercial process do not apply. There is likewise no distinction in such areas between a private contract and a commercial contract.

The effect of "civilization" of key components of commercial law is to bring about a lackadaisical approach to commercial law contracts, putting much "persona" considerations into enforcements. In this sense they have become truly "Filipinized."

It has been observed that the "Civil law has been commercialized to such a degree in all economically developed nations that there are hardly any rules left in which commercial obligations are treated differently from civil obligations. Moreover, as a result of the national codification, the international character of Commercial law which formerly distinguished it from the Civil law has now been lost."[121] In essence, because of the "Filipinization" of some our commercial laws by being engrafted into the Civil Code, they begin to lose their characteristic of being "universal," placing the Philippines at less competitive and attractive state in the world commerce.

The movement towards integration into the Civil Law system of the Philippines of commercial laws, which may seem counter-progressive, has actually seen the enmeshing of the inherently common-law underpinnings of commercial laws into the legal system of the country, such that the need for the Judiciary to construe and interpret the economic and social bases of statutory provisions, which amounts to "judicial legislation" is now almost a given in our society.

In effect, under Philippine jurisdiction, progress in the law and legal structure is achieved not only by the enactment of statutory provisions by the Legislature, but also by judicial developments borne out of jurisprudence, as the Judiciary fits legal principles into the emerging societal and technological changes.

Since there can be no doubt that our Supreme Court possesses the power of "judicial legislation" as recognized under Article 9 of the Civil Code,[122] one should realize the critical role it has played in defining the economic and

121. RENE DAVID AND JOHN BRIERLEY, THE MAJOR LEGAL SYSTEMS 90-91 (1978).

122. Art. 9 provides that "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."

The author's position on the matter is thoroughly discussed in Ceasar L. Villanueva, *Comparative Study of the Judicial Role and Its Effect on the Theory on Judicial Precedents in the Philippine Hybrid Legal System*, 65 PHIL. L.J. 1 & 2 (1990) [hereinafter Comparative Study of the Judicial Role].

commercial agenda of the country based on prevailing national and international developments.

E. Jurisprudential Tempering as Primary Development in Commercial Laws

It has been observed that as a world-wide phenomenon that what is more significant today is the transformation of traditional commercial law into "law and economics" that give fresh consideration to socio-political factors involved and the inter-penetration of public law and private law.[123]

In the Philippines, this can be seen from the practice of our Supreme Court, in tandem with Legislative and Executive Departments, in looking into the philosophical underpinning of issues in Commercial law, particularly by assessing the impact of Philippine commercial laws vis-à-vis the constitutional provisions on economic and commercial matters. This can be demonstrated in the fields of retail trade, foreign equity investments in nationalized areas, and in matters relating to international treaty commitments.

1. The Retail Trade Scene

The "mishandling" of the laudable public policy of tilting the balance in favor of Filipino businessmen and entrepreneurs is perhaps best demonstrated in the Philippine legal history of the handling of the retail trade sector of the economy.

i. Retail Trade Nationalization Law: Legislation Borne Out of Fear

In 1954, Philippine Congress and the President enacted into law Republic Act No. 1180 which came to be known as the "Retail Trade Nationalization Law," which effectively nationalized the retail trade business in the Philippines, by prohibiting aliens and corporations not wholly-owned by citizens of the Philippines, from engaging directly or indirectly in the retail trade. The constitutionality of the law was attacked *Inchong v. Hernandez*[124] on the grounds that the law violated the due process and equal protection clauses in the Constitution.

In the case, the Supreme Court acknowledged that when the subject of legislative regulation is business, then "[t]he problem becomes more complex because its subject is a common, trade or occupation, as old as society itself, which from time immemorial has always been open to residents, irrespective of race, color or citizenship."[125] The Court therefore acknowledged the "universal" character of trade and commerce, and the universal character of

123. *See* Comparative Study of the Judicial Role, *supra* note 122.

124. 101 Phil. 1155 (1957).

125. *Id.* at 1166.

commercial laws. In addition, the Court acknowledged that the basic limitations of due process and equal protection are "constitutional guarantees which embody the essence of individual liberty and freedom in democracies, and are not limited to citizens alone but are admittedly universal in their application, without regard to any differences of race, of color, or of nationality."[126]

Nevertheless, the Court took serious note of the importance of retail trade to the national economy, thus:

> Under modern conditions and standards of living, in which man's needs have multiplied and diversified to unlimited extents and proportions, the retailer comes as essential as the producer, because thru him the infinite variety of articles, goods and commodities needed for daily life are placed within the easy reach of consumers. Retail dealers perform the functions of capillaries in the human body, thru which all the needed food an supplies are ministered to members of the communities comprising the nation.... The retailer, therefore, from the lowly peddler, the owner of a small *sari-sari* store, to the operator of a department store or a supermarket is so much a part of day-to-day existence.[127]

It held that "the State can deprive persons of life, liberty and property, provided there is due process of law; and persona may be classified into classes and groups, provided everyone is given the equal protection of the law. The test or standard, as always, is reason. The interest and welfare, and a reasonable relation must exist between purposes and means. And if distinction and classification has been made, there must be a reasonable basis for said distinction."[128]

In essence, the Court accepted nationality as a legal and reasonable basis for distinction in the field of retail trade, thus:

> Through it, and within the field of economy it regulates, Congress attempts to translate national aspirations for economic independence and national security, rooted in the drive and urge for national survival and welfare, into a concrete and tangible measures designed to free the national retailer from the competing dominance of the alien, so that the country and the nation may be free from a supposed economic dependence and bondage. Do the facts and circumstances justify the enactment?[129]

In addressing whether it had the right to subject to judicial review Legislative discretion, the Court held:

> Now, in this matter of equitable balancing, what is the proper place and role of the courts? It must not be overlooked, in the first place, that the legislature, which is the constitutional repository of police power and exercises the prerogative of determining the policy of the State, is by force of circumstances primarily the judge of necessity, adequacy or reasonableness and wisdom, of any law promulgated in the exercise of

126. *Id.* at 1164, *citing* Yick Wo v. Hopkins, 118 U.S. 356, 369, 30 L. ed. 220, 226 (1886).

127. *Id.* at 1167.

128. *Id.* at 1165.

129. *Id.* at 1160-61.

> the police power, or of the measures adopted to implement the public policy or to achieve public interest. On the other hand, courts, although zealous guardians of individual liberty and right, have nevertheless evinced a reluctance to interfere with the exercise of the legislative prerogative. They have done so early where there has been a clear, patent or palpable arbitrary and unreasonable abuse of the legislative prerogative. Moreover, courts are not supposed to override legitimate policy, and the courts never inquire into the wisdom of the law.[130]

It saw the dangers of alien control and dominance in retail trade, in that:

> (a) With ample capital, unity of purpose, and action and thorough organization, alien retailers and merchants can act in complete unison and concert on such vital matters as the fixing of prices, the determination of the amount of goods or articles to be made available in the market, and even the choice of the goods or articles they would or would not patronize or distribute. Therefore, the fears of dislocation of the national economy and of the complete subservience of national retailers and of the consuming public are not entirely unfounded;
>
> (b) Alien participation in the retail trade has been attended by pernicious and intolerable practices, like the cornering the market of essential commodities, like corn and rice, creating artificial scarcities to justify and enhance profits to unreasonable proportions; hoarding of essential foods to inconvenience and prejudice of the consuming public; secret combinations to control prices; cheating the operation of law of supply and demand; conniving to boycott honest merchants and trader who would not cater or yield to their demands, in unlawful restraint of freedom of trade and enterprise;
>
> (c) Aliens are believed to have evaded tax laws, smuggled goods and money into and out of the land, violated import and export prohibitions, control laws and the like, in derision and contempt of lawful authority;[131] and
>
> (d) Aliens have engaged in the practice of corrupting public officials with fabulous bribes, indirectly causing the prevalence of graft and corruption in the Government.

Based on its assessment of the statistical reports on retail trade adduced during trial, the Court found that indeed, the retail trade sector in the Philippines was dominated by aliens[132] *and acknowledged the national fear against alien control and domination as being part of the constitutional framework*, thus:

> It is this domination and control, which we believe has been sufficiently shown to exist, that is the legislature's target in the enactment of the disputed nationalization law. If they did not exist as a fact the sweeping remedy of nationalization would never have been adopted. The framers of our Constitution also believed in the existence of this alien dominance and control when they approved a resolution categorically declaring among other things, that "it is the sense of the Convention that public interest requires the nationalization of the retail trade;... That was twenty years ago; and the events since then have not been either pleasant or comforting. Dean Sinco of the University of the Philippine College of Law, commenting on the patrimony clause of the Preamble opines that the fathers of our Constitution were merely translating the general preoccupation of the Filipinos" of the dangers from alien

130. *Id.* at 1165-66.

131. *Id.* at 1173-74.

132. *Id.* at 1170-71.

> interests that had already brought under their control the commercial and economic activities of the country....[133]

ii. Patronizing Stance on Filipino Entrepreneurs

The Philippine political and business leaders felt that the retail trade was at the heart of national life and survival, and it seemed that Chinese residents were just much better merchants than the native Filipinos could ever be. Congress did not undertake the difficult task of helping the Filipino merchants to evolve into a more competitive group by providing effective systems of skills development, financing, warehousing and the appropriate infrastructure to allow them ability to move up the competition ladder. Instead, it enacted the Retail Trade Nationalization Law which effectively banned all foreigners from retail trade, and consequently insulated the Filipino from competition. Such a move was not only short-sighted, but was effectively a cop-out since it removed the challenges that would have allowed the Filipino merchant to mature and make themselves competent to meet international competition. Instead of meeting the basic problems that beset Filipino merchants, the Law tried to insulate the Filipino merchants from competition.

It seemed that fear drove Philippine leaders into the wrong direction, as they failed to believe and trust in their citizens' talents or capacity to grow and mature. They took the easy way out by forcibly taking the competition out of the game. The move did not necessarily make the Philippines a better nation of retailers. Left to their own inadequacies, they settled down on easy profits playing a low-end retailing game.

The Philippine experience with "cradling" its citizens has clearly demonstrated that Filipinos did not "grow up" to be better individuals; by securing Filipinos from competition and perceived hardships and taking-away the challenges from qualified competition that would have exposed them to higher modes of doing business, the Filipinos were then to remain childlike if not childish in their ways. The Filipino merchants, due to their insulation from worthy competitors, truly have became retail and small merchants, of small bakeshops, sari-sari stores, small market and commercial stalls, scrap dealerships, etc., while the Chinese competition simply took up Philippine citizenship or

133. *Id.* at 1171: "The figures reveal that in percentage distribution of assets and of gross sales, alien participation has steadily increased during the years. It is true, of course, that Filipinos have the edge in the number of retailers, but aliens more than make up for the numerical gap through their assets and gross sales which average between six and seven times those of the Filipino retailers. Numbers in retailers, here, do not imply superiority; the alien invests more capital, buys and sells six to seven times more, and gains much more. The same official report, pointing out to the known predominance of foreign elements in the retail trade, remarks that the Filipino retailers were largely engaged in minor retailer enterprises. . . the native investment is thinly spread, and the Filipino retailer is practically helpless in matters of capital, credit, price and supply."

being driven away from the retail trade areas, had moved on to control the wholesaling, import and export sectors, medium and large manufacturing concerns, and even the financial markets.

iii. Retail Trade Liberalization Law of 2000

In fifty year's time, the Philippine policy makers took an almost complete turn-around. In March 2000, the political and business leadership caused the enactment of Republic Act 8762, entitled as the "Retail Trade Liberalization Act of 2000," which specifically took the place of and repealed Republic Act No. 1180. Among other things, Philippines had no choice but to liberalize the retail trade sector as one of the demands of the International Monetary Fund.

The Retail Trade Nationalization Law nationalized the retail trade system and allowed only Filipino citizens and juridical entities wholly-owned by Filipinos to engage in retail trade. It sprang "from deep, militant, and positive nationalistic impulse" which sought to "protect citizen and country from the alien retailers."[134] In stark contrast, the Retail Trade Liberalization Law of 2000 liberalized the retail trade industry to further the State policy, "to promote consumer welfare in attracting, promoting and welcoming productive investments that will bring down prices for the Filipino consumer, create more jobs, promote tourism, assist small manufacturers, stimulate economic growth and enable Philippine goods and services to become globally competitive through the liberalization of the retail trade sector."[135]

The declared policy of R.A. 8762 would, when properly read, constitute a frank admission by Philippine leadership that nationalization of the retail trade sector had not promoted the best interests of the Filipino consumers, and had not lead to enhancing the competitive skills of the Filipino merchants. Under the Law, it is admitted that the liberalization of the retail trade sector would encourage Filipino and foreign investors to forge an efficient and competitive retail trade sector in the interest of empowering the Filipino consumer through lower prices, higher quality goods, better services and wider choices.[136]

134. "Through it, and within the field of economy it regulates, Congress attempts to translate national aspirations for economic independence and national security, rooted in the drive and urge for national survival and welfare, into a concrete and tangible measures designed to free the national retailer from the competing dominance of the alien, so that the country and the national may be free from a supposed economic dependence and bondage." *Inchong* 101 Phil. at 1160-61 (1957).

135. Retail Trade Liberalization Act of 2000, REPUBLIC ACT NO. 8762, §2 (2000) [hereinafter Retail Trade Act].

136. *Id.*

iv. Judicial Tempering

Even before the passage of the Retail Trade Liberalization Law of 2000, the Supreme Court had began to emasculate the application of the Retail Trade Nationalization Law, to allow foreign companies to participate in the national development.

First the Supreme Court began tampering with the meaning of "merchandise, commodities or goods for consumption"[137] in defining retail trade found under the old Retail Trade Law. The Court interpreted the old Retail Trade Law to exclude from its coverage merchandise and goods, which are not "consumer goods."

In *Balmaceda v. Union Carbide Philippines, Inc.*,[138] it held that the term "retail trade" should be associated with and limited to goods for personal, family or household use, consumption and utilization. It construed the Retail Trade Law to refer to "consumption goods" or "consumer goods" which directly satisfy human wants and desires and are needed for home and daily life. Accordingly, it excluded from the coverage of retail trade, goods which are generally considered as raw materials used in the manufacture of other goods, or if not, as one of the component raw material, or at least as elements utilized in the process of production and manufacturing.[139]

In *Goodyear Tire and Rubber Co. v. Reyes*,[140] it held that a manufacturer which sells rubber products to the government, public utilities, agricultural enterprises, logging, mining and other entities and persons engaged in the exploitation of natural resources, automotive assembly plants, industrial and commercial enterprises engaged in manufacturing and sale of essential commodities, is not engaged in retail business within the purview of the law.

The same principle was reiterated later in *B.F. Goodrich v. Reyes, Sr.*,[141] which held that in view of the amendatory provisions of P.D. No. 714, manufacturers engaged in the business of manufacturing and selling rubber

137. Id. at § 3(1).

138. 124 SCRA 893 (1983).

139. *Balmaceda* in effect rejected the Department of Justice Opinion No. 253, series of 1954 where it was held that the Retail Trade Law was not limited in its coverage to house-owner or members of his family who purchase goods for their personal consumption and should include public utility operators who need large quantities for their services; as well as the DOJ Opinion, dated September 12, 1963 which rejected that a sale made to a manufacturer or producer would not in itself be determinative of the issue of whether the transaction is covered by the then Retail Trade Law: "For . . . it is not the character of the business conducted by either seller or buyer that maters; it is, rather, whether the purchaser uses or consumes the goods or whether he resells the same or passes them on to the ultimate consumer."

140. 123 SCRA 273 (1983).

141. 121 SCRA 363 (1988).

products, principally automotive tires and tubes, batteries, conveyor belts, heels and soles for shoes and tiles to dealers, who in turn sell them, or who use them for their production, are not covered within the prohibition, but that sales to employees and officers are covered by the prohibition of the law.

In *Marsman & Co., Inc. v. First Coconut Central Co., Inc.*,[142] the Supreme Court defined "producer goods," which are not within the coverage of the Law, as "goods (as tools and raw material) that are factors in the production of other goods and that satisfy wants only indirectly—called also auxiliary goods, instrumental goods, intermediate goods." It held that since a diesel generating unit is not a consumer item, it necessarily did not come within the ambit of retail business as defined under the old Retail Trade Nationalization Act.

In effect, a large and important sector of retail trade that involved industrial and commercial equipment and materials were effectively taken out of the provisions of the Retail Trade Nationalization Act to allow foreign companies to engage in such area within the Philippines.

In terms of "suspected" schemes allegedly meant to indirectly skirt the prohibition under the Retail Trade Nationalization Act, the Supreme Court did not show much sympathy.

In *Asbestos Integrated Manufacturing, Inc. v. Peralta*,[143] it held that an agreement of a domestic entity to deal exclusively with the products of a foreign manufacturer, where the domestic entity retains entire control and direction of its business operations, did not make the domestic entity an *alter ego* of the foreign manufacturer nor convert the relation into one of agency as to be violative of the Anti-Dummy Act or the Retail Trade Nationalization Act.

In *Talan v. People*,[144] the Court held that the Filipino common-law wife of a Chinese national is not barred from engaging in the retail business provided she uses capital exclusively derived from her paraphernal properties.

The Court also held that when an alien gives or donates his money to a citizen of the Philippines so that the latter could invest it in retail trade, such act *per se* did not violate our laws, since what was prohibited by the Anti-Dummy Law and the then prevailing retail trade law, was the conduct of retail trade by the alien himself.[145]

142. 162 SCRA 206 (1988).

143. 155 SCRA 213 (1987).

144. 169 SCRA 586 (1989).

145. Sui v. Court of Appeals, G.R. No. 129507 (Sept. 29, 2000), *citing* People v. Altea, 53 O.G. No. 5 (1464).

In *Dando v. Fraser*,[146] the Court held that when a license to engage in a cocktail lounge and restaurant is issued in the name of a Filipino citizen, such license shall be conclusive evidence of the latter's ownership of the said retail business as far as private parties are concerned. Only the government can question the matter, and the existence of such license in binding on private individuals.

2. Diluting the Concept of Foreign Equity

Even in business sectors which either the Constitution or statutory provisions have effectively nationalized, our Supreme Court, again in tandem with agencies within the Executive Department, has taken a more "rationale" approach in determining what constitutes "foreign equity".

i. Distinguishing Between Important Commercial Concepts

In commercial and business enterprises, there are clear legal consequences on the regulation of business media, between the juridical entity that is used as the medium to hold title and manage a business concern, as distinguished from the underlying assets or properties of such business and the business enterprise itself.

To illustrate, in an "assets-only" transaction, the contracting parties are dealing only with the "raw" assets and properties of the business, and are not interested in the entity of the corporate owner of the assets, nor in the goodwill and other factors relating to the business itself. In the "business-enterprise" level, the transaction focuses beyond the assets or properties of the business enterprise, and the primary target of the transaction or regulation would be the "earning or operating capability" of the venture. While, the "equity" level looks at the *entirety* of the business enterprise as it is owned and operated by a juridical entity. The purchaser takes control and assumes ownership of the business by purchasing the equity of the corporate owner. The control of the business enterprise is therefore indirect, since the juridical owner remains the direct owner of the business, and what a purchaser has actually purchased is the ability to elect the members of the board of the corporation who run the business.

ii. Public Utilities

Section 11, Article XII of the 1987 Constitution provides that "[n]o franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations *organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens*.... The participation of foreign investors in

146. 227 SCRA 126 (1993).

the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines."

Filipino "control" of public utilities is the essence of the constitutional provision, and "is a recognition of the sensitive and vital position of public utilities both in the national economy and for national security."[147] Unlike the provisions on the exploitation of natural resources, the afore-quoted provisions expressly includes the place of incorporation test and requires that only domestic corporations with at least 60% of the capital stock owned by Filipinos may own and operate public utilities in the Philippines, which provides a control on the "equity" or "investment" level . The nationalistic stance of the Constitution when it comes to public utilities is clearly punctuated by its injunction that not only can foreigners be members of the governing Board up to the extent of allowable foreign equity (*i.e.*, 40% of the Board membership), but also that foreigners cannot be officers of a public utility company, which provide for limitations on "participation in the managing agency" and complete prohibition to be in actual management of the entity.

In *People v. Quasha*[148] the Court held that the Constitution does not prohibit the *mere formation* of a public utility corporation without the required proportion of Filipino capital. What it does prohibit is the granting of a franchise or other form of authorization for the operation of a public utility to a corporation *already in existence* but without the requisite proportion of Filipino capital. *Quasha* therefore draws the distinction between the "primary franchise" of a corporate entity by virtue of which it is constituted as a body politic endowed with separate juridical personality, and the "secondary franchise" that it may receive during its life for the exercise of a privilege granted by law, such as the operation of a public utility. The primary franchise pertains to the juridical person or being of the corporation, while the secondary franchise pertains to the underlying business enterprise or the license to undertake the business enterprise, which in that case meant the ability to operate a public utility.

Tatad v. Garcia, Jr.,[149] went on further to distinguish between the "business enterprise" and the underlying assets that it employs to achieve its purpose. In *Tatad*, the Court held that although the Constitution requires in no uncertain terms that a franchise for the operation of a public utility can be granted only to corporations at least 60% of the capital of which is owned by Filipinos, however, "it does not require a franchise before one can own the facilities needed to operate a public utility so long as it does not operate them to serve the public." *Tatad* made a distinction between the "operation" of a public

147. 2 BERNAS , *supra* note 65, at 452.

148. 93 Phil. 333 (1953).

149. 243 SCRA 436 (1995).

utility and the "ownership of the facilities and equipment used to serve the public."[150] The Court held that in a railway system, while a foreign corporation may own the rail tracks, rolling stocks like the coaches, rail stations, terminals and the power plant, and although a franchise is needed to operate these facilities to serve the public, they do not by themselves constitute a public utility, thus: "What constitutes a public utility is not their ownership but their use to serve the public."[151] The Court held that in law, there is a clear distinction between the "operation" of a public utility and the "ownership" of the facilities and equipment used to serve the public,[152] thus:

> The right to operate a public utility may exist independently and separately from the ownership of the facilities thereof. One can own said facilities without operating them as a public utility, or conversely, one may operate a public utility without owning the facilities used to serve the public. The devotion of property to serve the public may be done by the owner or by the person in control thereof who may not necessarily be the owner thereof.
>
> The dichotomy between the operation of a public utility and the ownership of the facilities used to serve the public can be very well appreciated when we consider the transportation industry. Enfranchised airline and shipping companies may lease their aircraft and vessels instead of owning them themselves.[153]

The ratiocination of the Supreme Court would generally have been correct, but not under the aegis of "build-lease-and-transfer" schemes allowed under the Build-Operate Transfer Law[154] under which the railway project was pursued. The "built-lease-and-transfer" is defined under the Law to be a contractual arrangement whereby the contractor undertakes the construction, including financing, of a given infrastructure facility, and its turnover after completion to the government agency or local government unit concerned which shall pay the contractor its total investment expended on the project, plus a reasonable rate of return thereon.[155] This arrangement may be employed in the construction of any infrastructure project including critical facilities which, for security or strategic reasons, must be operated directly by the Government.

In other words, under the scheme adopted in the *Tatad* case, the entirety of the facilities of the railway system were actually owned by the EDSA LRT Corporation. Ltd., a foreign entity organized under the laws of Hongkong, which not only was entitled to receive rentals tied but also reasonable rate of return, which are intrinsically connected to the operations of the public utility

150. *Id.* at 452-53.

151. *Id.* at 453, *citing* Iloilo Ice & Cold Storage Co. v. Public Service Board, 44 Phil. 551 (1923).

152. *Id.* at 452-53, *citing* Iloilo Ice & Cold Storage Co. v. Public Service Board, 44 Phil. 551, 557-58 (1923).

153. *Id.* at 453.

154. Republic Act 6957 (1990) *amended by* Republic Act 7718 (1994).

155. Republic Act 6957; *see also Tatad*, 243 SCRA at 457.

enterprise, but as lessor-owner of the facilities, it also was contractually bound to be retained "to provide technical maintenance and repair service" for the railway system;[156] "to train DOTC personnel for familiarization with the operation, use, maintenance and repair of the rolling stock, power plant, substations, electrical signalling, communications and all other equipment,"[157] and to collect "rent, which likewise includes the project cost, cost of replacement of plant equipment and spare parts, investment and financing cost, plus a reasonable rate of return thereon."[158]

The Supreme Court put emphasis on the fact that the foreign lessor "will not run the light rail vehicles and collect fees from the riding public [and]... will have no dealing with the public and the public will have no right to demand any services from it." What the constitutional provision on public utilities prohibits is placing in the hands of foreign entity the "control" over the public utility operations, because of the nationality security aspect. If the constitutional provisions prohibit foreigners from being even officers participating in the management of the public utility enterprise, would it not be worse that a foreign entity holds within its hands the ability to enforce both ownership and contractual rights over the entirety of the facilities of a public utility with full capabilities through court actions to compromise the continued operations thereof based on breach of contract?

The Supreme Court therefore, does not see danger to the national economy or the national security, if foreigners controlled or owned all of the technology and assets by which a public utility enterprise is able to operate and render service to the public, and is content that the legal concepts of "business enterprise" or "secondary franchise" constituting the public utility are owned and operated by Filipino citizens or Filipino corporations. This is more of a formal test rather a test on the substantive operations of such nationalized industry. Under the constitutional clause, foreigners cannot even qualify to manage the facilities, yet under the *Tatad* ruling they can actually own the facilities themselves. However, the focal point under Section 11 of Article XII is equity ownership in the medium that operates the facilities.

iii. The SEC-DOJ Grandfather Rule

Another movement towards dilution of the rule against foreign equity in the nationalized industry is the liberalized definition of "Filipino equity" in the application of the grandfather rule. The "grandfather rule" is the method by which the percentage of Filipino equity in a corporation engaged in nationalized and/or partly nationalized areas of activities, provided for under

156. *Tatad*, 243 SCRA at 454.

157. *Id.*

158. *Id.*

the Constitution and other nationalization laws, is computed, in cases where corporate shareholders are present in the situation, by attributing the nationality of the second or even subsequent tier of ownership to determine the nationality of the corporate shareholder.

On November 2, 1989, the SEC formally adopted the method of determining corporate nationality on the basis of the Opinion of the Department of Justice No. 18, s. 1989, dated January 19, 1989, which read as follows:

> Shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality, but if the percentage of Filipino ownership in the corporation or partnership is less than 60% only the number of shares corresponding to such percentage shall be counted as of Philippine nationality. Thus, if 100,000 shares are registered in the name of a corporation or partnership at least 60% of the capital stock or capital respectively, of which belong to Filipino citizens, all of the said shares shall be recorded as owned by Filipinos. But if less than 60% or, say, only 50% of the capital stock or capital of the corporation or partnership, respectively belongs to Filipino citizens, only 50,000 shares shall be counted as owned by Filipinos and the other 50,000 shares shall be recorded as belonging to aliens. [159]

However, the SEC Opinion clarified that "while a corporation with 60% Filipino and 40% Foreign equity ownership is considered a Philippine national *for purposes of investment*, it is not qualified to invest in or enter into a joint venture agreement with corporations or partnerships, the capital or ownership of which under the Constitution or other special laws are limited to Filipino citizens only.[160]

Through the employment of the SEC-DOJ ruling, foreign equity investments in fully and partially nationalized enterprises may be made more pervasive by employing a sort of pyramiding scheme of corporate holdings. To illustrate, a foreigner Mr. Doe may actually own a full 40% of the equity of a corporation engaged in Public Utility Enterprise, and the remaining 60% is registered in the name of a Holding Company, which Mr. Doe would again own 40%, while the balance of 60% equity is held by Filipinos. Under such structure, Mr. Doe can vote himself into the Board of Directors of Public Utility Enterprise, and could also be a Board member in the Holding Company, able to have a say in the decisions of the Holding Company on its investments in Public Utility Enterprise.

Before the SEC-DOJ ruling. the Holding Company's equity in the Public Utility Enterprise would violate the constitutional prohibition because apart from the 40% direct equity of Mr. Doe in Public Utility Enterprise, 20% of the 60% equity of Holding Company would be construed as foreign holding also,

159. XXIV SEC Q. BULL. 56 (No. 1, Mar. 1990).

160. SEC Opinion, Dec. 14, 1989, XXIV SEC Q. BULL. 7 (No. 2, June 1990); SEC Opinion, Nov. 21, 1972, SEC Folio 1960-1976, 581; SEC Opinion, Feb. 22, 1973.

granting a total foreign equity of 60% in Public Utility Enterprise. But now under the SEC-DOJ ruling, the entire 60% equity of Holding Company is deemed to be entirely Filipino equity (as though Mr. Doe did not hold any shares in Holding Company). The philosophical basis of the SEC-DOJ ruling is that even if Mr. Doe did hold 40% equity in the Holding Company, he would still be a minority and the decision of the majority members of the Board of Directors representing 60% of the Filipino would always prevail, such that when Holding Company makes any decision or determination of its investment holdings in Public Utility Enterprise, it would always reflect the 100% decision of the Filipino equity of Hodling Company.

iv. The FIA '91 Grandfather Rule

Prior to the passage of the Foreign Investments Act of 1991[161] (FIA '91), the operating rule on foreign investment in the Philippines was that "foreign investment are subject to regulation and specific registration requirement with the Board of Investment," whether or not incentives were being sought. With the passage of FIA '91, there was a complete reversal of policy in that: "as a general rule, there are no restrictions on the extent of foreign ownership of export enterprises. In domestic market enterprises, foreigners can invest as much as one hundred percent (100%) equity except in areas included in the negative list,"[162] and only when incentives are being sought is registration with the Board of Investment required.

Aside from the industry sectors which have been totally or partially nationalized by the Constitution or under special laws, the FIA '91 includes in the negative lists and limits foreign equity to 40% in "small and medium sized domestic market enterprises." "Small and medium sized domestic market enterprises" means:

> (a) Enterprises with paid in equity of less than the equivalent of US$200,000, or only US$100,000 when they involve advanced technology as determined by the Department of Science and Technology; and
>
> (b) Export enterprises which utilize raw materials from depleting natural resources, with paid-in equity of less than the equivalent of US$200,000.

Although FIA '91 governs only foreign investments in the Philippines and actually contains no operative provisions covering Filipino investments, nevertheless Section 3(a) thereof provides a definition of a corporate "Philippine national" as covering a corporation organized under the laws of the Philippines, of which at least sixty percent (60%) of the capital stock outstanding *and entitled to vote* is owned and held by citizens of the Philippines. However, it provides that where a corporation and its non-Filipino

161. Foreign Investments Act of 1991, Republic Act 7042 (1991).

162. *Id.* at §2.

stockholders own stocks in a SEC-registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national.

By defining what constitute a corporate "Philippine National" to cover a situation where at least 60% of the *voting equity* being owned by Filipino citizens, FIA '91 was able to expand and dramatically liberalize foreign investment in the Philippines even as to nationalized industries falling outside of constitutional provisions. For purposes of investment in a corporate enterprise, FIA '91 therefore, limits the test of "Filipino equity" *versus* "foreign equity" to the voting shares of the corporation. Therefore, even when foreign equity is much larger in the domestic enterprise, but the portion constituting voting shares is held at least 60% by Filipino citizens, the entity is deemed to be wholly a "Philippine national" not governed by the foreign equity limitations set by statutory provisions.

Subsequently, when FIA '91 was amended by R.A. No. 8179, it expanded the coverage of "Philippine national" to include a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code, provided that 100% of the outstanding voting capital stock is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least 60% of the fund will accrue to the benefit of Philippine nationals.

The liberal statutory definition of "Philippine national" under FIA '91 means that except where the Constitution sets down specific limitations on foreign investments, a wide range of business opportunities, even when falling within the negative lists, have been opened to foreign individuals and foreign corporations by limiting their investments in non-voting shares, which would ensure that their main motivation would be in derivation of profits, rather than in managing Philippine business enterprises.

3. Internationalization of Philippine Economy

In spite of the injunctions of the Constitution to forge a self-reliant economy, a clear development in the Philippines is a movement towards being an active member-nation in the world economic order, and consequently a movement towards internationalizing its economic set-up. In the Philippine psyche, there is considered to be a clear distinction between considering particular foreign investments into the country, and the general commitment of the Philippines to international economic treaties.

While politics continues to be the main menu of the Filipino nation in recent decades, having emerged from the corrupt dictatorial excess of the Marcos Government, in the second half of the 20TH century, the Philippines, while remaining a loyal ally of the United States and dependent largely on the American market, has spent much energy forging ties with its Asian neighbors, especially increasing its economic ties with Japan.

i. Adherence to International Associations Based on Economic Impetus

a. Association of Southeast Asian Nations (ASEAN)

The Philippines is a key founding member of the Association of East Asia Nation (ASEAN).

In January 1992, the Philippines adhered to the ASEAN Free Trade Area (AFTA) which aims to create a free market within the ASEAN region by reducing tariff rates on manufactured products, which would allow member-countries to further develop their economies, enhance cost-effectiveness, and attract more direct investments.

R.A. No. 7888 provided for the suspension of nationality requirements for ASEAN Nationals investments, by amending Article 7(13) of the Omnibus Investment Code of 1987, by suspending the nationality requirements provided in said Code in cases of ASEAN projects, or investments by ASEAN nationals, regional ASEAN or multilateral financial institutions including their subsidiaries in preferred projects and/or projects, but only "to the extent that such activities are allowed by the Constitution and relevant laws." It also authorized either financial or technical assistance agreements to be entered into by the President, and in the case of regional cooperation for the manufacture of a particular product which seeks to take advantage of economies of scale.

b. Asia Pacific Economic Cooperation (APEC)

The Philippine joined the Asia Pacific Economic Cooperation (APEC) when it was established in 1989. Unlike membership in the General Agreement on Tariff and Trade (GATT) and AFTA, APEC is not the result of a treaty commitment, but is governed by an international agreement entered into by the President, without the concurrence of Philippine Congress

APEC's primary goal is the commitment to a vision of a free trade arrangement which means taking down the barriers to trade and investment that exists through the Asia-Pacific region. Specifically, the members pledged to a common vision statement:

(a) To support an expanding world economy and open multilateral trading system;

(b) To continue to reduce trade barriers to trade investment to enable goods, services and capital to flow freely among economies;

(c) To ensure that our people share the benefits of economic growth, improve education and training, link our economies through advances in telecommunications and transportation, and use our resources sustainably; and

(d) To find cooperative solutions to the challenges of our rapidly changing regional and global economy.[163]

c. World Trade Organization (WTO) and General Agreement on Tariffs and Trade (GATT)

The Philippine Senate concurred[164] in the ratification by the President to the Philippine membership with the GATT specifically establishing the WTO. The main purpose of the GATT is to expand world trade by opening the doors of member countries to one another's products.[165]

The most-favored nation principle, in Article I, requires Philippines and each GATT contracting party to grant each other contracting party treatment at least as favorable as it grants to its most favored trade partner. No country can discriminate among countries in applying tariffs or charges, unless exemption is allowed.

The national treatment principle, in Article III, obligates each country not to discriminate between domestic and foreign products; and that once an imported product has entered the country, the product must be treated no less favorably than a "like product" domestically produced.

The Philippines joined the WTO as a founding member with the goal of improving Philippine access to foreign markets, especially its major trading partners, through reduction of tariffs on its exports and the attraction of more investments into the country.[166] The Philippine Supreme Court has acknowledged that the WTO Agreement "has revolutionized international business and economic relations among states, and has propelled the world towards trade liberalization and economic globalization."[167]

163. WALDEN BELLO & JOY MALALUAN, APEC: FOUR ADJECTIVES IN SEARCH OF A NOUN: APEC LEADERS' DECLARATION OF COMMON RESOLVE IN BOGOR INDONESIA 1 (1996)

164. S. Res. 97 (Dec. 14, 1994).

165. Gloria Macapagal-Arroyo, RP Will Be Better Off Within WTO, excerpts from the sponsorship speech, (Nov. 23, 1994).

166. *Id.*.

167. Mirpuri v. Court of Appeals, 318 SCRA 516, 557 (1999).

ii. Recognizing the Importance of an Internationally Recognized Regime on Intellectual and Industrial Property Rights

Essential to making the Philippine commercial system an integral part of the world commerce was its recognition and taking a responsible role in the protection of intellectual property rights, which constitute a major component of international trade.

a. Paris Convention

The Philippines is a member country to the Convention of Paris for the Protection of Industrial Property,[168] which is a multi-lateral treaty that seeks to protect industrial property consisting of patents, utility models, industrial designs, trademarks, service marks, trade names and indications of source or appellation of origin, and at the same time aims to repress unfair competition.[169]

The Paris Convention is a compact among various countries which have pledged to accord to citizens of the other member countries trademark and other rights comparable to those accorded their own citizens by their domestic laws for an effective protection against unfair competition,[170] and to essentially give the same treatment to each of the member countries as that country makes available to its own citizens.

In *La Chemise Lacoste, S.A. v. Fernandez*,[171] the Supreme Court expressed its concern "that the Philippines should not acquire an unbecoming reputation among the manufacturing and trading centers of the world as a haven for intellectual pirates imitating and illegally profiting from trademarks and tradenames which have established themselves in international or foreign trade."[172] The Court reiterated the doctrine that a foreign corporation which has never done any business in the Philippines and which is unlicensed and unregistered to do business in the Philippines, but is widely and favorably known in the Philippines through the use therein of its products bearing its corporate and trade name, has the legal right to maintain an action in the

168. The Philippine Senate concurred to the Paris Convention on May 10, 1965; Phillip Morris, Inc. v. Court of Appeals, 224 SCRA 599, 615 (1993) (Feliciano, J. dissenting); The President signed the instrument of adherence on July 21, 1965: RUBEN AGPALO, TRADEMARK LAW AND PRACTICE IN THE PHILIPPINES 201 (1990).

169. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, art. 1, 61, 828 U.N.T.S. 11851 [hereinafter Paris Convention]; *see also Mirpuri*, 318 SCRA at 540.

170. *Mirpuri*, 318 SCRA at 540 *citing* AGPALO, *supra* note 174, at 200.

171. 129 SCRA 373 (1984).

172. *Id.* at 378.

Philippines to restrain the residents and inhabitants thereof from infringing on its corporate and tradename.[173]

But more importantly, the Court in *La Chemise*, in upholding the right of the foreign corporation to maintain the suit before local courts for unfair competition or infringement of trademarks, emphasized that it was "recognizing our duties and the rights of foreign states under the Paris Convention for the Protection of Industrial Property... [and] simply interpreting and enforcing a solemn international commitment of the Philippines embodied in a multilateral treaty to which we are a party and which we entered into because it is in our national interest to do so."[174]

b. Intellectual Property Code

The Intellectual Property Code of 1998,[175] which took effect on 1 January 1998, consolidated all laws pertaining to all intellectual properties, and was enacted "to strengthen the intellectual and industrial property system in the Philippines as mandated by the country's accession to the Agreement Establishing the World Trade Organization (WTO)."[176]

Among those annexed to the Agreement Establishing the World Trade Organization is the Agreement on Trade-Related Aspects of Intellectual Property Rights, by which members have agreed to adhere to minimum standards of protection set by several Conventions.[177]

In *Mirpuri v. Court of Appeals*,[178] in setting aside the stance of a local registrant of 30-years of the name "Barbizon" against the original American corporation owner of such trademark which it alleged "swaggers into the country like a conquering hero," to usurp the local's trademark within the local market, the Supreme Court relied on the obligations of the Philippines under the Paris Convention to "[n]ationals of the various member nations [to be] assured of a certain minimum of international protection of their industrial

173. Western Equipment and Supply Co. v. Reyes, 51 Phil. 115 (1927); General Garments Corp. v. Director of Patents, 41 SCRA 50 (1971).

174. *La Chemise*, 129 SCRA at 386.

175. Republic Act 8293.

176. Mipuri 318 SCRA, at 540, *citing* Emma C. Francisco, *The Policy of Intellectual Property Protection in the Philippines*, 12 WORLD BULL. (UP Law Center, Jan-June 1996).

177. The Conventions are: The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43; Paris Convention, *supra* note 175, *revised in* Stockholm on July 14, 1967. *Mirpuri*, 318 SCRA at 554-56.

178. *Mirpuri*, 318 SCRA at 540.

property."[179] The Court recognized the importance of trademark and other intellectual properties in national and international commerce, thus —

> Intellectual and industrial property rights cases are not simple property cases.... [They] play a significant role in communication, commerce and trade, and serve valuable and interrelated business functions, both nationally and internationally. For this reason, all agreements concerning industrial property, like those on trademarks and trade names, are intimately connected with economic development. Industrial property encourages investments in new ideas and inventions and stimulates creative efforts for the satisfaction of human needs. They speed up transfer of technology and industrialization, and thereby being about social and economic progress. The advantages have been recognized by the Philippine government itself. The Intellectual Property Code of the Philippines declares that "an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, it attracts foreign investments, and ensures market access for our products."[180]

The Court noted that a major proportion of international trade depended on the protection of intellectual property rights.[181]

iii. Passage of Foreign Investment Friendly Laws

In contrast to its constitutional posturing, the Philippines has aggressively encouraged foreign investments to come into Philippine shores by enacting and updating its foreign investments laws, and improving legal structures to facilitate foreign investments and business in the country.

Omnibus Investment Code of 1987 — Even before the passage of FIA '91 and the Build-Operate-and-Transfer Law, the Philippine had in place the Omnibus Investment Code,[182] which grants incentives to foreign investments[183] in

179. *Id.* at 541.

180. *Id.* at 553-54.

181. *Id.* at 556.

182. Executive Order 226 (1986).

183. Among the incentives granted by the Code are: (a) Guarantee of investment repatriation in the currency in which the investment was originally made and at the exchange rate prevailing at the time of repatriation; (b) Guarantee of remittance of earnings in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance; (c) Freedom from expropriation; (d) No requisition of investment; (e) Income tax holiday for 6 years from the commercial operation for pioneer firms and 4 years for non-pioneer firms; (f) Additional deduction for labor expense for the first 5 years from the registration of 50% of the wages corresponding to the increment in the number of direct labor for skilled and unskilled workers; (g) Tax and duty exemption on imported capital equipment; (h) Tax credit on domestic capital equipment; (i) Exemption from contractor's tax; (j) Simplification of customs procedure; (k) Unrestricted use of consigned equipment; (l) Employment of foreign nationals; (m) Tax credit for taxes and duties on raw materials; (n) Exemption from taxes and duties on imported spare parts; and (o) Exemption from wharfage dues and any export tax, duty, impost and fee.

preferred areas of investment as designated in the Investment Priorities Plan (IPP), a yearly pamphlet issued by the Board of Investments (BOI).

The Special Economic Zone Act of 1995[184] — The law established the legal framework and mechanism for the integration, coordination, planning and monitoring of special economic zones, industrial estates and parks, export processing zones, and other economic zones.

Investor's Lease Act[185] — In order to encourage foreign investments, the Act was enacted to allow foreign investors to lease land for an original term of 50 years, renewable for another 25 years, with the leasehold right being transferable or assignable. However, the long-term lease may be used for the establishment of industrial estates, factories, assembly or processing plants, agro-industrial enterprises, land development for industrial or commercial use, tourism, and other similar productive endeavors.

In order to encourage foreign investments, the Act seems to be a legislative defiance to the early rulings in *Krivenko v. Register of Deeds*,[186] and *Philippine Banking Corporation v. Lui She*,[187] where the Supreme Court struck down any business scheme that would allow aliens to "hold" on to land under "public policy to conserve lands for the Filipinos." In *Lui She*, the Court declared unconstitutional a lease arrangement as a virtual sale, when by its terms the Filipino owner could not sell or otherwise dispose of his property for 50 years, which was construed to mean a virtual transfer of ownership. The Court did not even allow the doctrine of *pari delicto* to be used as a stumbling block to prevent the undoing of the contractual commitments under the lease.

Electronic Commerce Act[188] — In recognition that adherence to modern technology, particularly information technology, is indispensable to the survival and progress of a nation, and in fact may hold the key to the future well-being of a country and its people, the Philippines enacted the Electronic Commerce Act, which provided for the recognition, admissibility and evidentiary weight of electronic data messages, and electronic documents.

The Act mandates that within two years for all government agencies to use and accept electronic data messages, electronic signatures in their transactions, and the installation of an electronic online network otherwise known as RPWEB to promote the use of electronic documents and electronic data, messages in government and to the general public.

184. Republic Act No. 7916 (1995).

185. Republic Act No. 7652 (1993).

186. 79 Phil. 461 (1947).

187. 21 SCRA 52 (1967).

188. Republic Act No. 8792 (2000).

It also provided specific penalties for hacking or cracking which is the unauthorized access to, intrusion or interference in a computer or a computer network by means of a computer, device or gadget, including the introduction of viruses. It also penalized the piracy of copyrighted works, including legally protected sound recordings or information materials through the use of telecommunications networks in a manner that infringes intellectual property rights.

iv. Emerging Judicial Dynamism Towards Globalization and International Commerce

In spite the apparent fear under our 1987 Constitution of foreign competition and reliance upon foreign investment, our Supreme Court, tentatively at first, but clearly on the march today, has began to recognize the "inevitability" of opening the Philippine commercial and economic system to foreign investments. These movement can be seen from the pronouncements of the Supreme Court in the cases of *Mirpuri* and *La Chemise*.

The Supreme Court seems to have spoken the loudest and clearest of such movement in *Tañada v. Angara*,[189] thus:

> The emergence on January 1, 1995 of the World Trade Organization, abetted by the membership thereto of the vast majority of countries, has revolutionized international business and economic relations amongst states. It has irreversibly propelled the world towards trade liberalization and economic globalization. Liberalization, globalization, deregulation and privatization, the third-millennium buzz words, are ushering in a new borderless world of business by sweeping away as mere historical relics the heretofore traditional modes of promoting and protecting national economies like tariffs, export subsidies, import quotas, quantitative restrictions, tax exemptions and currency controls. Finding market niches and becoming the best in specific industries in a market-driven and export-oriented global scenario are replacing age-old and "beggar-thy-neighbor" policies that unilaterally protect weak and inefficient domestic producers of goods and services. In the words of Peter Drucker, the well-known management guru, "Increased participation in the world economy has become the key to domestic economic growth and prosperity."[190]

Tañada demonstrated how fluid the Supreme Court can be when it comes to taking a stance on the economic and commercial provisions of the Constitution. In spite of the declared principle under Section 19, Article II of the Constitution which directs the State to "develop a self-reliant and independent national economy effectively controlled by Filipinos," and the provisions of Sections 10 and 12 of Article XII directing Congress "to enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos;" that "[i]n the grant of rights, privileges, and concession covering the national economy and patrimony, the State shall

189. 272 SCRA 18 (1997).

190. *Id.* at 28.

give preference to qualified Filipinos;" and directing the State to "promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive;" the Court in *Tañada*, nevertheless held that it was not against the Constitution for the Philippines to have adhered to the WTO Agreement which obliged the Philippines to adhere to the "parity provisions" and "national treatment" clauses and which contained principles of "most favored nation," "national treatment," and "trade without discrimination," which effectively placed nationals and products of member countries on the same footing as Filipino and local products, in contravention of the Filipino First Policy of the Constitution.

Tañada held that Article II and some sections of Article XII of the Constitution are not self-executing provisions, the disregard of which can give rise to a cause of action in the courts, since they do not embody judicially enforceable constitutional rights but guidelines for legislation.[191] The pronouncement in *Tañada* were in stark contrast to what was held *a few months earlier* in *Manila Prince Hotel*, thus:

> As against constitutions of the past, modern constitutions have been generally drafted upon a different principle and have often become in effect extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments, and the function of the constitutional conventions has evolved into one or more like that of a legislative body. Hence, unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption now is that all provisions of the constitution are self-executing. If the constitutional provisions are treated as requiring legislation instead of self-executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law. This can be cataclysmic.[192]

In addition, *Tañada* held that Sections 10 and 12 of Article XII of the Constitution,

> . . . apart from merely laying down general principles relating to the national economy and patrimony, should be read and understood in relation to the other sections in said article, especially Secs. 1 and 13 thereof. . . Sec. 1 lays down the *basic goal of national economic development*... the Constitution then ordains the ideals of economic nationalism... [but] In similar language, the Constitution takes into account the realities of the outside world as it requires the pursuit of 'a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity;' and speaks of industries 'which are competitive in both domestic and *foreign* markets' as well as of the protection of 'Filipino enterprises against *unfair* foreign competition and trade practices."[193]

In conclusion, the Court held:

191. *Id.* at 54.

192. 267 SCRA 408, 431-32.

193. *Tañada*, 272 SCRA at 57-58.

> All told, while the Constitution indeed mandates a bias in favor of Filipino goods, services, labor and enterprises, at the same time, it recognizes the need for business exchange with the rest of the world on the bases of equality and reciprocity and limits protection of Filipino enterprises only against foreign competition of Filipino enterprises only against foreign competition and trade practices that are unfair. In other words, the Constitution did not intend to pursue an isolationist policy. It did not shut out foreign investments, goods and services in the development o the Philippine economy. While the Constitution does not encourage the unlimited entry of foreign goods, services and investments into the country, it does not prohibit them either. In fact, it allows an exchange on the basis of equality and reciprocity, frowning only on foreign competition that is *unfair*.[194]

The decision in *Tañada* was unanimously approved by the Supreme Court *en banc*. The Court also upheld that adherence to the WTO Agreement was in line with the principle in our Constitution that "adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity, with all nations."[195]

Tañada demonstrates the paradox in our system: that we can be so parochial when it comes to a domestic squabbles, even if it involves a foreign element; but that in the international scene, like adherence to an international treaty of great prestige, it must be shown that the Philippines is equal to the task of meeting its perceived international commitments.

v. The Threat of International Sanctions

The dependency of the Philippine economy to foreign investments and international funding has truly made the Philippines vulnerable to pressures from international economic or financial organizations.

An example of the effectiveness of foreign pressure on domestic policies is the liberalization of the Philippine banking sector which was mandated by the IMF as part of the reform package of the Philippine Government. As a consequence of the IMF conditionalities on the releases of financing tranches, the Bank Liberalization Act[196] was enacted into law, authorizing the Monetary Board to allow the entry of foreign banks through any of the following modes:

> (a) Acquiring, purchasing, or owning a maximum of 60% of the voting stock of a domestic bank;
>
> (b) Investing in the voting stock of a new banking subsidiary locally incorporated to a maximum of 60%;
>
> (c) Establishing branches with full banking authority, with a required to inward remittance of a minimum capital of ₱210.0 Million in foreign exchange.

194. *Id.* at 58-59.

195. PHIL. CONST. art. II, §2.

196. Republic Act No. 7721 (1994).

Entry under the second and third modes were restricted to banks among the top 150 foreign banks worldwide or to banks in the top 5 in their country of origin.

The liberalization of the retail industry sector through the passage of the Retail Trade Liberalization Act of 2001 was also the result of IMF pressure and the collective efforts of the American and European chambers of commerce based in the Philippines.

Sometimes Philippine leadership tends to demonstrate that when it comes to projecting a proper image in the world stage, Filipinos tend to accept that international treaties and commitments have a stronger force than even the Philippine constitutional mandate. An example can be seen in the just promulgated Anti-Money Laundering Act of 2001,[197] which in its declared policy provides that "[c]onsistent with its foreign policy, the State shall extend cooperation in transnational investigations and prosecutions of persons involved in money laundering activities wherever committed."[198]

Under Section 13(d) of the Act, Philippine Congress has provided that the Anti-Money Laundering Council "may refuse to comply with any request for assistance where the action sought by the request contravenes any provision of the Constitution or the execution of a request is likely to prejudice the national interest of the Philippines *unless there is a treaty between the Philippines and the requesting State relating to the provision of assistance in relation to money laundering offenses.*"

In the case of the Anti-Money Laundering Act of 2001, it was enacted into the law on the September 30, 2001 deadline imposed by the Paris-based Financial Action Task Force (FATF), the financial crimes monitoring arm of the Group of Seven highly industrialized countries (OECD). The FATF had already prepared "initial set of sanctions" like ordering western financial institutions to isolate all incoming and outgoing Philippine transactions from other business transactions to allow requests to verify origins and nature of transfers. Philippine transactions would have been shifted from the computerized processing to manual processing, and the regulators of Western countries would tighten documentation and examination requirements for Philippine-based firms and their companies doing business in the country.

LEAVETAKING

It has been said that the making of law by deliberate act is a crucial stage in the process of political development, because it is only then that a community achieves dynamism; for as long as a community is governed by God-given law

197. Republic Act No. 9160 (2001).

198. *Id.* at §2.

or customary law, it remains static, as such laws are difficult to change.[199] In the fast moving modern world, the economic welfare of a nation relies heavily on the dynamism and universality of its commercial law system and reasonable pliability of the foundation upon which that system rests.

By the choosing of our constitutional writers, the foundation of our commercial law system finds its mooring on the economic and commercial declarations of the 1987 Constitution.

The Filipino believes in his Constitution. He defines what he is, his ideals and values, by his Constitution, and seeks to chart his future by and through the dictates he gives to himself through his Constitution. By his Constitution, the Filipino declares to the world that it would be a willing player in world developments, but only when he is able to pursue the public good at home.

But the Filipino is not exactly what his Constitution says he is, for the Constitution is an integral part of the great Philippine socio-economic experiment, and to realize that the Filipino is in the midst of social re-engineering is to accept that dynamism, a careful attention to contributing factors, and the willingness to make adjustments based on emerging results, would be the undeniable characteristics of such a movement.

For foreign investors scouting the region for the best places to make investments, the Philippine Constitution presents an entrance menu that seems anti-foreign and isolationist, in strong contrast to how the Philippines has tended to behave in the international stage, through its membership in ASEAN, APEC and WTO, and the pro-investment language of Philippine investment laws. From such a vantage point, the message seems to be that the Constitution is for "Filipino eyes only," and is used primarily in trying to achieve a balance on how best to serve the greater local constituencies which happen to be generally poor. But it seems that as the Filipino gets more and more engaged in the international order by treaties and other international agreements, then foreign governments and investors can rely upon the Filipino living-up to such international commitments.

This is the reality of the "Filipino world" today — that it must comply with international commitments no matter what its municipal Constitution says, because of two imperatives: *first,* he deems it important for national and international pride that it shows that it can be a responsible member of the international community; and *second,* the Filipino hardly has any choice on the matter, for being poor and small, refusal to comply would bring international sanctions that would work undue hardship to his people.

The Filipino therefore must admit that, like the god Janus from which the month was named after, the Filipino is actually at the January of his national

199. O.D. CORPUZ, THE ROOTS OF THE FILIPINO NATION 44 (1990).

existence, a truly young nation, with one face still firmly focused in its colonial past and the psychological and economic despondency that experience wrought upon his psyche and his home;[200] and another face with a hopeful look into the future and the challenges that this world and its technological future may bring.

With globalization encompassing not only commercial activities, but almost all aspects of a nation's life, the Filipino, as a minor player in the world stage and buffeted by the bigger nations, and aggressive multinational corporations, has no choice but to conform, or perhaps, the better term is to *adapt.* How the Filipino will adapt or adjust to the emerging world order will be the ultimate statement of his genius.

The unmistakable conclusion therefore, is that the Philippines is very much still within the framework of the revolution it began at the last decade of the nineteenth century. That revolution continues to be mainly politico-social in nature, the politico-social agenda it is pursuing will continues to define the employment of its economic and commercial doctrines to achieve those goals.

Through his Supreme Court, the Filipino has declared that "beyond doubt, the Constitution committed us to the free enterprise system *but it is a system impressed with its own distinctness. . .* dictated by the need to achieve the goals of our national economy as defined by section 1, Article XII of the Constitution which are: more equitable distribution of opportunities, income and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the qualify of life for all, especially the underprivileged. It also calls for the State to protect Filipino enterprises against unfair competition and trade practices."[201]

By his constitutional declarations, the Filipino does not adhere to the Darwinian law of "survival of the fittest," because he would tend to put down the best of his brood, for the benefit of the slower majority. By his declaration, he molds his nation, willing to wait for the weakest members to catch up; will dally in the race among other nations to keep pace with the slowest members of his team. Perhaps he is even willing to stifle the best of its resources, talents and skills, for the benefit of the lackluster majority.

200. "If political independence is a legitimate aspiration of a people, then economic independence is none the less legitimate. Freedom and liberty are not real and positive if the people are subject to the economic control and domination of others, especially if not of their own race or country. The removal and eradication of the shackles of foreign economic control and domination, is one of the noblest motives that a national legislature may pursue. It is impossible to conceive that legislation that seeks to bring it about can infringe the constitutional limitation of due process. The attainment of a legitimate aspiration of a people can never be beyond the limits of legislative authority." Inchong v. Hernandez, 101 Phil. 1155 (1957).

201. *Tatad,* 281 SCRA at 358.

The evolution of Philippine commercial laws will lie within the ambit of these constitutional parameters. The determination of how far those parameters can be stretched or even bent, lie primarily within the active role of the Legislative and Executive Departments; but in each instance of test, it would be the unelected Supreme Court that sits in judgment as the Nation's umpire on the basis of its reading of the constitutional mandate. But because it must make pronouncements pursuant only to justiciable controversies based on adversarial proceedings before it, the Supreme Court is able to take into account contemporaneous circumstance and development, only so far as its rulings tend to be progressive and universal. The dynamics of such critical collaboration between the three Departments of the Government have been expressed in *Garcia v. Corona*, thus:

> While the Court respects the firm resolve displayed by Congress and the President, all departments of the Government are equally bound by the sovereign will expressed in the commands of the Constitution. There is a need for utmost care if this Court is to faithfully discharge its duties as arbitral guardian of the Constitution. We cannot encroach on the policy functions of the two other great departments of Government. But neither can we ignore any overstepping of constitutional limitations. *Locating the correct balance between legality and policy, constitutional boundaries and freedom of action, and validity and expedition is this Court's dilemma as it resolves the legitimacy of a Government program aimed at giving every Filipino a more secure, fulfilling and abundant life.*[202]

The statement of Fr. Bernas on the direction that the deliberations would take in the Constitutional Commission on Section 1, Article XII of the Constitution that "[i]t would be a struggle between a group adhering to a liberal economic policy balanced by a concern for social justice and another group desirous of a more protectionist constitution because of the distrust of foreign and local business magnates,"[203] also reflects the continuing struggle being fought under the aegis of the 1987 Constitution in the pursuit by the various Departments of the Government, including internally within the Supreme Court itself, of the ideal, if not workable economic and commercial set-up that will achieve the economic and commercial systems that will best serve the Filipino nation.

That the Philippines will eventually find it way to qualifying to its rightful place as a responsible and developed member in the family of nations can best be glimpsed through what the Supreme Court said on the eve of the new millenium:

> Protectionism and isolationism belong to the past. Trade is no longer confined to a bilateral system. There is now "a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system." Conformably, the [Philippines] must reaffirm its commitment to the global community and take part in evolving a new international economic order at the dawn of the new millenium.[204]

202. 321 SCRA 218, 227-28 (1999).

203. BERNAS INTENT, *supra* note 28, at 799.

While the Philippines is yet a young nation and must learn the virtues of perseverance and patience, it must at the same time realize that it is in the midst of a busy and often heartless marketplace, where it seems that mammon sits at the altar; but will probably always keep close to his heart his beatitude-like Constitution which reflects the Lord's words on the mount that the blessed ones are not the best and the brightest, but rather the humble and poor in spirit.

204. *Mirpuri*, 318 SCRA at 557, *quoting from* BLAKENEY, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPS AGREEMENT 36-37 (1996).