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AN APPRAISAL OF THE UNITED STATES—PHILIPPINES' SPECIAL RELATIONSHIP†

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Since 1898, when the United States acquired possession of the Philippines from Spain, both sides have characterized relations with the other as "special." As with other characterizations of this type, "special relationship" has meant different things at different times. This article will attempt to chip away some of the encrustation that has accumulated upon this term over the years, at least in the economic sphere, and to see what this special economic relationship should mean in the world of the mid-1960's.

In the early period of United States administration of the Philippines, the special relationship could perhaps be said to have been motivated by a paternal instinct and an inarticulated but real sense of national mission. While at the outset, the stated intention was to prepare the country for independence, progress along this road was slow in the early years. After World War I, empires began to go out of style, and American attitudes began to be shaped by Wilsonian principles of self-determination. This new philosophy prodded the national conscience further into taking steps to make the Philippines independent. Japanese occupation of the islands during World War II and the joint American-Filipino efforts to win them back added a new facet to the special relationship—a spirit of allied partnership striving for a common goal.

Upon independence, the Philippines, responding to assurances given by the United States during the war, looked to Washington for assistance in rebuilding its devastated economy. This search for help was again to shape the relationship.

Today, the character of the special relationship, at least from the United States' point of view, is probably a potpourri of all American earlier attitudes towards the Philippines—paternal feelings, conscience, gratitude and moral obligations.

However, the situation in the Philippines is not the same as it was even five years ago. Whether desirable or not, American relations with

† The views expressed in this article are solely the authors' and should not be attributed to the Department of State.

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the Philippines are entering a new phase shaped by what might be called new Philippines nationalism.

On June 19, 1954, years of effort by nationalist elements in the Philippines came to fruition in the enactment of Philippine Republic Act No. 1180, an Act to Regulate the Retail Business. The "Retail Trade" Act prohibits aliens or corporations not wholly owned by Philippine citizens from engaging in what is termed "retail trade" business, but what is in fact a much broader area of business activity. To meet dislocations, the act provided that corporations already engaged in retail trade at the time of enactment would be permitted a ten-year period of grace during which they could continue and presumably phase out their activities. The period of grace for individuals runs until their death or voluntary retirement.

The forces that led to enactment of the retail trade law were so long-standing and complex that they provide a classic case history to students of Philippine political development.[1] Suffice it for our purposes to say that the law was directed against the Chinese community in the Philippines, a group whose long stay in the islands makes it anomalous to call alien, but whose autonomy within the Filipino society makes it just as anomalous to call native. For at least a hundred years and perhaps for as long as four hundred, the Chinese community has been viewed with suspicion and resentment by native Filipinos.[2] When the Philippines became independent in 1946, it became intolerable to nationalist elements that this Chinese community could control, through its ownership of retail trade operations, such a large segment of the Philippine economy.

While ostensibly aimed at the Chinese, the Retail Trade Act has had an impact on American business interests causing deep concern in the United States. If the act as presently interpreted is enforced against American retail trade establishments in the Philippines, it would require termination or major modification of operations which represent some $250 million of American investments.

Despite the magnitude of this figure, it does not represent fully the possible impact of the Retail Trade Act. Not only would American investments in these enterprises cease, but the entire climate for all for-

[1] For one account of the development of the Retail Trade Act, see AGPOLO, THE POLITICAL PROCESS AND THE NATIONALIZATION OF THE RETAIL TRADE IN THE PHILIPPINES (1962).

[2] For a detailed discussion of early treatment of the Chinese Community, see Miller, *The Part of the Philippines in the Opening of China to the West*, 30 UNITAS 130, 166-70 (1957).

eign investment in the Philippines would be severely damaged. Perhaps even more significantly, a cloud would be cast over the whole future of commercial and trade relations between the United States and the Philippines.

The retail trade problem is, at one and the same time, a reflection of past U.S.-Philippine trade relations, a symptom of today's increasing economic nationalism in the Philippines and a barometer pointing to the future trade relationship between our two countries. We now turn to an examination of these various aspects of American trade relationship.

UNITED STATES-PHILIPPINE TRADE RELATIONS THROUGH 1946

The basis for a special trade relationship between the United States and the Philippines was laid early in the American administration of the islands. Reciprocal free trade, with certain limited exceptions, was instituted in 1909[3] and strengthened in 1913[4] by the removal of some of the restrictions contained in earlier acts. Until 1934, these trade relations continued on substantially the same reciprocal free trade basis.[5]

The Tydings-McDuffie Act of 1934,[6] which established a broad program for Philippine independence, provided for a gradual, partial elimination of tariff preferences then enjoyed by Philippine products in the United States. Tariff quotas were instituted that gave duty free treatment to Philippine sugar, cordage and coconut oil, but imports in excess of these quotas were subject to full duties. The act also provided for gradual imposition of export taxes (up to twenty-five per cent of the United States duties) by the Philippines on exports to the United States. Upon independence, all Philippine products would be subject to most-favored-nation tariff treatment.

The preferential treatment accorded to Philippine products by this early trade legislation nurtured almost complete reliance by Filipino exporters on the United States market. During the period 1930-1940, an average of over eighty per cent of the total annual exports of the

[3] Tariff Act of Aug. 5, 1909, ch. 6, 36 Stat. 11 and Act of Aug. 5, 1909, ch. 8, 36 Stat. 130. For earlier legislation pertaining to United States-Philippine trade relations, see Act of March 8, 1902, ch. 140, 32 Stat. 54.

[4] Tariff Act. of Oct. 3, 1913, ch. 16, 38 Stat. 114.

[5] See Tariff Acts of Sept. 21, 1922, ch. 356, 42 Stat. 858 and June 17, 1930, ch. 497, 46 Stat. 509.

[6] Act of March 24, 1934, ch. 84, 48 Stat. 456. The Tydings-McDuffie Act was amended by an Act of Aug. 7, 1939, ch. 502, 53 Stat. 1226. For other legislation affecting US-Philippine tariffs in this period, see the Jones-Costigan Act of May 9, 1934, ch. 263, 48 Stat. 670 and the Revenue Act of 1934, ch. 277, 48 Stat. 680.

Philippines was sold to Americans.[7] Practically all Philippine exports of sugar products and coconut oil, and the major share of copra, abaca and tobacco went to the United States.[8]

World War II brought cataclysmic destruction in the Philippines, leaving the economy shattered. United States High Commissioner Paul V. McNutt described the situation in April 1946:

> Their economy is suspended, paralyzed. They have virtually no economy, no production of cash goods, no working at rehabilitation, no repair, no making, no growing. Today, 10 months after liberation, their production of export commodities is just a trickle. They are still living on GI money, and that is rapidly, very rapidly disappearing.[9]

Despite these conditions, Filipinos still wanted independence and the United States was determined to grant it.[10] However, the Tydings-McDuffie Act was shortly to require imposition of full U.S. tariffs on Philippine products, and with an almost complete dependence on the United States market, the Philippines would overnight be left to compete with all other countries in that market. It was clear that if the Philippines was to have a real chance for successful independence, the special trade relationship with the United States would have to be continued.

PHILIPPINE TRADE ACT AND TRADE AGREEMENT OF 1946

The United States' response to this need was enactment by Congress of the Philippine Trade Act[11] and the subsequent negotiation of a trade agreement with the Philippines.[12] The act authorized the President to conclude a Philippine trade agreement and establish exact provisions to be incorporated in the agreement.[13] The Trade Agreement, negotiated shortly thereafter, was concluded on July 4, 1946.

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[7] H. R. REP. No. 1821, 79th Cong., 2d Sess. 28 (1946).

[8] *Ibid.*

[9] *Hearings on H. R. 5856 Before the Committee on Finance of the United States Senate*, 79th Cong., 2d Sess. 17 (1946).

[10] The Tydings-McDuffie Act provided for U. S. recognition of Philippine independence and withdrawal of American sovereignty on the 4th day of July immediately following expiration of a period of 10 years from the date of inauguration of a new Philippine Government under the constitution provided for in the act. Ch. 84, § 10, 48 Stat. 456 (1934).

[11] Act of April 30, 1946, ch. 244, 60 Stat. 141.

[12] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and Oct. 22, 1946 [1947] 61 Stat. 2611, T.I.A.S. No. 1588.

[13] Congress could be optimistic that the Philippines would accept these provisions. It was made clear that the United States' willingness to supply the bulk of war damage payments would depend on Philippine acceptance. See Philippine Rehabilitation Act of 1946, ch. 243, 60 Stat. 128.

The agreement provided for duty-free entry into the United States of "Philippine articles"[14] until July 3, 1954.[15] Beginning July 4, 1954, these articles would be subject to five per cent of the most-favored-nation U.S. duty. The duties would increase annually by five per cent until they reached 100 per cent of the most-favored-nation rate.[16] After July 4, 1974, all Philippine imports would be treated the same for tariff purposes as imports from any other country. For the duration of the agreement, commodities which were not "Philippine articles," as defined in the agreement, would be subject to the full most-favored-nation rates.[17]

The agreement also imposed absolute quotas on certain Philippine commodities which made up the bulk of Philippine exports to the United States, including sugar, coconut oil, cigars, tobacco, rice, and cordage.[18] These quotas were of two kinds: sugar, cordage, and rice would be duty-free until July 4, 1954, and then be subject to the graduated duty treatment described above. The entire quotas for coconut oil[19] and tobacco were treated on a duty-free basis until 1955, but thereafter the duty-free portion of the quotas would be reduced five per cent annually. Other imports within the quotas would be subject to the full United States most-favored-nation duty.

The agreement also provided for duty-free entry into the Philippines of "United States articles" until July 4, 1954.[20] Beginning July 4, 1954, and ending July 3, 1974, United States articles would be subject to an annually increasing percentage of the Philippine duty.[21] Products of the United States which did not fall within the definition of "United

[14] As defined in the Protocol para. 1(f), accompanying the Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and Oct. 22, 1946 [1947] 61 Stat. 2611, T.I.A.S. No. 1588.

[15] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and Oct. 22, 1946 [1947] Art. I, para. 1, 61 Stat. 2611, T.I.A.S. No. 1588.

[16] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. I, para. 2, 61 Stat. 2611, T.I.A.S. No. 1588.

[17] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. 1, para. 6, 61 Stat. 2611, T.I.A.S. No. 1588.

[18] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. II, 61 Stat. 2611, T.I.A.S. No. 1588. This article also contained detailed provisions for the allocation of the quotas among producers and manufacturers in the Philippines.

[19] The Agreement also guaranteed an U.S. internal tax preference for Philippine coconut oil. Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. IV, para. 6, 61 Stat. 2611, T.I.A.S. No. 1588.

[20] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. I, para. 1, 61 Stat. 2611, T.I.A.S. No. 1588.

[21] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. I, para. 2, 61 Stat. 2611, T.I.A.S. No. 1588.

States products" established in the agreement were to receive most-favored-nation tariff treatment by the Philippines.[22]

The agreement embodied assurances by the Philippines that American citizens or business enterprises owned or controlled by Americans would be accorded the same rights as Filipinos to develop and utilize natural resources and to operate public utilities.[23] The Philippines was required to amend its constitution in order to give effect to this so-called right of "parity."[24]

Article X, paragraph 4 of the agreement stated that if the President of the United States determined and proclaimed, after consultation with the President of the Philippines, that the Philippines was in any manner discriminating against United States citizens or any form of U.S. business enterprise, the United States would have the right to suspend the effectiveness of all or any part of the agreement between the two countries. If, after such consultation, the President found that the discrimination had not ceased after a reasonable time, then the United States would have the right to terminate the agreement after six months' written notice.

The agreement contained a commitment not to change the par value of the peso or suspend convertibility without the agreement of the President of the United States.[25] In addition, the Philippine Trade Act prohibited negotiation of a reciprocal trade agreement with the Philippines during the life of the agreement authorized by the act.[26]

The Philippine Trade Act (and subsequent Trade Agreement) was subjected to strong criticism in the United States. In a letter of April 2, 1946, to the Chairman of the Senate Finance Committee, Acting Secretary of State Dean Acheson expressed the views of the Department of State on the then proposed bill.[27] He argued that the provisions for absolute quotas and the maintenance of an internal tax preference for Philippine coconut oil were clearly inconsistent with basic United States commercial policy. The United States at that time was engaged in an effort to clear world trade channels of existing restrictions and

[22] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. I, para. 5, 61 Stat. 2611, T.I.A.S. No. 1588.

[23] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. VII, para. 1, 61 Stat. 2611, T.I.A.S. No. 1588.

[24] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. VII, para. 2, Stat. 2611, T.I.A.S. No. 1588.

[25] Agreement with the Republic of the Philippines on Trade and Related Matters, July 4 and October 22, 1946 [1947] Art. V, 61 Stat. 2611, T.I.A.S. No. 1588.

[26] Ch. 244, § 508, 60 Stat. 158 (1946).

[27] *Hearings on H. R. 5856, supra* note 9, at 75. A similar letter was written by the Dep't of Commerce, *Hearings on H. R. 5856, supra* note 9, at 77.

discriminatory trade practices. Secretary Acheson believed that the restrictions and preferences contained in the bill would severely limit the ability of the United States Government to obtain commitments from other governments to eliminate similar practices. He also argued that several provisions of the bill were clearly inconsistent with Philippine independence. For example, he singled out the provision of section 341 of the bill requiring the Philippines to grant Americans equal rights in the exploitation of Philippine natural resources and to amend its constitution accordingly. Acheson pointed out that these provisions were not reciprocal, that the United States under its laws did not give such existensive rights to Filipinos, and that we would not be required to do so under the bill's provisions.

The Acheson letter also decried the provisions of the bill concerning allocation of quotas as giving prewar producers a virtual monopoly of the most important Philippine exports.[28] New American enterprises, he argued, would not be able to invest capital in these important export industries, and new Philippine producers would not be allowed to compete freely in their own country.

Finally, Acheson took issue with the prohibition contained in the bill against negotiation of a reciprocal trade agreement with the Philippines for the life of the act. He stated, "I can see no valid reason why the Philippines should be the only independent country which could not enter into a trade agreement with this country."[29]

Despite these criticisms, the bill was enacted and the Trade Agreement concluded, as described, under the time pressure of imminent Philippine independence and the unchallenged necessity for special measures to deal with the war-ravaged Philippine economy. President Truman, when signing the bill into law, explained:

> [W]e are providing for the establishment, through an executive agreement, of an unprecedented plan of preferential trade relations with the Philippines to last for twenty-eight years. We have never entered into a similar agreement with any foreign government. Preferential trade relations are alien to the policy of this administration. In substance, however, H.R. 5856 is a rehabilitation act. Its sole purpose and guiding philosophy is to furnish a formula for the rehabilitation of the Philippine national economy through the encouragement of private enterprise and private initiative. . . .[30]

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[28] See note 18 *supra*.
[29] *Hearings on H. R. 5856, supra* note 9, at 77.
[30] Public Papers of the Presidents of the United States, Harry S. Truman, 1946, 217 (1962).

Thus, the special trade relationship between the United States and the Philippines continued. However, instead of a preparation for independence, the relationship was aimed at rehabilitation of an ally devastated by war.

EXPERIENCE UNDER THE 1946 AGREEMENT

Soon after the negotiation of the 1946 agreement, Filipinos expressed dissatisfaction with its provisions. Economic development did not progress as rapidly as anticipated. Some believed that the agreement was not advantageous to the Philippines in that it tended to perpetuate the dominant position of Philippine export industries dependent upon the United States market, and it discouraged Filipinos from establishing local industries to produce consumer goods imported duty-free from the United States.

In 1950, an economic mission sent by President Truman to the Philippines headed by Daniel W. Bell, made a report including the following recommendation:

> The present Trade Agreement sets the terms that will govern the trade relations between the United States and the Philippine Republic for the next twenty-four years. The Act under which the Agreement was made was passed more than four years ago. Conditions have changed very radically since then, new problems have emerged and new policies have become necessary to deal with them. It would be desirable to have a joint United States-Philippine Commission study the need for modification of the trade agreement. . . .[31]

THE LAUREL-LANGLEY AGREEMENT

On March 7, 1953, President Magsaysay of the Philippines in a letter to President Eisenhower requested revision of the 1946 Trade Agreement.[32] Magsaysay stated that revision was vital to economic stability in the Philippines and to permanent trade relations between the United States and the Philippines. On March 16, 1953, President Eisenhower replied expressing the willingness of the United States Government to give prompt and sympathetic consideration to any specific proposal for revision of the agreement that the Philippines might offer.[33]

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[31] *Report to the President of the United States by the Economic Survey Mission to the Philippines,* Dep't of State pub. 4010, Washington, D. C. at 87 (Oct. 9, 1950); see also *Report and Recommendations of the Joint Philippine-American Finance Commission,* H. Doc. No. 390, 80th Cong., 1st Sess. (1947).

[32] See Dep't of State memorandum for the President reprinted in *Hearing before the Committee on Ways and Means of the House of Representatives on H. R. 6059,* 84th Cong., 1st Sess. at 13 (1955).

[33] *Ibid.*

Eisenhower's response paved the way, and negotiations to revise the 1946 agreement began in Washington on September 20, 1954. To prevent imposition of the duties scheduled under the terms of the 1946 agreement, the two governments hastily extended the period of reciprocal free trade from July 3, 1954, to December 31, 1955.[34]

As suggested above, one of the principal objectives of the Philippine request for revision of the 1946 agreement was modification of the tariff relationships of the two countries to give the greatest possible impetus to the lagging Philippine economy. The Philippine negotiating mission, headed by Senator Jose P. Laurel, argued that, although reciprocal free trade and preferences were intended to be mutually advantageous, the Philippines during the years immediately following the war had been unable to make any significant use of its privilege in the United States due to the devastated condition of its productive facilities. The United States, on the other hand, was able to take full advantage of its privilege, deluging the Philippines with American products, particularly luxury items. To remedy this situation, the Filipinos proposed a "selective free trade" arrangement under which Philippine products would continue to enjoy duty-free entry into the United States until 1970, following which there would be a rapid imposition of tariffs so that by 1974 Philippine products would be paying full United States duties. The bulk of American products, on the other hand, would immediately become subject to Philippine tariffs, exceptions being made for those United States products essential to Philippine needs. These would receive duty-free entry until 1970.[35]

This proposal was rejected by the chief United States negotiator, James Langley, but the tariff question was resolved by acceptance in article I of the revised agreement of a formula accelerating the rate at which Philippine duties would be levied on United States imports and decelerating the rate at which United States duties would be collected on Philippine products.[36]

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[34] In the United States, Act of July 5, 1954, ch. 459, 68 Stat. 448; Proclamation of the President No. 3060, July 10, 1954, 68 Stat. c46. In the Philippines, R. A. No. 1137 (1954), 50 Off. Gaz. 3484 (1954); Proclamation of the President No. 49, July 12, 1954, 50 Off. Gaz. 2921 (1954).

[35] *Hearing on H. R. 6059, supra* note 32, at 142. For a Philippine account of the Laurel-Langley negotiations, see PUYAT, REPORT ON THE NEGOTIATIONS TO AMEND THE TRADE AGREEMENT OF 1946 BETWEEN THE PHILIPPINES AND THE UNITED STATES (University of the East, Manila, 1955).

[36] Agreement with the Republic of the Philippines Concerning Trade and Related Matters July 4, 1946, as Revised, Sept. 6, 1955 [1955] 6 U.S.T. 2981, T.I.A.S. No. 3348. (effective Jan. 1, 1956) [hereinafter referred to as the 1955 Revised Trade Agreement or the Laurel-Langley Agreement].

Article II of the "Laurel-Langley" Agreement established various quotas on Philippine products. Tobacco products and coconut oil, subject to absolute quotas under the 1946 agreement, were placed under tariff quotas only.[37] Absolute quotas on Philippine sugar were imposed without prejudice to any increases which the United States Congress might allocate to the Philippines in the future (in fact, the Philippines have enjoyed such additional allocations).[38] Progressive reductions of duty-free tariff quotas on such items as cigars, scrap tobacco, coconut oil and pearl buttons were decelerated by the revised agreement. Finally, the provisions dealing with allocation of quotas among Philippine producers were deleted, because Filipinos particularly objected to these as an infringement on Philippine sovereignty and as a discrimination against new producers.

The Filipinos also insisted upon deletion of article V of the 1946 Agreement which prevented the Philippines from changing the value of the peso or imposing controls on the transfer of funds to the United States. This too was felt to be incompatible with full Philippine sovereignty.[39]

The provision of the 1946 agreement perhaps most strongly resented by Filipinos as an infringement of sovereignty was the so-called "parity" provision.[40] The Philippine negotiating mission requested either complete termination of this provision or, alternatively, a satisfactory reciprocal formula. The latter approach was adopted and a provision was embodied in article VI of the revised agreement making fully reciprocal the enjoyment by citizens of either country of the right to exploit natural resources and to operate public utilities in the territory of the other.

It will be recalled that article X of the 1946 agreement provided that the President of the United States could suspend all or part of the agreement if he determined that the Philippines was discriminating against American citizens or business enterprises.[41] This was

[37] Each party retains the right under article III of the agreement to impose quotas on a most-favored-nation basis or where there is serious injury to a domestic industry or imminent threat to a party's monetary reserves. *Ibid.*

[38] See Sugar Act Amendments of 1962, § 3, 76 Stat. 156, 7 U.S.C. 1112(b) (Supp. V, 1958).

[39] PUYAT, *op. cit. supra* note 35, at 11. A new article V was inserted in the agreement obligating the Philippines to take the necessary legislative and executive actions to enact and implement legislation complementing U. S. legislation (68 Stat. 264 (1954)) to facilitate the entry of nationals of each country into the other for purposes of trade, investment and related activities. A "treaty trader" agreement was concluded between the United States and the Philippines on the same date, Sept. 6, 1955, as the Revised Trade Agreement (6 U.S.T. 3030, T.I.A.S. 3349 (1955)).

[40] See text accompanying note 24 *supra.*

[41] See text folowing note 24 *supra.*

another unilateral provision which Filipinos found repugnant. To meet this objection, article VII of the Revised Trade Agreement prohibited discrimination by either party against citizens or corporations owned or controlled by citizens of the other party with respect to engaging in business activities.[42]

These and other important revisions of the 1946 agreement, for example, imposition of export[43] and exchange taxes,[44] were agreed to on December 15, 1954, three months after negotiations had begun. The agreement as revised was subsequently approved by the Congresses of the respective countries,[45] signed on September 6, 1955 and became effective on January 1, 1956.

The Laurel-Langley Agreement continued and even extended the special trade relationship embodied in the 1946 agreement. At the same time, the revision reflected the increasing sense of Philippine independence, nationalism and pride. It represented an effort to remove from our economic relations a number of irritants, and by adding reciprocity, to recast the "special relationship" as a partnership of equals.

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[42] Article VII provides as follows:

1. The United States of America and the Republic of the Philippines each agrees not to discriminate in any manner, with respect to their engaging in business activities, against the citizens or any form of business enterprise owned or controlled by citizens of the other and that new limitations imposed by either Party upon the extent to which aliens are accorded national treatment with respect to carrying on business activities within its territories, shall not be applied as against enterprises owned or controlled by citizens of the other Party which are engaged in such activities therein at the time such new limitations are adopted, nor shall such new limitations be applied to American citizens or corporations or associations owned or controlled by American citizens whose States do not impose like limitations on citizens or corporations or associations owned or controlled by citizens of the Republic of the Philippines.

2. The United States of America reserves the rights of the several States of the United States to limit the extent to which citizens or corporations or associations owned or controlled by citizens of the Philippines may engage in any business activities. The Republic of the Philippines reserves the power to deny any rights to engage in business activities to citizens of the United States who are citizens of States, or to corporations or associations at least 60% of the capital stock or capital of which is owned or controlled by citizens of States, which deny like rights to citizens of the Philippines or to corporations or associations owned or controlled by citizens of the Philippines. The exercise of this reservation on the part of the Philippines shall not affect previously acquired rights, provided that in the event that any State of the United States of America should in the future impose restrictions which would deny to citizens or corporations or associations owned or controlled by citizens of the Philippines the right to continue to engage in business activities in which they were engaged therein at the time of the imposition of such restrictions, the Republic of the Philippines shall be free to apply like limitations to the citizens or corporations or associations owned or controlled by citizens of such States.

[43] Art. IV [1955] 6 U.S.T. 2981, T.I.A.S. No. 3348.

[44] Art. I [1955] 6 U.S.T. 2981, T.I.A.S. No. 3348.

[45] For the Philippines, R.A. No. 1355 (June 18, 1955), 51 Off. Gaz. 3919 (1955); for the United States, Act of Aug. 1, 1955, ch. 438, 69 Stat. 413.

DEVELOPMENTS SINCE 1954

Since the signing of the Laurel-Langley Agreement, new problems have developed in Philippine-United States economic relations.

In the trade field, two major products, which have been the subject of concern, are illustrative of these problems. The first, coconut oil, was given a declining duty-free tariff quota in the Laurel-Langley Agreement.[46] Since 1954, Philippine productive capacity has expanded rapidly, so that now it far exceeds the tariff quota of 120,000 long tons presently applicable. To sell this increased capacity Filipino producers have not sought a revision of the tariff quota; rather, they have informally urged the U.S. to adopt free trade. They have said they are willing to eliminate altogether the tariff preference given to Philippine coconut oil in return for a zero duty to be applied by the United States on a most-favored-nation basis to all countries. While their point of view on this issue is not altogether altruistic (their major competitors are United States oil producers who are completely protected by our present most-favored-nation rate on coconut oil) it does represent a modification of the Laurel-Langley preference concept and a willingness to compete in the world market. This problem is currently being considered by both governments.

Perhaps the greatest strain on United States-Philippine trade relations over the last few years was caused by United States' efforts to secure Philippine cooperation in limiting its exports of cotton textiles to the United States. In October 1962, as part of its implementation of the Long-Term Arrangement Regarding International Trade in Cotton Textiles,[47] the United States government requested the Philippine Government to limit exports of two apparel categories of cotton textiles to the United States. These requests were later expanded to include other categories of apparel, and, when no action was taken by the Filipinos, import controls were instituted in accordance with the Long-Term Arrangement.[48]

The first reaction of the Philippine Government was that the import controls violated both the spirit and letter of the Laurel-Langley Agreement. It contended that article III(2)(a),[49] of the Laurel-

[46] Art. II (2) [1955] 6 U.S.T. 2981, T.I.A.S. No. 3348.
[47] [1962] 13 U.S.T. 2672, T.I.A.S. No. 5240.
[48] Art. 3(3) [1962] 13 U.S.T. 2672, T.I.A.S. No. 5240.
[49] Notwithstanding the provisions of Paragraph 1 of this Article, ... with respect to quotas on Philippine articles ... a quota may be established only if—
(1) The President of the country desiring to impose the quota, after investigation, finds and proclaims that, as the result of preferential treatment accorded pursuant to this Agreement, any article of the other country is being imported in such in-

Langley Agreement permitted the United States to impose quotas on Philippine articles only if the President of the United States should find and proclaim that these articles were being imported in such increased quantities and under such conditions as to cause or threaten serious injury to United States producers of like or competitive products. The United States responded that such a proclamation (which had not been issued) was required only where a discriminatory quota was being imposed. If the quota was nondiscriminatory, article III(1)[50] required only that importation of like articles from all third countries be similarly prohibited or restricted and that the quota preserve the share of the United States market held by the Philippines during a previous representative period. The United States was willing to demonstrate that it had applied restraints in the categories in question against all significant suppliers and that the levels allotted to the Philippines preserved their share of the market. The United States also contended that article III(2)(a) was applicable only to cases where, because of the preferential rate at which Philippine articles enter the United States, they are the only imports causing or threatening serious injury in the United States. In such a case, a discriminatory quota would be proper.[51]

Fortunately for those interested in economic harmony between the United States and the Philippines, if unfortunately for the international lawyer, this dispute never had to be resolved. After abortive discussions in Manila in October 1963, the Filipinos came to Washington early in 1964, and at that time a cotton-textile agreement was successfully negotiated.[52] That agreement specifically "does not prejudice any interpretation by either government of the [Laurel-Langley] Agreement."[53]

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creased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive articles.... [1955] U.S.T. 2981, T.I.A.S. No. 3348.

[50] Except as otherwise provided in Article II or in Paragraph 2 of this Article, neither country shall impose restrictions or prohibitions on the importation of any article of the other country... unless the importation of the like article of... all third countries is similarly prohibited. If either country, imposes quantitative restrictions on the importation... of any article in which the other country has an important interest and if it makes allotments to any third country, it shall afford such other country a share proportionate to the amount of the article, by quantity or value, supplied by... it during a previous representative period, due consideration being given to any special factors affecting the trade in such article. Article III(1). [1955] 6 U.S.T. 2981, T.I.A.S. No. 3348.

[51] This distinction was made in the House Ways and Means Committee Report on the Philippine Trade Agreement Revision Act of 1955. H. R. Rep. No. 934, 84th Cong., 1st Sess. 11 (1955).

[52] [1964] 15 U.S.T. 89, T.I.A.S. No. 5519.

[53] [1964] 15 U.S.T. 89, T.I.A.S. No. 5513.

In addition to trade problems, the last ten years have seen a reorientation in the Philippine outlook toward the United States and the rest of the world. Filipinos have witnessed the emergence of many other newly independent nations. Whether these new nations lean to the right, to the left, or remain "non-aligned," they pursue policies which in many cases for the first time are their own. They rejoice in their independence and look toward increased cooperation with other new nations to assure themselves a meaningful role in today's fluid world.

The Philippines are no exception. A new generation of Filipinos is coming to the forefront, Filipinos who were not raised in the pre-war period of American tutelage and who do not have the vested interests in ties with the United States their fathers had. They may even resent to some degree the legacy of Philippine dependence on the United States left to them by their ancestors. They believe that, while allied with the United States in pursuing a foreign and domestic policy opposed to Communist aggression, the Philippines can exert a large degree of independent influence in Southeast Asia. If Philippine efforts are to be successful, Filipinos must, they believe, turn from the economic reliance placed upon the United States in the past. They must continue and increase their economic relations with their sister countries in Southeast Asia.

RETAIL TRADE NATIONALIZATION LAW

At the very time that revision of the 1946 Trade Agreement was under consideration, the Philippines enacted into law an Act to Regulate the Retail Business.[54] Section 1 of the act, which has become known as the Retail Trade Nationalization Law, provides in part:

> No person who is not a citizen of the Philippines, and no association, partnership, or corporation the capital of which is not wholly owned by citizens of the Philippines, shall engage directly or indirectly in the retail business: *Provided,* that a person who is not a citizen of the Philippines, or an association, partnership, or corporation not wholly owned by citizens of the Philippines, which is actually engaged in the said business on May fifteen, nineteen hundred and fifty four, shall be entitled to continue to engage therein, unless its license is forfeited in accordance herewith, until his death or voluntary retirement from said business, in the case of a natural person, and for a period of ten years from the date of the approval of this Act or until the expiration of the term of the association or partnership or of the corporate existence of the corporation,

[54] R.A. No. 1180 (1954), PHIL. ANN. LAWS tit. 18, §§ 44-49 (1956).

whichever event comes first, in the case of juridical persons. Failure to renew a license to engage in retail business shall be considered voluntary retirement.

Nothing contained in this Act shall in any way impair or abridge whatever rights may be granted to citizens and juridical entities of the United States of America under the Executive Agreement signed on July fourth, nineteen hundred and forty six between that country and the Republic of the Philippines.

. . . .

No license shall be issued to any person who is not a citizen of the Philippines and to any association, partnership or corporation not wholly owned by citizens of the Philippines, actually engaged in the retail business, to establish or open additional stores or branches for retail business.[55]

Section 2 of the act places a registration requirement on all persons not citizens of the Philippines and corporations not wholly owned by Philippine citizens who are engaged in the retail business. Violators are subject to criminal penalties.

While the retail trade bill was being considered in the Philippine House of Representatives, the United States Embassy at Manila, upon instructions from the Department of State, delivered to the Philippine Acting Secretary of Foreign Affairs a note expressing concern over the proposed law. In that note, the Embassy stated, *inter alia:*

Due to the seriously detrimental effect which legislation of this type could have on existing and potential future foreign investment in all fields of economic activity in the Republic of the Philippines, the joint efforts of your Excellency's Government and my own to accelerate the economic development of the Republic of the Philippines through foreign capital investment could be substantially nullified. Such measures as those embodied in the retail trade bill . . . could also have a harmful effect on the climate in which there take place the negotiations, requested by Your Excellency's Government, for the revision of the Trade Agreement between our two countries.[56]

On June 22, 1954, after the law had been enacted, the Philippine Department of Foreign Affairs replied to the Embassy's note, stating that:

In view of the express exemption granted by the Act to citizens of the United States and United States business enterprises, my Government

[55] R.A. No. 1180, § 1 (1954), PHIL. ANN. LAWS tit. 18, § 44 (1956).
[56] American Embassy Manila Dispatch No. 1342, to the Dep't of State, June 7, 1954, File No. 896.055/6-754.

is unable to perceive how the approval of the Act can have a harmful effect on the climate in which the negotiations are to take place for the revision of the Trade Agreement between the Philippines and the United States.[57]

On July 15, 1954, the American Embassy sent another diplomatic note to the Philippine Department of Foreign Affairs following the announced decision of the Office of the Treasurer, City of Manila, that Americans must register under section 2 of the Retail Trade Law. The note, referring to the Philippine assurance of June 22, 1954, that American citizens and business enterprises were expressly exempt from the act, continued:

> It has come to the Embassy's attention . . . that the Office of the Treasurer, City of Manila, has ruled that American citizens engaged in retailing activities should comply with the registration requirements of section 2 of Republic Act No. 1180. In view of the express exemption of American citizens and firms from the provisions of the Act, it would be appreciated if your Excellency would have the necessary action taken to correct the misinterpretation attributed to the Office of the Treasurer in order that there may be avoided any unnecessary uncertainties in the American business community.[58]

In a note dated August 5, 1954, the Philippine Foreign Secretary replied that the Department of Foreign Affairs had requested the Philippine Secretary of Finance to enjoin all officers under his department charged with enforcement of the retail trade law "to be guided by the opinion of Secretary of Justice [Tuason] dated July 21, 1954, to the effect that all American citizens and juridical entities who are engaged in the retail business are exempt from the provisions of sections 1 and 2 of the Republic Act No. 1180."[59]

The Secretary of Justice's opinion referred to in this note was given in response to a question from the Philippine Department of Foreign Affairs on the nature and extent of exemptions granted Americans under the retail trade law. Secretary Tuason concluded that the second paragraph of section 1 of the retail trade law relating to the rights of Americans under the 1946 Trade Agreement "was conceived and adopted with the definite object of excluding American citizens and

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[57] Enclosure No. 1 to American Embassy Manila Despatch No. 1432 to the Dep't of State, June 25, 1954, File No. 896.005/6-2554.

[58] Enclosure No. 1 to American Embassy Manila Despatch No. 52 to the Dep't of State, July 19, 1954, File No. 896.055/7-1954.

[59] Enclosure No. 1 to American Embassy Manila Despatch No. 162 to the Dep't of State, Aug. 23, 1954, File No. 896.055/8-2354.

business entities from the operation of the Act regardless of the nature, extent and force of the rights and obligations provided in the trade agreement."[60] The Secretary referred to article X of the 1946 Trade Agreement giving the President of the United States the right to suspend that agreement if he determined that there was discrimination against American businesses. He pointed out that the Philippine Congress, in enacting the retail trade law, must have realized that the law, if applied to American citizens, would have been regarded by the United States Government as a form of discrimination against them. The second paragraph of section 1 of the retail trade law was intended, the Secretary wrote, "to forestall the sure abrogation of the treaty with the United States if American citizens were barred from the retail business." Secretary Tuason's opinion concluded with the statement that "American citizens or juridical entities are exempt from the provisions of sections 1 and 2 of the Republic Act No. 1180. . . ."

With these assurances from the Philippine Government and the Secretary of Justice's opinion, the concern of the United States Government and business community over the retail trade law was put to rest. So reassured was the United States Government that the American Congress was informed, in connection with passage of the Philippine Trade Agreement Revision Act of 1955, that the retail trade law did not apply to American citizens.[61]

Subsequent practice tended to reinforce this view. American citizens and corporations continued to invest in retail trade activities in the Philippines. Existing firms expanded their business without any attempt being made by the Philippine Government to enforce the licensing provision of section 1 of the retail trade law. Nor were American firms required to register under section 2 of the law.

It was not until April 22, 1963, little more than a year before the ten-year grace period provided by the retail trade law was to expire, that the situation changed. On that date, Philippine Secretary of Justice Juan R. Liwag rendered an opinion that in effect reversed Secretary Tuason's 1954 decision and held that Americans were in fact fully subject to the provisions of the retail trade law.[62]

The question put to the Secretary was whether a local subsidiary of Tidewater Oil Company, an American corporation ninety eight per

[60] OPS. SEC'Y JUSTICE 175 (1954).
[61] *Hearings on H.R. 6059, Philippine Trade Agreement Revision Acts, Before the House Ways and Means Committee,* 84th Cong., 1st Sess. 42 (1955).
[62] OPS. SEC'Y JUSTICE 71 (1963).

cent owned by American citizens, could engage in retail trade in the Philippines. Referring to the non-discriminatory provision of article VII of the Laurel-Langley Agreement, Secretary Liwag reasoned that the agreement did not commit the Philippines to place American citizens or corporations on a better footing than Filipino citizens or enterprises. He stated that "the commitment not to discriminate carries an obligation to give the other party an *equal* but not a better right to conduct business activity in the Philippines." United States citizens, or enterprises owned or controlled by them, must be allowed to engage in business activities in the Philippines as if they were Philippine citizens or enterprises. Since under the retail trade law, Filipino firms wishing to engage in retail trade must be wholly owned by Philippine citizens, American firms also must be wholly owned, *i.e.,* 100 per cent owned by American citizens.

Not surprisingly, this opinion came as a shock to the American business community in the Philippines. The assurances given by the Philippine Government in 1954 that Americans were exempt from the law, and the practice over the years since 1954 confirming that view, suddenly seemed to have been cast aside. It would have been virtually impossible for large American corporations whose shares were traded on public stock exchanges to prove 100 per cent American ownership. In addition, the Philippine Anti-Dummy Law[63] prevented reorganizations of the companies in a way that would satisfy the "wholly owned" requirement.

Moreover, the concept of "retail trade" had been so broadly interpreted in the Philippines that it included bulk sales, sales to manufacturers, and other transactions which one would normally consider of a wholesale character. In this regard, the retail trade law in section 4, defined retail business as meaning "any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or goods for consumption. . . ." As interpreted, it is the character of the purchaser and not the quantity of the commodity that determines the nature of the transaction.[64] "If the buyer is a consumer, the transaction whether in small or large quantity is at retail."[65] In addition, the Secretary of Justice has interpreted "consumption" as "the use of economic goods resulting in the diminution or destruction of

[63] C.A. No. 108 (1936), PHIL. ANN. LAWS tit. 18, §§ 38-41 (1957).
[64] City of Manila v. Manila Blueprinting, 74 Phil. 317 (1943); Sy Kiong v. Sarmiento, 90 Phil. 434 (1951).
[65] OPS. SEC'Y JUSTICE 160 (1963).

their utilities."[66] This definition does not distinguish between sales of goods to those who consume them in direct satisfaction of human wants and desires, and sales of goods destined for use as components of production, as production facilities used to make other goods, or in providing services.

In light of this situation, the Macapagal administration turned to the Philippine Congress for clarifying legislation. In 1963, a bill was introduced in the Philippine House of Representatives to redefine "retail trade" by eliminating sales of goods to be used in the manufacture, processing or production of other goods or for the provision of services.[67] However, this bill was not enacted. In the following regular session of Congress, the Philippine House passed House Bill No. 4274 which would have amended the retail trade law by limiting its applicability to the sale of consumer goods to the general public and by permitting up to forty per cent alien ownership in companies engaged in retail trade. The House, however, shortly thereafter recalled the bill from the Senate when charges were made that the so-called "Chinese amendment" (permitting only forty per cent alien ownership) had been "smuggled" into the House Committee Report and the bill itself after approval by the House.[68] A series of other bills designed principally to amend the retail trade law by redefining the term "retail trade" were introduced in both the regular and special sessions of the Congress, but all such attempts failed.[69]

For its part, the United States Government has taken a very serious view of these events in the retail trade area. While not wishing to interfere in the internal question of interpretation of Philippine statutes, the United States Government felt that the original intent of the retail trade law had been substantially modified through subsequent interpretations. To interpret "wholly owned" as requiring 100 per cent ownership of the stock of a parent corporation by Philippine or United States citizens seems unrealistic in the context of the modern corporate business world. Most, if not all, of the American subsidiaries engaged in retail business in the Philippines are "wholly owned," *i.e.*, 100 per cent owned by an American parent corporation. Even if ownership of the parent is to be determinative, the alien ownership of the parent American corporation is in most cases minimal—a *de minimis* test could easily be applied.

[66] Ops. Sec'y Justice 325 (1954).
[67] H. Bill 4274 (Phil. 1963).
[68] H. Bill 157 (Phil. 1964).
[69] See *e.g.*, H. Bill 9446 (Phil. 1964); S. Bill 671 (Phil 1964).

Quite apart from such considerations, however, the basic fact is that the Philippine Government had on numerous occasions assured the United States Government that Americans were exempt from the application of the retail trade law. These assurances formed an important part of the negotiating history of the Laurel-Langley Agreement. Moreover, they had been relied upon by the American business community in making large and important investments in the Philippines. The basic question is whether these commitments made by the Philippine Government will be upheld.

Aside from these questions, the Laurel-Langley Agreement has a strong bearing on the retail trade issue. Article VII[70] of the agreement prohibits discrimination against American citizens or business enterprises owned or controlled by American citizens with respect to their engaging in business activities in the Philippines. Due to the new interpretation of the retail trade law, business enterprises owned or controlled by American citizens are being adversely affected. It has been argued, perhaps most effectively by Secretary of Justice Liwag,[71] that the retail trade law involves no discrimination in this respect. The law applies the "wholly owned" requiremnt and the broad definition of "retail trade" to Philippine and American enterprises alike. Yet, while Secretary Liwag might argue that Filipinos and Americans were being afforded "equal" treatment, the fact is that American firms, which are broadly based and publicly owned, are faced with forced shutdowns, while the law is having little or no practical impact on Philippine firms which are mostly family owned or closely held. In practice, therefore, the law under Secretary Liwag's interpretation would result in discrimination.

It should be pointed out, in passing, that the obligations placed upon the Philippines in article VII of the Laurel-Langley Agreement are not unique or peculiarly burdensome to the Philippines. Nor should this article be viewed as an infringement on Philippines sovereignty and nationalism. The principle of non-discrimination or "national" treatment for existing business enterprises is a general rule throughout the free world regardless of treaties; discrimination is the exception. In fact, non-discriminatory treatment is formally assured to United States nationals on a reciprocal basis in all friendship, commerce and navigation treaties between the United States and other friendly countries,

[70] See text accompanying note 42 *supra*.

[71] See note 61 *supra*.

including a number of less developed countries.[72] This principle of national treatment, which is incorporated in so many friendship, commerce, and navigation treaties, could not recommend itself to governments unless they believed it operated to their mutual advantage. The obvious rationale for the principle is the creation of a favorable climate for private investment which is so important to the attainment of economic development goals.

Perhaps even more serious than the question of discrimination is the inevitably adverse effect Philippine action of this nature could have on the whole range of future United States-Philippine economic relations. Attainment of Philippine economic goals will require large amounts of foreign, private investment. The climate for such investment will be clouded if significant harm is done to existing investment.

With these various considerations in mind, President Johnson, on June 10, 1964, expressed to President Macapagal the concern of the United States over the retail trade law problem. The full text of his letter follows:

> Dear Mr. President:
>
> I am concerned that a serious problem in the relations between our two countries may be developing in connection with the Philippine Retail Trade Nationalization Law.
>
> Under this Law, as recently interpreted, it appears that, after June 19, 1964, a number of important American concerns may be prohibited from engaging in normal distribution activities because they cannot prove that they are one hundred percent owned by United States citizens.
>
> I understand that this Act has been construed to apply not only to sales to consumers for individual consumption, but also to sales of equipment to manufacturers, bulk sales, and other wholesale-type transactions.
>
> As you know, the United States and the Philippines have been parties to a trade agreement, the Laurel-Langley Agreement, which, for a num-

[72] Since World War II the U.S. has negotiated the following treaties (relevant articles noted): Belgium [1963] art. 6, T.I.A.S. No. 5432; Republic of China [1948] art. 4, 63 Stat. 1299, T.I.A.S. No. 1871 (art. 4 accords most-favored-nation rights); Denmark [1961] art. VIII, 12 U.S.T. 908, T.I.A.S. No. 4797; Ethiopia [1953] art. VIII, 4 U.S.T. 2134, T.I.A.S. No. 2864; France (Treaty of Establishment) [1960] art. V, 11 U.S.T. 2398, T.I.A.S. No. 4625; Germany [1956] art. VII, 7 U.S.T. 1839, T.I.A.S. No. 3593; Greece [1954] art. VIII, 5 U.S.T. 1829, T.I.A.S. No. 3057; Iran [1957] art. V, 8 U.S.T. 899, T.I.A.S. No. 3853; Ireland [1950] art. VI, 1 U.S.T. 785, T.I.A.S. No. 2155; Israel [1954] art. VII, 5 U.S.T. 550, T.I.A.S. No. 2948; Italy [1949] art. III, 63 Stat. 2255, T.I.A.S. No. 1965; and [1961] art. I, 12 U.S.T. 131, T.I.A.S. No. 4685; Japan [1953] art. VII, 4 U.S.T. 2063, T.I.A.S. No. 2863; Korea [1957] art. VII, 8 U.S.T. 2217, T.I.A.S. No. 3947; Luxembourg [1963] art. VI, 14 U.S.T. 251, T.I.A.S. No. 5306; Muscat [1960] art. V, 11 U.S.T. 1835, T.I.A.S. No. 4530; Netherlands [1957] art. VII, 8 U.S.T. 2043, T.I.A.S. No. 3942; Nicaragua [1958] art. VII, 9 U.S.T. 449, T.I.A.S. No. 4024; Pakistan [1961] art. VII, 12 U.S.T. 110, T.I.A.S. No. 4685; Viet-Nam [1961] art. V, 12 U.S.T. 1703, T.I.A.S. No. 4890.

ber of years, has been the foundation for a mutually beneficial business and trading partnership. American business in the Philippines has contributed substantially under the Laurel-Langley Agreement to the economic progress and welfare of the Philippines. It has established a solid record of adherence to Philippine law and it is now quite apprehensive regarding the effect of this particular statute as it has been recently interpreted.

On the basis of the Laurel-Langley Agreement, and assurances from your Government dating back to 1954, it has been our understanding that American enterprises in the Philippines were exempt from the requirements of the Retail Trade Nationalization Law. In view of the Trade Agreement and because we were assured that American firms were protected under that Agreement, these firms went ahead and expanded their activities, including extensive distribution facilities.

Recently, however, the Philippine Secretary of Justice ruled that the United States' firms were subject to the Retail Trade Nationalization Law, and under this new interpretation sanctions might be brought against them which would disrupt their operations and cause large layoffs of Filipino employees.

We had hoped that through appropriate legislative action by the Philippine Congress this situation would have been rectified. However, the Congress has adjourned without passage of clarifying legislation. I understand that you have called a special session of Congress for action on a number of important problems, and I very much hope you will be able to include appropriate amendment of the Retail Trade Nationalization Law among them.

I believe that successful resolution of this issue is in the best interests of both our countries. On the other hand, a failure to resolve it satisfactorily could do great harm to established and potential investment in the Philippines. If there are any thoughts on this matter you believe we should consider, I would be most receptive to them.

With warmest personal good wishes,

Sincerely,

Lyndon B. Johnson

Despite the introduction of clarifying legislation by President Macapagal, the June 19, 1964, deadline for implementation of the retail trade law approached with no affirmative action taken by the Philippine Government on this matter. Thereupon, the principal American companies affected filed suits in the Philippine courts seeking preliminary injunctions enjoining the Secretary of Commerce and Industry from enforcing the retail trade law. They also sought declaratory judgments (1) that petitioners were not engaged in the "retail trade," or (2) that if engaged in the retail business, petitioners were exempt

from the provisions of the retail trade law.[73] In these suits, the companies relied principally on the language of the second paragraph of section 1 of the retail trade law, the 1954 opinion of Secretary of Justice Tuason, the 1954 diplomatic exchanges between the Philippine and American Governments and exchanges between the Philippine and American Governments and subsequent reliance thereon by American firms. Article VII of the Laurel-Langley Agreement was also stressed.

The Philippine Solicitor General's replies to all the petitions of the American companies have been substantially uniform.[74] He has argued principally (1) that the courts have no jurisdiction over the petitions because the question raised is essentially political—to be resolved by the executive branch of the Philippine Government through diplomatic exchanges,[75] and (2) that if the courts do assume jurisdiction, they should give judicial sanction to Secretary of Justice Tuason's opinion of July 21, 1954.[76] In this connection, the Solicitor General referred to the assurances given the United States by the Philippine Government in 1954 and stated:

> This commitment of the Government of the Republic of the Philippines to the Government of the United States of America provided the background and served as the basis of Article VII of the Laurel-Langley Agreement enacted as Republic Act No. 1355 on June 18, 1955....[77]

The Solicitor General also quoted the text of a note from the United States Embassy at Manila to the Philippine Secretary of Foreign Affairs dated September 4, 1964, as follows:

> The Embassy of the United States of America presents its compliments to the Department of Foreign Affairs of the Republic of the Philippines and has the honor to refer to the Retail Trade Nationalization Law of the Philippines.
>
> A number of American companies doing business in the Philippines are currently seeking declaratory judgments in the Philippines courts that they are exempt from certain provisions of the Retail Nationalization Law. The Government of the Philippines is aware of the position of the United States Government that American companies are exempt from

[73] See, *e.g.*, Caltex v. Reyes, Civ. Case No. 57406, Court of First Instance of Manila, Branch XVI, (1964). Twenty-three similar suits were filed in the Philippine courts.

[74] See, *e.g.*, reply filed July 24, 1964, in Mobil Oil Philippines, Inc. v. Reyes, Civ. Case No. 57412, Court of First Instance of Manila, Branch VII (1964).

[75] On December 1, 1964, the Court of First Instance of Manila rule in the case of Burroughs, Ltd. v. Reyes, that the court had jurisdiction. Civ. Case No. 57420, Court of First Instance of Manila, Branch XIII (1964).

[76] See text accompanying note 59 *supra*.

[77] Memorandum for Respondent filed Sept. 9, 1964, in Burroughs, Ltd. v. Reyes, Civ. Case No. 57420, Court of First Instance of Manila, Branch XIII (1964), p. 8.

these provisions of the Retail Trade Nationalization Law by virtue of the Laurel-Langley Agreement and formal assurances given to the United States by the Government of the Philippines.

If the Philippine courts assume jurisdiction in those cases, the United States Government hopes that they will be guided by the answer filed by the Solicitor General of the Philippines and will accept the opinion of Secretary of Justice Tuason of July 21, 1954 that American citizens and juridical entities are exempt from the provisions of Sections 1 and 2 of the law. Such a course of action could provide a successful solution to this problem.

At the same time the United States Government maintains that this is a matter, as was pointed out by the Solicitor General, entailing international commitments and assurances of the Philippine Government on which both the United States Government and American citizens and companies have relied for the past ten years. The Government of the United States continues, therefore, to be deeply concerned in ensuring that these commitments and assurances are fulfilled.

The Embassy takes this opportunity to renew to the Department of Foreign Affairs the assurances of its highest consideration.[78]

In October 1964, while these cases were still pending in the Philippine courts, President Macapagal paid a state visit to the United States, and the subject of the retail trade law was discussed with President Johnson. The joint communique issued at the conclusion of their talks in Washington contained the following paragraph:

> The two Presidents noted the major contribution made by foreign private investment to the development and continued strength of their countries. President Johnson pointed out in this regard that United States economic relations with the Philippines would be seriously impaired if an enforcement of the Philippine Retail Trade Nationalization Law were to prejudice the position of long-established American firms. He observed that the Government of the Philippines had committed itself that the United States firms would not be affected by the Retail Trade Nationalization Law. He expressed confidence that the Government of the Philippines would uphold its long-standing commitments contained, *inter alia,* in a note of the Department of Foreign Affairs of August 4, 1954.[79]

Undoubtedly, continuing efforts will be made in the courts, through diplomatic channels, and in the Philippine legislature to resolve the problem created for American investment by the retail trade law. The problem cannot be viewed solely or even principally within the confines of the retail business framework. Its implications for the

[78] *Id.* at 13a.
[79] 51 DEP'T STATE BULL. 632, 633 (1964).

future of foreign investment in the Philippines, and consequently for the continued development and strength of the Philippine economy, are apparent. Successful resolution of the problem is in the interests of both the Philippines and the United States.

PROSPECTS FOR FUTURE ECONOMIC RELATIONS BETWEEN THE UNITED STATES AND THE PHILIPPINES

The Philippines Need for Foreign Investment. It has become axiomatic that developing countries cannot successfully achieve satisfactory economic progress without the influx of substantial foreign private investment. The United States Agency for International Development has been aware of the implications of this proposition for some time and has directed much of its efforts to promoting foreign private investment in less developed countries.

The Government of the Philippines has recognized the necessity of attracting private capital. In the Five-Year Socio-Economic Program for the Philippines, private foreign capital inflows averaging $109 million a year are contemplated.[80] Philippine leaders have repeatedly called for new investment to assist in the country's economic development.

In the past, the Philippines, not surprisingly, received special attention from United States investors. In addition to the special trade relationship between the United States and the Philippines, there was the natural attraction of investment toward a stable, friendly democratic country. In 1950, United States private investment in the Philippines totalled $149 million; by 1960 this figure had increased to $414 million.[81] Today this trend has stopped. By the end of 1963, estimated United States investment in the Philippines had increased only $1 million over the 1960 level.[82]

This failure of the Philippines to continue to attract outside capital can be blamed in good part on the uncertainty created by growing economic nationalism, as evidenced in the retail trade act controversy. Investors are not likely to find comfort in the fact that, despite assurances given by the Philippine Government in 1954, American firms are threatened with the sanctions of the retail trade law under new rulings by the Philippine Secretary of Justice. Moreover, other measures have

[80] MACAPAGAL, FIVE-YEAR INTEGRATED SOCIO-ECONOMIC PROGRAM FOR THE PHILIPPINES Annex A, at 84 (1962).

[81] Survey of Current Business, Office of Business Economics, U.S. Dep't of Commerce, Aug. 1963, p. 18 and Aug. 1964, p. 10.

[82] *Ibid.*

been proposed which could mean that even the satisfactory settlement of the retail trade issue would not change the attitude of foreign investors.

For example, as the Philippine presidential election of 1965 approaches, there has been increasing pressure in the Islands for immediate elimination of the so-called "parity" provisions embodied in article VI of the Laurel-Langley Agreement. That article permits United States citizens to enjoy the same rights of exploitation and utilization of publicly-owned agricultural and mineral lands as are enjoyed by Filipinos.[83]

Taken as purely economic matter, the rights of parity accorded by the Philippines to American investors can be considered a useful if not necessary means of securing full development of Philippine natural resources. It should be recognized that developing countries are often torn between the need to have foreign investment in the natural resource sector and the feeling that such resources are a "national asset" which should only benefit native citizens. In the Philippines, the issue is complicated even further by Filipino resentment caused by having to amend their constitution to permit parity for Americans.[84]

Another issue which could create difficulties for American investors in the Philippines is the proposal made during the last session of the Philippine Congress that would accord tax exemptions and deprecia-

[83] Article VI(1) provides:

> The disposition, exploitation, development, and utilization of all agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces and sources of energy, and other natural resources of either Party, and the operation of public utilities, shall, if open to any person, be open to citizens of the other Party and to all forms of business enterprise owned or controlled, directly or indirectly, by citizens of such other Party in the same manner as to and under the same conditions imposed on citizens or corporations or associations owned or controlled by citizens of the Party granting the right. 6 U.S.T. 2981, T.I.A.S. No. 3348 (1955).

[84] On March 8, 1965, the U.S. Assistant Secretary of State William P. Bundy made the following statement in Manila in response to a press query on the subject of parity:

> As you know, this matter was discussed between President Macapagal and President Johnson last October, and this was noted in the communique. Since then there have been continuing consultations and my Government has given the matter careful consideration. 1974 is a long way off and it may be premature to be talking about what kind of agreement should replace the Laurel-Langley Agreement. That agreement is a very special contract between our two sovereign countries, and I think it has served well both Philippine and United States interests in its first ten years of operation. During the life of the present agreement, its provisions will naturally continue to be operative. We believe that both countries will want to have a framework for continuity of a trade and investment relationship which will be mutually beneficial when the present agreement ceases.
>
> As far as the parity article is concerned—Article VI of the Agreement—we are aware of Philippine interest in seeing that this provision expires in 1974, and on our side I can say that we have no intention of seeking its extension. We assume, of course, that rights acquired prior to 1974 will be protected in accordance with the Philippine Constitution.

tion allowances in specified industries to Filipinos and to corporations having a minimum Philippine ownership. In addition, benefits of profit repatriation and guarantees against nationalization would be given to qualifying corporations.

While such incentives for private investments are not unusual, and co-ownership or other profit sharing arrangements are frequently found in concessions granted by less developed countries, the proposed Philippine law would be the first to set aside a broad area of economic activity in which corporations having a specified local participation would enjoy such a wide range of benefits. These laws would violate article VII of the Laurel-Langley Agreement in which both countries agree "not to discriminate in any manner, in respect to their engaging in business activities, against the citizens or any form of business enterprise owned or controlled by citizens of the other. . . ."[85]

Again it would seem that the substantive issues in these controversies are subservient to the political questions. The Philippines for Filipinos is perhaps a natural reaction in a country recently independent and now seeking full economic independence. However, the principles involved should not be so much questions of sovereignty, but rather of the normal relations between sovereign governments.

Expiration of the Laurel-Langley Agreement. On July 4, 1974, the United States-Philippine Trade Agreement will terminate. Already, interested parties in both countries have been discussing the future of United States-Philippine trade relations. In the Philippines, thinking on the future of a trade agreement with the United States has taken a variety of forms. Perhaps the most vocal elements are those on the extreme ends of the spectrum.

On one side are those groups which think the preference philosophy of the Laurel-Langley Agreement should be continued and expanded. They base their approach on the belief that the Philippines cannot continue its economic development, at least in the foreseeable future, without special access to the United States market. Rather than see the existing preferences wither away, these groups want prompt negotiations with the United States aimed at securing at least an extension of the

[85] 6 U.S.T. 2981, T.I.A.S. No. 3348 (1955). Article 6(3) of the recently negotiated double tax convention with the Philippines provides as follows:

> A corporation of one of the Contracting States, the capital of which is wholly or partly owned by one or more citizens or corporations of the other Contracting State, shall not be subjected in the former Contracting State to more burdensome taxes than is a corporation of the former Contracting State, the capital of which is wholly owned by one or more citizens or corporations of that former Contracting State.

preference system. The position of this segment of Philippine opinion on other questions such as parity and non-discrimination against United States investors seems to vary a good deal, but the more realistic proponents of continued preferences recognize that they are not likely to be successful if they advocate cutting off the rights of United States investors.

At the other extreme are those who seek immediate and total abrogation of the Laurel-Langley Agreement. These groups believe that the destiny of the Philippines lies in its further development of independence and in leadership in the Far East. To these groups, the provisions of the Laurel-Langley Agreement infringe on Philippine sovereignty. Moreover, they fear competition from large American enterprises enjoying non-discriminatory treatment under the Laurel-Langley Agreement. They recognize the wrench upon the Philippine economy which would result from termination of the present preferences in the Laurel-Langley Agreement, but they are willing to pay this price in order to force economic independence upon the Islands.

In the United States, those interested in trade relations with the Philippines take little comfort in either extreme position. On the one hand, extension of a preference system by the United States would fly in the face of efforts to eliminate other preferential systems which have grown up over the years. These examples have now been seized upon by the less-developed countries as a means for improving their lot. It has been the conviction in the United States that a program of preferences for the less-developed countries would not operate to their benefit for several reasons, the most important being the belief that generally, existing duties are not high enough to make preferences meaningful, and that in those few cases where preferences were effective, the advantages would not necessarily flow equitably among countries nor to the proper groups within countries. If the United States were to grant an extension of preferences to the Philippines, our policy could be seriously undermined.

However, no agreement would be acceptable which did not adequately protect the rights of United States investors. Since World War II, the United States has negotiated almost twenty treaties of friendship, commerce and navigation which provide for national treatment for Americans engaged in business activities abroad.[86] While these agreements permit the treaty partners to reserve some rights of business and

[86] See note 72 *supra*.

commercial activity for their own citizens, none would permit the wholesale attack on business activities which are contemplated by the retail trade law, nor would they permit the kind of discrimination embodied in the tax incentive schemes recently introduced into the Philippine Congress.

To what do these considerations add up? It seems clear that trade relations between the United States and the Philippines are at a critical point. The right of Americans to carry on their very extensive business operations in the Philippines is under attack. The basic trade agreement which guides and shapes these trade relations will expire in a decade, and there is no consensus in the Philippines even as to whether a new agreement should take its place. Certainly, there is no consensus on what a new agreement should contain. United States-Philippine trade relations seem to be a political hot potato being mashed as it is tossed from party to party.

Unless this atmosphere is cleared, United States investment in the Philippines is not going to expand and is likely to contract substantially. The repercussions of this development would be broad and could set back over-all Philippine economic development many years.

The authors believe this critical juncture can be survived by re-examining the basis of the "special relationship" the United States and the Philippines enjoy. In 1946, this special relationship embodied the obligations of a former metropolitan government to its newly independent territory. Given the catastrophic effects of the war in the Philippines, this obligation included our best efforts to put the Philippine economy back on its feet—in effect, a form of economic aid.

In 1965, this picture has changed. What was necessary nineteen years ago as a transfusion to the Philippine economy has now become a crutch, resented by many elements in the Islands. This is not to say that the preference system is no longer beneficial to the Philippines, but rather that it inhibits Philippines trade elsewhere and limits the necessity that Philippines industries become more competitive. These preferences are now being phased out under the Laurel-Langley Agreement. We believe this process should continue.

Another fact of life in 1965 is the rise of Philippine nationalism. In this context, a "special relationship" which looks to Filipinos more like "special privileges" for Americans cannot survive. If we are to continue our special relationship, it must clearly be a relation between equals.

The Laurel-Langley Agreement can be looked upon as the 1946 Trade Agreement with reciprocity grafted on to it. What is needed to supplant that agreement is the more usual type of friendship and commerce treaty containing a mutual recognition that "national" treatment accorded by one country to investors of the other can be looked upon as international cooperation rather than an infringement of sovereignty.

We believe the future of United States-Philippine trade relations can be fully beneficial to both countries only if this metamorphosis of the "special relationship" takes place. In the United States, it must be recognized that the Philippines have outgrown a trading relationship established twenty years ago. On the part of the Philippines, hopes for economic development and leadership can be realized only if there is recognition that its changed status brings responsibilities as well as opportunities. In this spirit, both countries can work together to preserve the "special relationship," not as a way of securing special advantages from one another, but as a means of working together toward common goals. In this atmosphere, the economic interests of each country can be furthered without detriment to the other.