

PASCN Discussion Paper No. 2000-09

Recommendations for Philippine Anti-Trust Policy and Regulation

Anthony R.A. Abad



The *PASCN Discussion Paper Series* constitutes studies that are preliminary and subject to further revisions and review. They are being circulated in a limited number of copies only for purposes of soliciting comments and suggestions for further refinements.

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January 2000

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Recommendations for Philippine Anti-Trust Policy and Regulation

Anthony R. A. Abad

ABSTRACT

Background

The recent introduction of economic reforms in the Philippines through substantial trade and investment liberalization, deregulation and privatization, has led to a slow realization that freer trade and open markets are good for Filipinos in general. This is due largely to the obvious efficiency and welfare gains brought about by increased *competition* from new products and services. Conversely, it can also be said of the Philippines that our long and sad history of underdevelopment can actually be traced to a lack of *competition* in our economy.

With this important realization, the Philippine government has adopted a policy of introducing more *competition*-enhancing measures, such as the further lowering of trade and investment barriers and the reform of certain economic regulations. Unfortunately, government officials have not even mentioned the need for a new and comprehensive framework for *anti-trust* policy and regulation, despite the central role played by *anti-trust* policy in economic reform measures for enhancing competition. There have been quite a number of draft bills for a proposed *anti-trust* or *competition* law filed in Congress; however, they have yet to be fully appreciated by our political leaders and they have yet to be filed as part of introducing a truly comprehensive new framework for *anti-trust* policy and regulation.

The introduction of a new framework for *anti-trust* policy and regulation will require much more than merely passing a new law. To avoid committing the mistakes of the past, a careful and in-depth analysis of the current approach of the Philippines to sustaining a market-oriented economy and regulating economic activity will be needed. Reviewing existing economic laws and regulations and testing their effectiveness as tools for promoting economic efficiency and public welfare through competition should also be done. This analysis can then form the basis for crafting a framework for *anti-trust* policy and regulation.

This short study has therefore been commissioned as a means of developing specific recommendations for new *anti-trust* policies and regulations. The scope of work and objectives of this study are as follows:

- a. To review existing anti-trust laws and regulations, especially with respect to how appropriate the provisions are in providing competitive conduct rules and balancing exclusionary with efficiency effects;
- b. To examine the effectiveness and adequacy of these laws and regulations;
- c. To examine how well these laws conform with international rules; and
- d. To suggest recommendations for reform.

There have already been quite a number of studies conducted dealing with *anti-trust* and/or *competition* issues from an economic analysis point of view, but also some on an industry or

sectoral basis. In contrast, this study will be focusing on *anti-trust* issues from a legal and regulatory structure point of view and in a comprehensive manner rather than a sector-specific approach. This study will also be analyzing the proper administrative structures for effective enforcement of policy, and necessarily including some insights on existing political economy conditions.

Structure of the Study

The study will have four major components:

1. *Rationale for a Legal and Regulatory Framework for Anti-Trust Enforcement in the Philippines* – Before anything else, there is a need to lay the basis for discussing a proposed new legal and regulatory framework for *anti-trust* enforcement in the Philippines, and hence, the rationale for this study. This means having to review the very importance of competition itself and the vital role it plays in economic development. This includes a very brief review of the theoretical bases for *anti-trust* policy and regulation. This section of the paper will also have to look into the political economy “realities” in the Philippines which make *anti-trust* regulation even more indispensable, taking into consideration the economic history of the Philippines, as well as the social conditions prevailing in Philippine society. Finally, this section will also review a few “success stories” from other countries and regional groupings, both developed and developing, which implemented their own *anti-trust* or competition laws and regulations.
2. *Survey of Existing Anti-Trust Laws and Regulations in the Philippines* – The concept of *anti-trust* regulation is not exactly new to the Philippines. Apparently, old *anti-trust* provisions of U.S. laws found their way into the Philippine Constitution, and Criminal and Civil Codes. *Anti-trust* enforcement is also implicitly vested in various regulatory agencies and bodies. This section of the paper will survey these existing laws and regulations that form what can be deemed the existing *anti-trust* and/or *competition* policy framework of the Philippines. This survey will also cover draft bills of the proposed *anti-trust* or *competition* law of the Philippines.
3. *Analysis of Existing Anti-Trust Regulation in the Philippines* – Knowing the existing laws and regulations for *anti-trust* enforcement at the disposal of the Philippine government, what is then the actual effectiveness of these laws and regulations in promoting *competition* in the Philippine economy? This section will analyze the state of *anti-trust* regulation in this country and examine the government’s capability to implement its *anti-trust* laws and regulations. It will study the general regulatory structure in place, and identify a number of the regulators and institutions involved in the *anti-trust* process. How have they managed to control the behavior of the players in various industries and sectors? How have they affected the structure of markets in the Philippine economy? What are the major problem areas?
4. *Recommendations for a New Legal and Regulatory Framework for Anti-Trust Enforcement in the Philippines* – This section will recommend a new *anti-trust* policy and regulatory framework for the Philippines. Given the Philippines’ long history of protectionism and over-regulation, market distortions are rampant in the economy despite the existence of basic *anti-trust* laws and regulations. Therefore, there is still a need to

propose a more effective framework for *anti-trust* regulation in this country. Such a framework should first lay down the basic policy objectives and principles, as well as spell out the basic structure for regulation. This section will also suggest certain basic provisions for new *anti-trust* legislation and mechanisms for more effective enforcement.

Abstract/PIDS/AAA

EXECUTIVE SUMMARY

INTRODUCTION

Background

The introduction of a new framework for *anti-trust* policy and regulation will first require a careful and in-depth analysis of the current approach of the Philippines to sustaining a market-oriented economy and regulating economic activity. This includes reviewing existing economic laws and regulations and testing their effectiveness as tools for promoting economic efficiency and public welfare through competition. This analysis can then form the basis for crafting a framework for *anti-trust* policy and regulation.

Rationale and Scope of the Study

The emphasis of this study is on the legal and regulatory aspects of competition policy, particularly the framework for effective enforcement of competition in all sectors of the Philippine economy. The scope of work and objectives of this study are:

- a. To review existing anti-trust laws and regulations, especially with respect to how appropriate the provisions are in providing competitive conduct rules and balancing exclusionary with efficiency effects;
- b. To examine the effectiveness and adequacy of these laws and regulations;
- c. To examine how well these laws conform with international rules; and
- d. To suggest recommendations for reform.

This study focuses on *anti-trust* issues from a legal and regulatory structure point of view and in a comprehensive manner rather than a sector-specific approach. This study also analyzes the proper administrative structures for effective enforcement of policy, and includes some insights on existing political economy conditions. The study has four major components:

- a. Rationale for a Legal and Regulatory Framework for Anti-Trust Enforcement in the Philippines.
- b. Survey of Existing Anti-Trust Laws and Regulations in the Philippines
- c. Analysis of Existing Anti-Trust Regulation in the Philippines
- d. Recommendations for a New Legal and Regulatory Framework for Anti-Trust Enforcement in the Philippines

RATIONALE FOR ANTI-TRUST REGULATION

Competition Policy

Competition policy can refer broadly to all government policies and laws and regulations aimed at establishing and maintaining competition. It covers measures aimed at promoting, advancing, and ensuring competitive market conditions by the removal or control and redress of the anti-competitive results of public and private restrictive practices. Competition law is but one of the means by which competition policy may be enforced.

Functions of competition policy

- a) Economic (allocative) efficiency
- b) Consumer protection
- c) Economic equity
- d) Regional and international relations
- e) Regulation and control

Anti-Competitive Practices

- a. Combinations
- b. Monopolies
- c. Oligopolies
- d. Mergers and acquisitions

Other Anti-Competitive Practices

- a. Cartel arrangements
- b. Horizontal price-fixing
- c. Excessive pricing
- d. Predatory pricing
- e. Price discrimination
- f. Market sharing agreements
- g. Tie-in arrangements

Entry and Exit Barriers

- a. Policy-Induced Entry Barriers
- b. Exit Barriers
- c. Structural Barriers
- d. Other Disincentives to Entry and Non-Tradables

Political Economy Considerations

An effective legal and regulatory framework for anti-trust enforcement can also contribute to a stable political economy. In fact, it is quite important to appreciate and understand a country's political economy in formulating such a framework. The interaction of key sectors of a state with each other (e.g., government-business, government-civil society, etc.) determines the quality and effectiveness of anti-trust enforcement. A weak government bureaucracy in a so-called "soft state," for example, may undermine well-crafted and sophisticated laws and regulations. In turn, effective anti-trust enforcement may lead to less political pressures on government and result in a more stable society.

Anti-Trust Enforcement in Other Countries

A cursory review of the developments in anti-trust enforcement in other Asia Pacific economies may be useful to benchmark the progress of the Philippines, as well as to better appreciate the trends at the international and regional levels.

EXISTING ANTI-TRUST LAWS AND REGULATIONS IN THE PHILIPPINES

Anti-Trust Law in the Philippines

The Constitution

Under the Constitution, the State is mandated to regulate or prohibit, for the sake of public interest, monopolies, combinations in restraint of trade, and other unfair competition practices.

Criminal Law

Act No. 3815 as amended, otherwise known as the Revised Penal Code, punishes anti-competitive behavior that is criminal in nature. Article 186 defines and penalizes monopolies and combinations in restraint of trade and Article 187 provides penalties. The Revised Penal Code also penalizes other frauds in commerce and industry such as falsely marking gold and silver articles and altering trademarks.

Civil Law

Republic Act No. 386 (1949) as amended, otherwise known as the Civil Code of the Philippines, took effect in August 1950. It allows the collection of damages arising from unfair competition in agricultural, commercial, or industrial enterprises or in labor. It also allows the collection of damages arising from abuse in the exercise of rights and in the performance of duties, e.g., abuse of a dominant market position by a monopolist.

Special laws specifically address some unfair competition practices.

Republic Act No. 8293 (1997), otherwise known as the Intellectual Property Code of the Philippines. This new law provides for the protection of patents, trademarks, and copyrights, and the corresponding penalties for infringement.

Batas Pambansa Blg. 68 (1980), otherwise known as the Corporation Code of the Philippines. This law provides for the rules regarding mergers and consolidations, and the acquisition of all or substantially all the assets or shares of stock of corporations

Batas Pambansa Blg. 178 (1982) as amended, otherwise known as the Revised Securities Act

Republic Act No. 7581 (1991), otherwise known as the Price Act, and Republic Act No. 7394 (1932), otherwise known as the Consumer Act of the Philippines. The Price Act defines and identifies illegal acts of price manipulation, such as, hoarding, profiteering and cartels. It also seeks to stabilize the prices of basic commodities and prescribes measures against abusive price increases during emergencies and other critical situations through price controls and mandated ceiling mechanisms. The Consumer Act of the Philippines provides for consumer product quality and safety standards. It also covers deceptive, unfair, and unconscionable sales acts and practices (including weight and measures, product and service warranties), consumer credit transactions, and penalties for violations of the statute.

Agencies Enforcing Anti-Trust Law and Policy in the Philippines

- a. Department of Trade and Industry (DTI) and its attached agencies, including the Bureau of Trade Regulation and Consumer Protection (BTRCP), Bureau of Food and Drugs (BFAD), Intellectual Property Office (IPO), Bureau of Product Standards (BPS)
- b. Securities and Exchange Commission (SEC)
- c. Philippine Economic Zone Authority (PEZA)
- d. Bases Conversion and Development Authority (BCDA)
- e. Subic Bay Metropolitan Authority (SBMA)
- f. Clark Development Corporation (CDC)

- g. National Library (for copyright registration)
- h. Industry-Specific Agencies (e.g., *Bangko Sentral ng Pilipinas* (BSP), for banks and financial institutions)

International Commitments

The WTO and ASEAN agreements and protocols implicitly encourage international competition through trade liberalization.

Jurisprudence

To date, there have been only two cases decided by the Supreme Court touching on anti-trust issues and defining monopoly and combinations in restraint of trade. These are *Gokongwei, Jr. v Securities and Exchange Commission, et al.*, and *Tatad, et al v. Secretary of Energy, et al.*

In addition, with its ruling in *Tanada, et al v. Angara, et al.*, that the Senate did not commit a grave abuse of discretion in ratifying the WTO Agreement and its Annexes, the Supreme Court removed any judicial obstacle against the adoption by the government of a policy of trade liberalization by enlisting the Philippines in the WTO.

Proposed Anti-Trust Legislation

Both Houses of the present 11th Congress have a number of draft anti-trust laws submitted. In the House of Representatives; there are four draft bills, authored by Rep. Roilo Golez, Rep. Gerardo Espina, Reps. Feliciano Belmonte Jr., Jack Enrile, and Oscar Moreno; and Reps. Neptali Gonzales II and Manuel Roxas II. In the Senate, there are two draft bills, one authored by Sen. Sergio Osmena III; and the other by Sen. Juan Ponce Enrile.

ASSESSMENT OF ANTI-TRUST REGULATION IN THE PHILIPPINES

Evaluating the "Treatment Regimen"

The existing laws for promoting competition in the Philippines have proven inadequate or ineffective to stave off the ill effects of anti-competitive structures and behavior in the market, mainly due to lack of enforcement. A number of reasons have been cited to explain the lack of enforcement of competition laws in the Philippines.

Lack of a Comprehensive Competition Law and a "User-Friendly" Enforcement Mechanism - Since existing anti-trust laws are penal in nature, the quantum of evidence required so that the case may prosper -- proof beyond reasonable doubt -- is difficult to obtain. In addition, the witnesses and/or aggrieved parties, because of the long tedious legal processes involved, are not themselves interested in putting the perpetrators behind bars; rather they are more interested in obtaining an injunction or cease and desist orders. Moreover, fines are inadequate to deter would-be criminals. An administrative enforcement mechanism that can be implemented faster with hefty fines as penalties for unfair competition would be more effective.

Lack of Jurisprudence on Competition - The judiciary has scarcely had the opportunity to pass upon the proper application of the various laws on competition, partly due to lack of enforcement. The silence or ambiguities in these laws have thus remained. The lack of guidance has discouraged full implementation.

"Too Many Cooks" - With so many agencies enforcing competition policy, responsibility is too diffused and accountability for implementation of the laws is difficult to fix. Some regulators are unable to relate all the different existing laws and regulations. Moreover, there is a lack of expertise in the appreciation and implementation of competition laws that rely heavily on economic thought, techniques of analysis, and value preferences as tools of enforcement.

"Regulatory Capture" - With a specific agency regulating each industry, the danger of regulatory capture is inevitable. In time and with familiarity, it is the industry that ultimately regulates the regulator.

Other Considerations

These are other practical considerations and problem areas that must be addressed so that this whole process of formulating a strategy for the introduction of a new legal and regulatory system in the Philippines will not prove futile.

- a. Political Capacity
- b. Budgetary Constraints
- c. Technical Capacity
- d. Management Constraints
- e. Proper Compensation

RECOMMENDATIONS FOR A NEW LEGAL AND REGULATORY FRAMEWORK

Proposed Framework for a Competition Law

Philippine laws and regulations bearing on competition are actually numerous and varied. However, there still remains a need to enact an overall law on competition, particularly a comprehensive anti-trust legislation, with the following features:

Competition law should focus on the actual and, or potential business conduct of firms in a given market, and not on the absolute or relative size of firms. It should look at the business conduct of firms and on the business environment in which the firms operate.

Competition law must be effectively harmonized and linked with other government policies. Promoting competition in the business environment constrains anti-competitive behavior by firms and also inculcates sound business practices and ethics.

Competition law should be a law of general application, addressing all sectors of the economy. Exemptions from its application may be allowed if they will not limit competition, are based on sound economic principles and are aimed at facilitating legitimate economic activity.

Competition law should contain provisions explicitly prohibiting business practices that are clearly against economic efficiency and consumer welfare, such as price fixing, bid rigging, restriction of output and market shares, allocation of geographic markets and customers, which should be deemed illegal per se and subject to criminal law and severe penalties.

Competition law should also provide for a "rule of reason" approach with respect to horizontal and vertical mergers, specialization agreements, joint ventures, vertical manufacturing and wholesale, retail distribution arrangements. Prior notification to and approval by the concerned agency of such business arrangements is recommended but

only with respect to largest transactions, taking into consideration size thresholds in terms of market share, assets, sales and/or employment of parties involved.

Anti-trust laws in the Philippines have been largely ineffective because their enforcement is vested in different agencies. This breeds confusion, non-coordination and conflicts. It is not uncommon for benefits from enforcement in one area to be negated by adverse effects from enforcement elsewhere. The effective implementation and enforcement of anti-competition laws should be vested in a centralized agency with sufficient powers to oversee and monitor the competitive climate in the different sectors of the economy, to formulate and recommend such measures as would ensure the maintenance of the competition in the Philippine domestic market and as would anticipate developments in the international market.

The entity could be called the *Philippine Trade Commission* or the *Philippine Competition Commission*, which may be composed of members with backgrounds in laws, economics, finance and various fields of industry and business. In determining the nature, powers, functions and duties of the Commission, it is proposed that the following guiding principles be considered:

The Commission should be independent and insulated from political interference, or influence.

There should be a separation between the investigation, prosecution and adjudication functions.

A system of checks and balances with appropriate rights of appeal and review of decisions and facts on legal and economic grounds should be provided.

The Commission should guarantee the expeditious resolutions of cases and related matter.

The proceedings should be transparent and acceptable to all affected parties.

The Commission should have a statutory role in participating, formulating and commenting on government economic and regulatory policies impacting on competition in the market place.

The Commission should consistently and fairly implement or apply all competition laws in addressing different types of restrictive business practices.

Suggested Scope and Provisions for a Competition Law

A recent report of the World Bank and the Organization for Economic Cooperation and Development (OECD) entitled, *A Framework for the Design and Implementation of Competition Law and Policy*, provides a suggested structure for a competition law, including wording for its substantive provisions. Some of the suggested provisions are accompanied by a brief commentary. It must be emphasized that the statutory provisions are only suggestions. Competition laws must be drafted to fit the legal and economic contexts of each country.

Reality Check

Given the central importance of competition in economic development, as well as the basic lack of capacity for enforcing competition in the Philippines, there is a need to engage in a general overhaul of the legal and regulatory system. Ideally, therefore, the introduction of true competition policy in this country should be done in a centralized and comprehensive manner. This would necessarily involve the introduction of a new comprehensive law, that would outline the anti-

competitive structures and behavior which need to be curtailed and the procedures for enforcing this, as well the creation of a new competition agency to implement the new law.

First Option: Comprehensive Approach

Therefore, the first option in introducing an effective legal and regulatory framework for anti-trust enforcement will be the passage of a new law which is comprehensive in scope and central to economic policy. This new law will have to contain all the major provisions governing the conduct of anti-trust enforcement and it will, in effect, modify the manner in which the government regulates the economic activities in the Philippines. The new law will centralize the different interventions of the government which relate to competition policy.

Second Option: Piecemeal Approach

Unfortunately, the political economy realities, as well as the administrative and other problems outlined above make the passage of a comprehensive anti-trust/competition law in the near future rather difficult. Although it is the more ideal approach, the comprehensiveness of the proposed new law may make it difficult to understand and appreciate, attract all kinds of political interventions, give rise to various obstacles to its timely passage, and render its actual implementation unwieldy.

Therefore, even if the comprehensive approach may be the ideal option, it may not be the most practical. This means we need to explore other possibilities if only to ensure that this country still introduces some form of improved legal and regulatory framework for anti-trust enforcement. One other possibility is to approach the problem in a more "piecemeal" manner. For example, rather than introduce a single comprehensive law, this could be divided into components and introduced as separate draft bills. The portion outlining the list of anti-trust violations may be separated from the list of remedies and the portion creating a new anti-trust body. The technical details of implementing these laws could then be contained in rules and regulations. Also, rather than introducing completely new legislation, the government could instead introduce only amendatory legislation and revise various existing laws relating to anti-trust/competition.

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I INTRODUCTION

Background

The recent introduction of economic reforms in the Philippines through substantial trade and investment liberalization, deregulation and privatization, has led to a slow realization that freer trade and open markets are good for Filipinos in general. This is due largely to the obvious efficiency and welfare gains brought about by increased *competition* from new products and services. Conversely, it can also be said of the Philippines that our long and sad history of underdevelopment can actually be traced to a lack of *competition* in our economy.

With this important realization, the Philippine government has adopted a policy of introducing more *competition*-enhancing measures, such as the further lowering of trade and investment barriers and the reform of certain economic regulations. Unfortunately, government officials have not even mentioned the need for a new and comprehensive framework for *anti-trust* policy and regulation, despite the central role played by *anti-trust* policy in economic reform measures for enhancing competition. There have been quite a number of draft bills for a proposed *anti-trust* or *competition* law filed in Congress; however, they have yet to be fully appreciated by our political leaders and they have yet to be filed as part of introducing a truly comprehensive new framework for *anti-trust* policy and regulation.

The introduction of a new framework for *anti-trust* policy and regulation will require much more than merely passing a new law. To avoid committing the mistakes of the past, a careful and in-depth analysis of the current approach of the Philippines to sustaining a market-oriented economy and regulating economic activity will be needed. Reviewing existing economic laws and regulations and testing their effectiveness as tools for promoting economic efficiency and public welfare through competition should also be done. This analysis can then form the basis for crafting a framework for *anti-trust* policy and regulation.

Rationale and Scope of the Study

This study is being undertaken as a component of a larger collection of studies of the Philippine Institute for Development Studies (PIDS) as part of the Philippine APEC Study Center Network (PASCN) project, "*Towards a Philippine National Competition Policy*." It has been commissioned as a means of developing specific recommendations for new *anti-trust* laws and regulations. The conceptual portions of the study, as well as much of the initial research on laws and regulations in the Philippines, are drawn largely from the previous work of the author in studies prepared by FTAsia Consulting for the Asia Foundation and Philexport-TAPS.

Since competition policy is a rather broad topic encompassing various aspects of functioning market economies, there is need to focus on specific key areas. The emphasis of this study is on the legal and regulatory aspects of competition policy, particularly the framework for effective enforcement of competition in all sectors of the Philippine economy. This is important because of its bearing on the actual implementation of competition policy in the country.

The scope of work and objectives of this study are as follows:

- a. To review existing anti-trust laws and regulations, especially with respect to how appropriate the provisions are in providing competitive conduct rules and balancing exclusionary with efficiency effects;
- b. To examine the effectiveness and adequacy of these laws and regulations;
- c. To examine how well these laws conform with international rules; and
- d. To suggest recommendations for reform.

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The study will have four major components:

1. *Rationale for a Legal and Regulatory Framework for Anti-Trust Enforcement in the Philippines* – Before anything else, there is a need to lay the basis for discussing a proposed new legal and regulatory framework for *anti-trust* enforcement in the Philippines, and hence, the rationale for this study. This means having to revisit the very importance of competition itself and the vital role it plays in economic development. This includes a very brief review of the theoretical bases for *anti-trust* policy and regulation. This section of the paper will also have to look into the political economy “realities” in the Philippines which make *anti-trust* regulation even more indispensable, taking into consideration the economic history of the Philippines, as well as the social conditions prevailing in Philippine society. Finally, this section will also review a few “success stories” from other countries and regional groupings, both developed and developing, which implemented their own *anti-trust* or competition laws and regulations.
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3. *Analysis of Existing Anti-Trust Regulation in the Philippines* – Knowing the existing laws and regulations for *anti-trust* enforcement at the disposal of the Philippine government, what is then the actual effectiveness of these laws and regulations in promoting *competition* in the Philippine economy? This section will analyze the state of *anti-trust* regulation in this country and examine the government’s capability to implement its *anti-trust* laws and regulations. It will study the general regulatory structure in place, and identify a number of the regulators and institutions involved in the *anti-trust* process. How have they managed to control the behavior of the players in various industries and sectors? How have they affected the structure of markets in the Philippine economy? What are the major problem areas?

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4. *Recommendations for a New Legal and Regulatory Framework for Anti-Trust Enforcement in the Philippines* – This section will recommend a new *anti-trust* policy and regulatory framework for the Philippines. Given the Philippines' long history of protectionism and over-regulation, market distortions are rampant in the economy despite the existence of basic *anti-trust* laws and regulations. Therefore, there is still a need to propose a more effective framework for *anti-trust* regulation in this country. Such a framework should first lay down the basic policy objectives and principles, as well as spell out the basic structure for regulation. This section will also suggest certain basic provisions for new *anti-trust* legislation and mechanisms for more effective enforcement.

II RATIONALE FOR ANTI-TRUST REGULATION

Why does the Philippines need a legal and regulatory framework for anti-trust enforcement? There is a need to first lay the basis for discussing a proposed new legal and regulatory framework for *anti-trust* enforcement in the Philippines, which is an objective of this study. First of all, the importance of *competition* and the vital role it plays in economic development need to be emphasized.

Concepts of Competition

The dictionary defines competition as an event in which one takes part in a contest.¹ In a commercial context, this means vying with other players (e.g. manufacturers, retailers, processors, merchants, and service providers) for business and trade in the market.

“Perfect competition”

Based on neo-classical economic theory, consumer welfare is maximized in conditions of perfect competition.² Perfectly competition has certain essential characteristics.³ First, the market must have numerous players, that is buyers and sellers, all of which are small relative to the market and none of which can exert a perceptible influence on the market, particularly regarding price. Second, there must be freedom and perfect mobility in the market, *i.e.* no barriers to entry and exit of players. Third, there must be ready access to information about market conditions so that the players know about the products in demand and the price that consumers are willing to pay for such products. Players must act rationally with the view of maximizing their income and profits. Finally, each player must act individually and independently of the others. Their individual decisions would not significantly affect the behavior and operation of the market.

Therefore, under perfect competition, there is both allocative efficiency, *i.e.* economic resources are allocated between different goods and services in the exact amounts desired by consumers as shown by their willingness to pay the price of goods and services, and productive efficiency, *i.e.* goods and services are produced at the lowest cost possible.

At the opposite end is monopoly. A monopoly is a market characterized by one seller and many buyers. Thus, a monopoly, and an oligopoly to a certain extent, being free from the constraints of competition, can cause allocative inefficiency by reducing supply and selling goods and services at higher prices, and productive inefficiency by incurring higher production costs as there are no competitive forces to reduce costs to the lowest possible level. Further allocative inefficiency also results when a monopolist or oligopolist uses its resources to preserve its abusive dominant market position.

Another important factor to consider is the desirability of competition in terms of non-economic values. The government has always protected agriculture, labor, and intellectual

¹ The Pocket Oxford Dictionary of Current English, 8th Ed, p. 169 (1992), Oxford, England.

² D. Swann, Competition and Consumer Protection, Ch. 3, (1979), London, England.

³ L. Dejillas, “Competition Policy and the Market Economy: The Philippine Experience” in Economic Policy and the Market Economy – The Philippine Setting, p. 102 (1996), Makati, Philippines.

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property. Competition may also force firms to cut down costs at the expense of safety, e.g. transportation firms. Witness how the bus companies have rickety old buses with drivers racing each other to the next bus stop or blocking other buses at stops in order to get more passengers.

Finally, there is a paradox of competition. In a competition, there necessarily is a winner. If the winning enterprise, after competing fairly, becomes a monopolist, it cannot be punished for playing by the rules. As will be seen, a monopoly by itself is not illegal under Philippine law but the abuse of monopoly power is.

“Contestable markets”

In a perfectly contestable market, entry into an industry is relatively free and the cost of exit therefrom is minimal.⁴ Enterprises will be constrained to ensure allocative and productive efficiency provided that the market in which they operate is contestable. This means that even with few players in the market, the market can be competitive inasmuch as new enterprises can freely enter and provide more competition or old enterprises can leave if there is too much competition and too little profit. In a perfectly contestable market, regulatory intervention by competition authorities is not necessary.

However, it may be said that this theory is only different from the theory of competition in the matter of emphasis. While competition theory focuses on many players as being essential, the theory of contestable markets focuses on the characteristics of the market in which the players operate.

“Workable competition”

Since nothing is truly perfect, not even competition, “perfect competition” remains a theory inasmuch as the conditions necessary for its occurrence are highly improbable. Between the opposite ends of perfect competition and monopoly, there are variations of market structures.

If perfect competition is unattainable, the best competitive arrangement that is practically attainable is what can be studied. Some economists have referred to this as *workable competition*.⁵ The difficulty lies in determining workable competition, which is what this paper seeks to set the parameters for.

Assuming the desirability of workable competition, the competition policy framework to be designed to protect it will face four challenges:

- (a) preventing enterprises from entering into agreements which do not have any beneficial features and which will restrict competition, either amongst themselves or between them and third parties;
- (b) controlling attempts by monopolists or dominant firms from abusing their market position and preventing new firms from entering the market;

⁴ Baumol, Panzar and Willing, “Contestable Markets and the Theory of Industry Structure” (1982). Bailey, “Contestability and the Design of Regulatory and Anti-Trust Policy” (1981) 71 Am Ec Rev 178-183.

⁵ Clark, “Toward a Concept of Workable Competition” (1940) 30 Am Ec Rev 241-256.

- (c) ensuring that workable competition is maintained in oligopolistic industries; and
- (d) monitoring mergers between independent enterprises, where the effect of the merger may be to concentrate the market and reduce competitive pressures.

Competition Policy

Competition policy can refer broadly to all government policies and laws and regulations aimed at establishing and maintaining competition. It covers measures aimed at promoting, advancing, and ensuring competitive market conditions by the removal or control and redress of the anti-competitive results of public and private restrictive practices.⁶

Competition policy is not the same as competition law. Competition policy is broader and covers diverse issues including, but not limited to, policies addressing monopolies, oligopolies, cartels, mergers, restrictive and anti-competitive trade practices, entry barriers, liberalization, deregulation, privatization, employment, and consumer protection. Competition law is but one of the means by which competition policy may be enforced.

Functions of competition policy

Several functions may be ascribed to competition law. It would be simpler to ascribe a single function which is the economic policy objective of maximizing consumer welfare by the efficient allocation of resources at the least cost. Devising laws and applying them would be also be made simpler. Realistically, however, competition law is utilized to achieve non-economic policy objectives as well. An examination will show that all of the following functions of competition are present in existing Philippine legislation.

Economic efficiency

Competition can be used to achieve allocative and productive efficiency and maximize society's wealth overall.⁷ Allocative efficiency is achieved because the producer will, for as long as it earns a profit, increase production. Under perfect competition, a producer cannot affect price to its advantage by decreasing production so there is no reason to limit the same. Thus, a producer will allocate its economic resources to increase output to the point at which marginal cost (production cost plus a sufficient profit margin to have encouraged the producer to enter the industry in the first place) will coincide with marginal revenue (the net addition to sales revenue of the last unit sold). The producer will thereby stay at optimal production and charge marginal cost for its goods or services, for to charge more would attract new producers into the market because of the profit opportunity and to charge less than marginal cost would be unprofitable to the producer. In contrast, without competition, an abusive monopolist can reduce production and raise prices, resulting in allocative and productive inefficiency.⁸

Consumer protection

⁶ R. Shyam Khemani, *The Role and Importance of Competition Law and Policy in the Region*, at 1.

⁷ D. Swann, *Competition and Consumer Protection*, Ch. 3, (1979), London.

⁸ Lipsey, *An Introduction to Positive Economics* (7th ed. 1989) Ch 13.

Competition, through policy and law, can protect the consumer by safeguarding the consumer against the power of monopolies, or the anti-competitive practices of independent enterprises, e.g. where a producer requires its distributors to sell at maintained prices preventing competition among the distributors. A balance must, however, be made between consumer welfare and creating a disincentive for producers to continue producing in the face of an unreasonable competition law and policy.

Economic equity

Competition can have a re-distributive function: the dispersal of economic power and the re-distribution of wealth, i.e. economic equity rather than economic efficiency. Competition can prevent any one firm or group of firms from abusing its/their dominant position or from blocking the entry of other firms to compete with it, e.g. monopolies, oligopolies, or cartels. But competition is a double-edged sword. While competition can give small- and medium-sized firms a fair chance to succeed, competition will also weed out the inefficient among these firms. Competition can also be used to generate employment.

Regional and international relations

Competition law and policy should also be considered within the context of various multilateral and regional agreements to establish trading blocs or common markets, such as, in the case of the Philippines, the ASEAN Free Trade Area (AFTA), the Asia-Pacific Economic Cooperation (APEC), and the World Trade Organization (WTO) with reference to the General Agreement on Tariff and Trade (GATT) which, however, treats competition law and policy in a piecemeal manner. All these arrangements have the principal objective of liberalizing trade and investments and, in fact, have caused "lowered impediments to international commerce."⁹

Regulation and control

Adherence to the mechanisms of the free market and free market forces implies that the government plays a basically subsidiary role in economic decisions. In this instance, competition, rather than direct government intervention, can be used to prevent the formation of permanently uncontrolled economic power.

Anti-Competitive Practices

The rationale for some form of legal and regulatory framework for anti-trust enforcement can also be understood by identifying the various forms of anti-competitive behavior that need to be dealt with.

Combinations

As the civil law and criminal law definitions are not antithetical, they can be combined. The following elements must be present for an act to constitute a illegal combination in restraint of trade:

⁹ P. Watson, "Practical Implications of the Post-GATT Order: Considerations for the Future Multilateral Agenda," at 1.

- (a) there must be an agreement in whatever form between two or more persons, e.g. contract, trust, conspiracy, concert of action, unification of interest or management;
- (b) the agreement must be acted upon;
- (c) the methods used in acting upon the agreement may include force, intimidation, deceit, machination, or any other unjust, oppressive or highhanded method; and
- (d) the action must result in: (i) the restraint of trade or commerce, or (ii) the prevention by artificial means of free competition in the market, or (iii) prejudice to lawful commerce, or (iv) the increase of the market price of the relevant merchandise or object of commerce or the market price of any other article wherein such merchandise or object of commerce is used for its manufacture, production, or processing, or importation, or (v) unfair competition causing damages.

A formal agreement to compete unfairly would be a straightforward case. Harder to define and catch is concert of action or concerted action, which is subtler. Concerted action or practice refers to an informal cooperation not characterized by a formal agreement or decision. Hence, even if an "agreement" cannot be proved, an erring enterprise will still be liable under civil and criminal laws if it is found that there is concerted action.¹⁰ Concerted action is a form of coordination between enterprises that knowingly substitute practical cooperation between or among them for the risks of competition, without having reached the stage where a so-called "proper agreement" has been concluded.¹¹ Concerted action does not require a contract. It is sufficient that the erring enterprises act *knowingly*, show *parallel behavior* (*i.e.* a common intention to avoid the risk of competition), and have any *direct or indirect contact between the erring enterprises* with the object or effect of influencing the conduct on the market of an actual or potential competitor or of disclosing the course of conduct which they have adopted or contemplated adopting on the market.

To illustrate, the European polypropylene cartel case¹² involved an oral agreement among 15 petrochemical firms to fix prices and sales volume targets. The oral agreement was not legally binding, *i.e.* enforceable as a contract, but nevertheless constituted a prohibited agreement. All the firms were held guilty even if not all the firms had participated in all aspects of the agreement. Moreover, even if an agreement could not be proved, concerted action was shown.

An agreement may be deemed to exist even if the firm only expressed an intention to conduct itself in the market in a particular way jointly with other firms,¹³ or where a firm appears to be acting unilaterally but there is a tacit or express understanding with or implied acceptance by, other firms which allows the apparently "unilateral" action. To illustrate, the AEG-Telefunken case involved a supplier that had a restricted system of distribution. AEG refused to supply distributors that were technically qualified but had a low profit margin. The European competition authority considered this distribution system as resulting from an

¹⁰ Case T-7/89 *Re Polypropylene Cartel SA Hercules* (1991) ECR II-1711

¹¹ Case 48/69 *ICI vs Commission* (Dyestuffs case 1972) ECR 619

¹² Case T-7/89 *Re Polypropylene Cartel SA Hercules* (1991) ECR II-1711

¹³ Case T-11/89 *Shell v. Commission* [1992] ECR II-757.

understanding between AEG with its distributors to exclude certain distributors from the system, which was an unfair competition practice.¹⁴

Monopolies

The word monopoly is taken from two Greek words: *monos* (alone) and *poleo* (sell).¹⁵ It is defined in the dictionary as exclusive possession or control of the trade in a commodity or service. This means a market situation of one seller and many buyers. Monopolies are not illegal *per se* or in themselves. The monopoly must be used for some wrongful purpose or result in some wrongdoing. The elements of an illegal monopoly are:

- (a) the monopoly must be over any merchandise or object of trade or commerce in any kind of enterprise, including agricultural, commercial and industrial enterprises; or
- (b) the monopoly may be by one or more persons who monopolize or agree to monopolize any merchandise or object of trade or commerce;
- (c) the purpose of the monopoly is to alter the price of the monopolized merchandise or object of trade or commerce or to restrain free competition in the market; and
- (d) the methods used in establishing or perpetuating the monopoly may include spreading false rumors or any other artifice to restrain free competition in the market, including force, intimidation, deceit, machination, the unification of interest or management, concerted action, or any other unjust, oppressive or highhanded method.

Oligopolies

The word oligopoly is taken from two Greek words: *oligoi* (few) and *poleo* (sell). This means a market situation of few sellers and many buyers. As in the case of a monopoly, an oligopoly is not illegal *per se* or in itself. The oligopoly must be used for some wrongful purpose or result in some wrongdoing. The elements of an illegal oligopoly are the same as for illegal combinations in restraint of trade.

Mergers and acquisitions

The corporation and securities laws, which govern mergers and acquisitions, do not prescribe penalties for mergers or acquisitions that could result in illegal combinations in restraint of trade or illegal monopolies or oligopolies. This is not to say that mergers, consolidations, and acquisitions are illegal *per se*. However, mergers and acquisitions which are not scrutinized for compliance with the rules of fair competition, can create monopolies and oligopolies and eliminate competition.

A merger takes place when one of the combining companies continues in existence and absorbs the other company or companies, while a consolidation takes place when both or all of the combining companies are deemed dissolved and lose their identity and form a

¹⁴ Case 107/82 AEG-Telefunken v. Commission [1983] ECR 3151.

¹⁵ The Pocket Oxford Dictionary 8th ed. (1992), Clarendon Press, Oxford, England, p 576.

new company which takes over the properties, powers, rights, and liabilities of the combining companies.¹⁶ An acquisition occurs when a company acquires all or substantially all of the assets of another company that may continue to exist as a subsidiary of the acquiring company.¹⁷

A merger or acquisition may be:

- (a) Horizontal, that is, when the combining companies are competing or active in the same market, e.g. the merger of Aboitiz, William Lines, and Gothong Lines - all shipping companies - into the WGA Super Ferry.
- (b) Vertical, that is, when the combining companies operate upstream and downstream of each other, e.g. the acquisition of Sequel Net, Inc., a local Internet service provider, by the Philippine Long Distance Telephone Company.
- (c) Conglomerate, that is, when the merger is between, or the acquisition is by, companies which are unrelated in their product range or which are not active either on the same upstream or downstream stages of the same market, e.g. Lopez family conglomerate consisting of, among others, the ABS-CBN Television and Broadcasting Corporation, Bayan Telecommunications Holding Corporation (a telephone company), Manila Electric Company (a power company), Sky Cable Network and Sun Cable (cable TV providers), Manila Water Company, and The Manila Chronicle (a newspaper).

There are varied legitimate reasons for corporate combinations. For instance, a financially weak company may need new investors, or a solvent company may want a new organizational set-up or may simply want to expand its business. However, the problem starts when the government fails to monitor combinations that can create abusive monopolies or illegal combinations that eliminate competition.

Other anti-competitive practices

There are other anti-competitive practices that can exist outside of a monopoly, oligopoly, or combination. These are horizontal and vertical restraints. Vertical restraints refer to business practices among firms that operate upstream or downstream from each other, e.g. an agreement to fix prices between flower farms and flower retailers. Horizontal restraints refer to business practices among firms that operate on the same level, e.g. an agreement to fix prices between flower retailers.

Other examples of anti-competitive practices are:

- (a) Cartel arrangements - These are generally arrangements to fix prices of goods or services. An exception, which may not be economically sound but may be dictated by a national state of events, are crisis cartels allowed by law and the Constitution. For instance, an acute rice shortage may constrain the government to fix prices.

¹⁶ 19 Am Jur 2d, p. 85.

¹⁷ Sec 40, Batas Pambansa Blg. 68 (1980), otherwise known as The Corporation Code of the Philippines.

- (b) Horizontal price-fixing - This occurs when firms supplying substitutable goods or services agree to sell at the same prices.
- (c) Excessive pricing - This anti-competitive practice is usually committed by dominant sellers. Charging a price that is excessive in relation to the economic value of the product is *prima facie* abusive conduct. The economic value can be inferred by examining prices for comparable goods or by examining the costs of the relevant goods or services supplied. The test is one of unfairness.¹⁸

Dominant buyers, e.g. supermarkets vis-à-vis suppliers, may also commit excessive pricing.

- (d) Predatory pricing - Normal price competition, which is a legitimate competitive response, must not be confused with predatory pricing. Prices below previous rates and below average total cost, by which a firm tries to eliminate a competitor, is an anti-competitive practice. This is because sale at such prices causes a loss, and the only possible rationale for such low prices is the elimination of the competitor in the long run and capture market share.

In international trade, dumping is considered predatory pricing, i.e. a firm exports its goods into another country at predatory prices.

- (e) Price discrimination - This occurs when a firm supplies its goods or services at different prices to buyers, even if selling costs to such buyers are identical.
- (f) Market sharing agreements - This is a situation where firms may agree to geographically divide a market and prohibit each other from selling in the other's territory.
- (g) Tie-in arrangements - This type of practice is generally a refusal to supply goods or services unless the buyer also obtains certain supplies or all of its supplies from the seller. For example, a paper manufacturer of a certain type of paper may refuse to supply the same to a buyer unless the buyer obtains all its other paper requirements from the paper manufacturer.

Entry and Exit Barriers

In the case of *Tatad v. The Secretary of the Department of Energy and The Secretary of the Department of Finance, etc.*,¹⁹ the Supreme Court "... conceded that the success of deregulation lies in a truly competitive market and there can be no competitive market without the easy entry and exit of competitors."

A 1992 study commissioned by the U.S. Agency for International Development (USAID) characterizes entry barriers in the Philippines as either policy-induced or structural.²⁰ The high concentration ratio in various industries is also directly attributable to entry barriers that prevent new participants from competing in the same industry.

¹⁸ Case 26/75 *Generale de produits laitiers continentaux NV v Commission* [1976] ECR 1367.

¹⁹ G.R. Nos. 14360 and 14361, Decision *En Banc* dated 03 December 1997 on the Motion for Reconsideration.

²⁰ SGV Consulting, Philippines, Barriers to Entry Study, Final Report, Vol. 1 (April 1992).

(a) Policy-Induced Entry Barriers

Policy-induced barriers²¹ to market entry include direct restriction of entrants, *i.e.* where the government explicitly limits the number of participants in a specific industry as a matter of policy, such as through the requirement of franchises or licenses to operate, or through rationalization programs. Fiscal incentives, when conferred selectively to certain firms or areas of economic activities, as well as credit subsidies, particularly when the same terms are not made available to all potential market entrants at all times, are also policy-induced barriers.

Other such barriers to entry include bureaucratic requirements which can significantly raise the cost of setting up or expanding firms, import restrictions and tariffs which reinforces the dominant or monopolistic position of incumbent enterprises or which sustain incumbents despite inefficiency, and price or rate regulation that set price limits and discourage entry and maintain the existing configuration of firms in an industry.

(b) Exit Barriers

Exit barriers can also discourage the entry of new market players as these make it difficult for investors to shift resources from one economic activity to another.

Foreign exchange controls may make it difficult for a foreign investor to remit earnings to its home country or even to dissolve a company when its project has been completed. With floating exchange rates, domestic currency is likely to depreciate and offer new protection from import competition, if domestic companies fail to rationalize high-cost operations and improve productivity. For example, currency devaluations in Mexico have offset the impact of tariff reductions under the North American Free Trade Agreement (NAFTA).²²

(c) Structural Barriers

Structural barriers²³ cover scale economies and excess capacity, absolute advantages, or those arising from the peculiar nature of the technology or marketing enjoyed by incumbents, high capital requirements and imperfect capital markets, predatory or limit pricing, product differentiation and brand loyalty, and incumbent reactions which may include the unjustified resort to regulatory processes or the judicial system in order to block, or otherwise make conditions extremely difficult for, new market entrants.

For example, quotas, voluntary export restraints, anti-dumping and countervailing duties are among the instruments that governments can wield to limit import competition. Restrictions on direct foreign investments or preferential tax treatment for domestic firms may increase.

²¹ *Ibid.*

²² Gerald E. Meyerman and Mario A. Cuevas, "Competition Policy in a Global Economy - An Interpretive Summary," The International Bank for Reconstruction and Development/The World Bank (1998), Washington, D.C., U.S.A., at 6.

²³ Barriers to Entry Study, *op. cit. supra* Note 41.

An inelastic supply of imports may also prevent competition, despite trade liberalization. This occurs when increased demand for imports can only be met at significantly higher prices, or when imports are comparatively insensitive to domestic price changes.²⁴

Importers and foreign firms may also find it more profitable to become parties to anti-competitive domestic arrangements, rather than to compete. This can result in price-fixing or market-sharing arrangements, particularly in concentrated industries in which there are only few firms worldwide, e.g. petrochemicals, pharmaceuticals, and telecommunications.

(d) Other Disincentives to Entry and Non-Tradables

The lack or inadequacy of infrastructure and other support services, high operating costs, high criminality and a worsening peace and order situation has also aggravated the sorry state of market conditions in the Philippines.

Non-tradable²⁵ goods and services include high weight-to-value products with high transport costs (e.g. cement, steel), perishables (e.g. food), legal, financial, and other services. Without effective competition, domestic companies can raise prices up to the international price plus transport costs, and still keep out imports. Differences in income, cultures, tastes, and standards of product safety and consumer protection, and technical standards may also separate markets.

The foregoing barriers to entry have helped perpetuate the stronghold of existing dominant firms in the market. They have resulted in higher prices in the domestic market, compared to export prices. They have likewise encouraged inefficient and complacent firms, which are content with low profits and unwilling to innovate due to the absence of competition, to continue to operate. The same barriers have instilled rent-seeking behavior. This means that the generation of monopoly rents have induced firms to continue focusing on those rents rather than producing for a competitive external market. Moreover, efforts towards market reforms are rendered ineffective, due to private enterprises' conduct which undermine these reforms.

The existence of barriers to entry also justify government's continued participation in determining when and how competition should operate in the market. Too much government intervention in the market causes dysfunction.

Political Economy Considerations

An effective legal and regulatory framework for anti-trust enforcement can also contribute to a stable political economy. In fact, it is quite important to appreciate and understand a country's political economy in formulating such a framework. The interaction of key sectors of a state with each other (e.g., government-business, government-civil society, etc.) determines the quality and effectiveness of anti-trust enforcement. A weak government bureaucracy in a so-called "soft state," for example, may undermine well-crafted and sophisticated laws

²⁴ Gerald E. Meyerman and Mario A. Cuevas, *op. cit.* Note 44.

²⁵ *Ibid.*

and regulations. In turn, effective anti-trust enforcement may lead to less political pressures on government and result in a more stable society.

The political considerations for the Philippines as they are related to anti-trust enforcement and competition policy are discussed in Chapter IV of this study.

Anti-Trust Enforcement in Other Countries

A cursory review²⁶ of the developments in anti-trust enforcement in other Asia Pacific economies may be useful to benchmark the progress of the Philippines, as well as to better appreciate the trends at the international and regional levels.

Indonesia

The Indonesian *Competition Law* was only recently enacted on 05 March 1999 after lengthy deliberations in Parliament and as part of economic restructuring efforts following the Asian financial crisis. The Law takes full effect on 05 March 2000.

The over-all objectives of the *Competition Law* are to prohibit anti-competitive behavior in order to safeguard the public interest, to increase the efficiency of the national economy, and to enhance social welfare. The Law is also designed to build a conducive business environment through fair competition that assures equal business opportunity for all business actors, to prevent monopoly practices and unfair business competition, and to create efficient and effective business activities.

The *Competition Law* prohibits oligopoly, price-fixing, market division, boycott, cartels and trusts, vertical integration, tying-in agreements, and agreements with foreign parties that may lead to monopoly practices and unfair business competition. Mergers and acquisitions are also prohibited if they lead to monopoly and unfair competition.

The Law includes the establishment of an independent enforcement agency called the Business Competition Oversight Commission, which reports to the President. The Commission's responsibilities include examining agreements that may lead to monopoly or unfair practices, investigating abuse of dominance, giving policy recommendations to the government, and issuing and compiling implementation guidelines. The Commission has the authority to conduct investigations and impose administrative and punitive sanctions. Administrative sanctions may be in the form of cancellation of business permit or prohibition of interlocking directorships. Punitive sanctions are in the form of fines and imprisonment. Parties to a case may appeal the Commission's decisions to a District Court or the Supreme Court.

Malaysia

Efforts to draft a competition law or trade practices law begun in 1993, but no law has yet been promulgated. Various consultations and information campaigns have been conducted in order to get a consensus from and educate the public.

²⁶ Gerald E. Meyerman and Mario A. Cuevas, "Competition Policy in a Global Economy - An Interpretive Summary," The International Bank for Reconstruction and Development/The World Bank (1998), Washington, D.C., U.S.A., at 10-15. Price Waterhouse Coopers, "APEC Competition Law Study," (July 1999), at 105-114. International Bar Association, "International Business Lawyer," (December 1999), at 488-492.

Existing laws do not prohibit restrictive trade practices or abuse of dominance. However, competition policy has been integrated in the process of deregulation and privatization. A regulatory body monitoring privatized public utilities seeks to promote competition by allowing other firms to operate certain parts of privatized service through licensing arrangements. For example, eight firms have been licensed to operate telecommunications services in competition with the dominant privatized *Telekom Malaysia*, while several independent power producers have been allowed to generate and sell energy to the dominant *Tenaga Nasional Berhad*. As part of the WTO mandate of trade liberalization, tariffs and non-tariff restrictions are being dismantled to encourage domestic and international trade.

There are also approximately 30 laws which regulate enterprises and promote consumer protection, as well as administrative rules and regulations, such as those administered by the Foreign Investment Commission which govern the acquisition of assets, mergers, and takeovers.

Singapore

Singapore does not have any formal competition laws. Its "competition policy framework" depends on a free and open market that, in turn, ensures a competitive environment in the domestic economy. For the services sector, in which the government has traditionally been the sole provider, Singapore has commenced a program of corporatization and privatization in order to subject the such services to competition and market disciplines.

Japan

Japan's *Anti-Monopoly Act (AMA)* was passed in 1947. The Japan Fair Trade Commission (JFTC) is an independent regulatory commission created under the AMA. American laws exerted a strong influence on the AMA which had the following goals:

- Promote free and fair competition.
- Stimulate the creative initiative of entrepreneurs.
- Encourage business activities, to
- Increase employment levels and people's real income.
- Promote the development of the economy while protecting the interests of consumers in general.

To achieve these goals, the AMA aims to eliminate any unreasonable constraint to business activities by prohibiting private monopolies, unreasonable restraints of trade and unfair trade practices, and preventing excessive concentration of market power. In 1977, the AMA was amended to impose tougher sanctions against cartel.

In addition to regulating common anti-competitive conduct, the AMA also regulates mergers, acquisitions, shareholdings and interlocking directorates that are subject to filing requirements and scrutiny by the JFTC. The JFTC may direct the erring enterprises not to implement or to terminate or to take the necessary steps to lessen the possible anti-

competitive impact of a transaction. Almost all enterprises contemplating mergers with anti-trust concerns consult the JFTC before they formally file for approval and registration of mergers. The JFTC regularly published its merger guidelines and actual merger consultation cases in order to ensure transparency.

The JFTC also published recommendations for deregulation and exemption systems under the AMA. On the basis of these recommendations, the concerned government agencies modify or abolish economic regulations. Thereafter, the JFTC monitors the impact of these changes to determine if significant competition has come about.

In the mid-1980s, the U.S. government alleged possible anti-competitive practices²⁷ of Japanese enterprises and associations. As a consequence, Japan improved its enforcement of competition policy through the following measures: increasing the JFTC staff and budget allocation, formal action by the JFTC particularly on price-fixing cartels and bid rigging, disclosure of detailed information on cases, increasing the severity of penalties, and publication of JFTC guidelines on distribution and trade practices. In 1991, Japan raised the surcharge rate on cartels to 6% from 1.5% of sales. In 1992, the maximum fine for criminal anti-competitive conduct was raised 2000% or up to ¥100 million or approximately P33 million.²⁸

Korea

Since 1966, government intervention helped in South Korea's rapid economic development. However, such a strategy is no longer recognized as suitable in the current international economic context. In 1996, the *Monopoly Regulation and Fair Trade Act* (MRFTA) was amended to boost the effectiveness of competition law on a wider spectrum. Remedial measures were the earlier focus of competition law, and preventive measures were neglected. Thus, some monopolistic and oligopolistic enterprises enjoyed the protection of "government supervision." The Korean Fair Trade Commission (KFTC) has begun concentrating on markets where monopolists and oligopolists have become entrenched and identifying restraints on competition in these markets. The KFTC is also studying *chaebols*, that is large business groups engaged in group-based competition through mutual assistance. The fleet-like expansion and management of such groups are a disincentive to building individual competitiveness. Under the 1996 amendments to the MRFTA, the ceiling for debt guarantees among affiliates of large business groups has been decreased to 100% of the individual firm's assets from 200%. Penalties for anti-competitive conduct have also become stiffer. For example, the KFTC imposed its highest fine, to date, on three paper producers the amount of 8.3 billion won (US\$10 million or approximately P437.8 million²⁹) for engaging in collusive activity.

All anti-competitive mergers are now forbidden, regardless of the size of the enterprises. Previously, only mergers involving assets exceeding 20 billion won (US\$25 million approximately P1.1 billion) were evaluated by the KFTC. Pre-merger notification to

²⁷ In *Matsushita Electric Industrial Co. Ltd., et al. v. Zenith Radio Corporation, et al.*, 475 US 574 (1986), a U.S. television manufacturer claimed that a Japanese company was exporting television sets to the U.S. at dumped prices. The U.S. Supreme Court ruled that the actions of Japanese television makers were not demonstrably predatory, under the Sherman Act. The U.S. Supreme Court had stricter standards for predatory pricing.

²⁸ P1.00 = ¥3.0194 (Bangko Sentral ng Pilipinas Exchange Rate as of 18 September 1998).

²⁹ US\$1.00 = P43.78 (Bangko Sentral ng Pilipinas Exchange Rate as of 18 September 1998).

the KFTC is required for enterprises with a minimum size of 100 billion won (US\$125 million or approximately P5.4 billion).

The importance of competition policy was signaled by the elevation of the KFTC to a ministerial-level agency. The KFTC chairman is now a Cabinet member. More significantly, the KFTC is specifically responsible for removing restraints to competition cause by government policy and initiating procedures to review anti-competitive regulation. These changes reflect the growing recognition that competition policy is extremely important in a globally integrated economy and need to be coordinated with the other economic policies of a country.

China

China's first competition legislation was the *Regulations on Development and Protection of Competition*, which was promulgated in 1980 by the Chinese government, through the State Council. It still featured characteristics of the centrally planned economy prevailing at the time. Nevertheless, the first Regulations had a significant impact since shed new light on the theoretical research on competition in China.

The Regulations were eventually modified on 01 December 1993, when the *Law for Countering Unfair Competition* became effective, after having been endorsed by the Standing Committee of the National People's Congress on 02 September 1993. This was the result of the work of a unified task force formed in 1987, consisting of several departments, such as the State Legislative Bureau (now known as the State Legislative Office) and the State Administration for Industry and Commerce (SAIC) and others, to draft a national law for competition. A new Anti-Monopoly Law is currently being drafted.

In addition, competition law and policy are also embodied in other new laws such as the *Law of the People's Republic of China for Protecting Consumer's Rights and Interests* (promulgated in 1993), as well as the *Regulations on Anti-dumping and Anti-subsidization* (promulgated by the State Council in 1997).

Taiwan

After a decade of policy debate and deliberation, Taiwan's *Fair Trade Law* was promulgated on 04 February 1991 and enforced a year later with the establishment of the Fair Trade Commission. The *Fair Trade Law* covers a wide range of anti-trust and unfair competition concerns. The anti-trust portion of the Law regulates monopolies, mergers, and concerted actions. In general, the Law permits the existence of monopolies, as long as they do not abuse their market power. Mergers involving parties reaching a certain sales volume or market share must apply with the Commission for approval. The Commission in principle forbids concerted actions but allows for exceptions which require the Commission's prior approval. The unfair competition portion of the Law regulates practices such as resale price maintenance, various other types of vertical constraints, acts which are likely to impede fair competition, false and deceptive advertising, multi-level sales and other practices which are deceptive or grossly unfair.

In order to keep pace with the current social and economic circumstances, as well as to anticipate future developments, the *Fair Trade Law* was amended as of 05 February 1999. Salient points of the amendments include: increasing pecuniary penalties administrative and criminal fines directed at persons who and enterprises that violate the Fair Trade Law. This upgraded the Fair Trade Commission's capability to regulate

enterprises that do not comply with the Commission's directives; requiring the cases to be dealt through administrative means before resorting to the judicial system, except for those cases involving illegal multi-level sales schemes.

Australia

Australia first enacted its competition law in 1906 with the passing of the *Australian Industries Preservation Act*, which prohibited monopoly and restraints of trade. Due to early strict judicial interpretation and constitutional limitations, this, and subsequent related legislation, was not entirely successful until the enactment of the *Trade Practices Act of 1974*, which contains Australia's basic competition law which provides a comprehensive regime for business competition and regulation.

The competition laws were greatly enhanced following the adoption of the 1993 Hilmer Committee recommendations and the development of the National Competition Policy, agreed to in 1995 by the Federal, State and Territory governments. Key features of the new laws include the following:

- An independent regulator, the Australian Competition and Consumer Commission (ACCC), now undertakes compliance and education activities, and enforces the law by pursuing court action.
- Universal application of the competitive conduct rules to all sectors of the Australian economy, including government business activities and the unincorporated sectors (e.g., the professions).
- Mechanisms for providing access to essential services provided by means of significant infrastructure facilities; and price oversight of State and Territory government businesses through the *Price Surveillance Act of 1983*.

Australia's competition laws apply to all forms of business and all industry sectors. They fit within a competition policy framework that involves many other initiatives such as review of anti-competitive regulation and the application of a competitive neutrality policy to government businesses.

New Zealand

New Zealand has had a variety of competition laws since 1905. Between 1958 and 1986 the trade practices law was based primarily on United Kingdom legislation. This type of legislation was formalistic, consisting of lists of practices, which could be investigated, and generally only preventing those considered contrary to the public interest. A change of approach was made with the enactment of the *Commerce Act* in 1986, at the same time as a number of measures designed to increase the competitiveness and efficiency of the New Zealand economy by reducing Government control and direct regulation of business activity. The *Commerce Act* was seen as a necessary accompaniment to the market reforms, as it ensured that private firms did not replace the previous government regulation with anti-competitive behaviour. The Act was needed to:

- Define the rules by which business were to operate in the newly deregulated, open economy.

- Deter the possible spread of restrictive practices and mergers by firms wishing to reduce the new competition.
- Provide a basis for the regulation of corporatized and privatized utilities.

In this environment, it was intended that the Commerce Act would promote competition through legislation which:

- Prohibits the establishment or operation of business arrangements which reduce competition;
- Prohibits firms from using market power for anti-competitive purposes;
- Provides for the scrutiny of mergers and take-overs to prevent undesirable acquisitions of market power; and
- Provides for price control in markets where there is an absence of competition.

The Act was largely modelled on the Australian *Trade Practices Act*. The enactment of the Act represented a shift in competition law approach in New Zealand moving from an abuse control to a prohibition law modelled on the Australian Act. New Zealand's approach, like Australia, is to focus on the behavior of industries rather than their structure, and recognizes that in some cases an efficient industry structure may imply fewer competitors.

Mexico

The *Federal Law on Economic Competition (FLEC)* was enacted on 23 June 1993 creating the Federal Competition Commission as the agency in charge of enforcing the law. The Federal Competition Commission was designed to function as an autonomous administrative body of the executive branch within the Mexican Secretariat of Commerce (*Secretaria de Comercio y Fomento Industrial* or SECOFI). The President appoints a panel of five commissioners, including the Commission president, to form a plenary session with decisions made by majority vote. The Commission is empowered to:

- Conduct investigations of competition violations initiated at the request of interested parties or by the Commission itself.
- Issue administrative rulings and assess penalties for violations.
- Render advisory opinions regarding competition policy questions.
- Participate in the negotiation of international agreements regarding competition policy.

This antitrust statute consists of 39 articles that establishes economic and legal regulations for all economic agents in Mexico. This includes all government agencies or entities, individuals, private companies, state owned companies or companies with government participation, associations, professional organizations, trusts and the like.

III SURVEY OF EXISTING ANTI-TRUST LAWS AND REGULATIONS IN THE PHILIPPINES

Anti-trust regulation is not new to the Philippines. Apparently, old *anti-trust* provisions of U.S. laws found their way into the Philippine Constitution, and Criminal and Civil Codes. *Anti-trust* enforcement is also implicitly vested in various regulatory agencies and bodies. This section of the paper will survey these existing laws and regulations that form what can be deemed the existing *anti-trust* and/or *competition* policy framework of the Philippines. This survey will also cover draft bills of the proposed *anti-trust* or *competition* law of the Philippines.

Anti-Trust Law in the Philippines

The Constitution

Under the Constitution,³⁰ the State is mandated to regulate or prohibit, for the sake of public interest, monopolies, combinations in restraint of trade, and other unfair competition practices. These provisions were based on the U.S. Sherman Act.

Note that the Constitution does not prohibit monopolies *per se*. Monopolies are not illegal in themselves, in contrast with combinations in restraint of trade and other unfair competition practices that are illegal *per se*. The latter are to be prohibited without exception.

However, since the Constitution does not define what would constitute unlawful monopolies, or combinations in restraint of trade or unfair competition practices, separate legislation and/or case law are the bases for making such definitions.

Criminal Law

Act No. 3815 as amended, otherwise known as the Revised Penal Code, punishes anti-competitive behavior that is criminal in nature. Article 186 defines and penalizes monopolies and combinations in restraint of trade and Article 187 provides penalties.

Combinations in restraint of trade are defined as:

- (1) any agreement, whether in the form of a contract or conspiracy or combination in the form of trust or otherwise, resulting in the restraint of trade or commerce; or
- (2) preventing by artificial means free competition in the market; or
- (3) any manner of combination, conspiracy, or agreement between or among manufacturers, producers, processors, or importers of any merchandise or object of commerce, or with any other persons, for the purpose of making transactions prejudicial to lawful commerce, or increasing the market price of

³⁰ Constitution, Article XII, Section 19.

such merchandise or object of commerce or any other article in the manufacture, production, or processing, or importation of which such merchandise or object of commerce is used.

Illegal monopolies are defined as:

- (1) *monopolizing* any merchandise or object of trade or commerce; or
- (2) combining with any other person or persons to *monopolize* any merchandise or object of trade or commerce,

in order to alter the price thereof by spreading false rumors or making use of any other artifice to restrain free competition in the market.

The Revised Penal Code also penalizes other frauds in commerce and industry such as falsely marking gold and silver articles and altering trademarks.³¹

Civil Law

Republic Act No. 386 (1949) as amended, otherwise known as the Civil Code of the Philippines, took effect in August 1950. It allows the collection of damages arising from unfair competition in agricultural, commercial, or industrial enterprises or in labor.³² It also allows the collection of damages arising from abuse in the exercise of rights and in the performance of duties,³³ e.g. abuse of a dominant market position by a monopolist.

Peculiarly enough, the Civil Code does not define unfair competition and merely lists the means by which unfair competition can be committed: force, intimidation, deceit, machination, or any other unjust, oppressive or highhanded method.

Treble damages for civil liability arising from anti-competitive behavior is allowed under Republic Act No. 165, otherwise known as An Act to Prohibit Monopolies and Combinations in Restraint of Trade.

Special Laws

Special laws specifically address some unfair competition practices.

- (1) Republic Act No. 8293 (1997), otherwise known as the Intellectual Property Code of the Philippines

This new law provides for the protection of patents,³⁴ trademarks,³⁵ and copyrights,³⁶ and the corresponding penalties for infringement.

- (2) Batas Pambansa Blg. 68 (1980), otherwise known as the Corporation Code of the Philippines

³¹ Republic Act No. 166 (1947).

³² Article 28.

³³ Article 19.

³⁴ Rep. Act No. 8293 (1997), at Part II.

³⁵ *Id.*, at Part III.

³⁶ *Id.*, at Part IV.

This law provides for the rules regarding mergers and consolidations,³⁷ and the acquisition of all or substantially all the assets or shares of stock of corporations.³⁸ It must be noted, however, that the Corporation Code does not address the problem of the probable abuse of a dominant position when horizontal mergers occur, e.g. merger of three (3) shipping lines – Aboitiz, William Lines, and Gothong Lines into the WGA Super Ferry, or in case of vertical acquisitions, e.g. Philippine Long Distance Telephone Company with respect to Sequel Net (an Internet service provider) and Home Cable.

- (3) Batas Pambansa Blg. 178 (1982) as amended, otherwise known as the Revised Securities Act

This law complements the Corporation Code. It prohibits and penalizes the manipulation of security prices and insider trading.³⁹

- (4) Republic Act No. 7581 (1991), otherwise known as the Price Act, and Republic Act No. 7394 (1932), otherwise known as the Consumer Act of the Philippines

Consumer welfare and protection is also an important aspect of competition policy. In this area, the significant laws are the Price Act and the Consumer Act of the Philippines.

The Price Act defines and identifies illegal acts of price manipulation, such as, hoarding, profiteering and cartels. It also seeks to stabilize the prices of basic commodities and prescribes measures against abusive price increases during emergencies and other critical situations through price controls and mandated ceiling mechanisms.

The Consumer Act of the Philippines provides for consumer product quality and safety standards. It also covers deceptive, unfair, and unconscionable sales acts and practices (including weight and measures, product and service warranties), consumer credit transactions, and penalties for violations of the statute.

Agencies Enforcing Anti-Trust Law in the Philippines

Under these various special laws, there are certain agencies which should be enforcing competition:

General Agencies

- (1) Department of Trade and Industry (DTI) and its attached agencies, including the Bureau of Trade Regulation and Consumer Protection (BTRCP), Bureau of Food and Drugs (BFAD), Intellectual Property Office (IPO), Bureau of Product Standards (BPS)

The DTI, BTRCP, BFAD, and BPS look out for consumer welfare, and the IPO is in charge of the protection of intellectual property rights.

- (2) Securities and Exchange Commission (SEC)

³⁷ Title IX.

³⁸ Title IV, Sections 40 and 42.

³⁹ *Id.* at secs. 26 and 30. Sec. 15 also provides for the revocation of registration for engaging in fraudulent acts in connection with the sale of securities. Sec. 27 prohibits manipulative and deceptive devices, sec. 28 artificial measures of price control, and sec. 29 fraudulent transactions.

The SEC supervises and monitors stock and non-stock corporations, and resolves intra-corporate disputes, and the regulates all forms of securities, brokers and dealers, financing companies and investment houses.

(3) Philippine Economic Zone Authority (PEZA)

The PEZA supervises ecozone developers and ecozone-registered enterprises.

(4) Bases Conversion and Development Authority (BCDA)

The BCDA administers and develops former military bases, other than Subic and Clark, and BCDA-registered enterprises.

(5) Subic Bay Metropolitan Authority (SBMA)

The SBMA administers and develops the former American Subic Naval Base and SBMA-registered enterprises.

(6) Clark Development Corporation (CDC)

The CDC administers and develops the former U.S. Clark Air Base, and Clark-registered enterprises.

(7) National Library

The National Library is in charge of copyright registration. Together with the Supreme Court Library, it is also the depository of copyrighted materials and other items.

Industry-Specific Agencies

- Bangko Sentral ng Pilipinas (BSP), for banks and financial institutions
- Insurance Commission (IC), for insurance companies
- Philippine Tourism Authority (PTA), for the tourism industry
- Housing and Land Use Regulatory Board (HLURB), for land use and real estate development
- National Food Authority (NFA), for rice, corn, wheat and other grains and food stuffs
- Sugar Regulatory Administration (SRA), for the sugar industry
- Philippine Coconut Authority (PCA), for the coconut industry
- Garments and Textile Export Board (GTEB), for garment manufacturers and exporters
- Board of Investments (BOI), for pioneer or non-pioneer industries and those listed in the Investments Priorities Plan, availing of the incentives under the Omnibus Investments Code.
- National Telecommunications Commission (NTC), for telecommunications companies
- Land Transportation Franchising and Regulatory Board (LTFRB), for common carriers for land
- Civil Aeronautics Board (CAB), for companies engaged in air commerce
- Maritime Industry Authority (MARINA), for the shipping industry

- Philippine Ports Authority (PPA), for port operators and arrastre services
- Department of Energy (DOE), Energy Regulatory Board (ERB), and the National Power Corporation (NAPOCOR), for power generation companies and oil companies.

A more thorough listing of various laws and regulations affecting competition is attached hereto as Annex A. Although these various laws and regulations do not explicitly implement competition policy, they all either directly or indirectly restrict or open market access or investment flows, and hence, affect competition.

International Commitments

The WTO agreements implicitly encourage international competition through trade liberalization. The agreements that are directly relevant to competition policy and restrictive business practices are:

- Agreement on the Implementation of Article VI of GATT 1994 on anti-dumping
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards, particularly Article 11:2 on voluntary export restraints, orderly marketing arrangements, etc. maintained by the government, and Article 11:3 on equivalent non-governmental measures
- General Agreement on Trade in Service (GATS), particularly Article VIII on supply of services by a monopolist in a member country, and required consultations with other member countries
- Agreement on Trade-Related aspects of Intellectual property Rights (TRIPs), including trade in counterfeit goods, particularly Article 8 on the abuse of intellectual property rights by right holders and Articles 31 and 40 on licensing practices and conditions on use
- Agreement on Trade-Related Investment Measures (TRIMs), particularly Article 9 on amending TRIMs to be complemented with investment policy and competition policy.

Jurisprudence

Since the law itself is not clear, case law or judicial interpretation is particularly important in defining unlawful monopolies, combinations in restraint of trade, and unfair competition practices.

The Supreme Court has affirmed the need to "... recast our laws on trust, monopolies, oligopolies, cartels and combinations injurious to public welfare – to restore competition where it has disappeared and to preserve it where it still exists. In a word, we need to perpetuate competition as a system to regulate the economy and achieve global product quality."⁴⁰

⁴⁰ *Tatad v. The Secretary of the Department of Energy and The Secretary of the Department of Finance, etc.*, G.R. Nos. 14360 and 17867, Decision *En Banc* dated 03 December 1997 on the Motion for Reconsideration,

To date, there have been only two cases decided by the Supreme Court defining monopoly. In the case of *Gokongwei, Jr. v Securities and Exchange Commission, et al.*,⁴¹ the Supreme Court narrowly defined monopoly as "unified tactics with regard to price." Further, the Supreme Court apparently considered a monopoly as undesirable in itself, and not the abuse of a monopoly or dominant position.

"A 'monopoly' embraces any combination the tendency of which is to prevent competition in the broad and general sense, or to control prices to the detriment of the public. In short, it is the concentration of business in the hands of a few. The material consideration in determining its existence is not that prices are raised and competition actually excluded, but that power exists to raise prices or exclude competition when desired. Further, it must be understood that the idea of a monopoly is now understood to include a condition produced by the mere act of individuals. Its dominant thought is the notion of exclusivity or unity, or the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. It is, in brief, unified tactics with regard to price."

In the *Gokongwei* case, John Gokongwei, Jr. had acquired enough SMC shares of stock to get himself elected to the board of directors of San Miguel Beer Corporation (SMBC), a beer manufacturer. However, Mr. Gokongwei also controlled a rival beer manufacturing company, Asia Brewery, Inc. The Supreme Court held Mr. Gokongwei's action as constituting unfair competition.

In the *Tatad* case,⁴² the Supreme Court, in its original decision, held that:

"A monopoly is a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right or power to carry on a particular business or trade, manufacture a particular article, or control the sale or the whole supply of a particular commodity. It is a form of market structure in which one or a few firms dominate the total sales of a product or service." (*Citations omitted*)

In the *Gokongwei* case, it was likewise held that a monopoly can be achieved through the "suppression of competition by the unification of interest or management, or it may be thru agreement and concert of action."⁴³ Thus, even mergers and consolidations of companies, where these could lead to unfair competition, can be regulated.

The *Tatad* case⁴⁴ also defined combinations in restraint of trade and differentiated a combination from a monopoly:

"On the other hand, a combination in restraint of trade is an agreement or understanding between two or more person, in the form of a contract, trust, pool, holding company, or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce

citing the State of the Nation Address of President Fidel V. Ramos, 3rd Session of the Ninth Congress, 25 July 1994.

⁴¹ G.R. No. L-45911, 89 SCRA 339 (1979).

⁴² G.R. Nos. 124360 and 127867, Decision *En Banc* dated 05 November 1997.

⁴³ *Id.*, at note 41.

⁴⁴ *Id.*, at note 42.

in a certain commodity, controlling its production, distribution and price, or otherwise interfering with the freedom of trade without statutory authority. Combination in restraint of trade refers to the means while monopoly refers to the end." (*Citations omitted*)

Note that the Supreme Court emphasized that for unfair competition to exist, there need not be an actual injury. It is sufficient that the "power exists to raise prices or exclude competition when desired."

With its ruling that the Senate did not commit a grave abuse of discretion in ratifying the WTO Agreement and its three Annexes, the Supreme Court removed any judicial obstacle against the adoption by the government of a policy of trade liberalization by enlisting the Philippines in the WTO.⁴⁵

"Moreover, GATT itself has provided built-in protection from unfair foreign competition and trade practices including anti-dumping measures, countervailing measures and safeguards against import surges. Where local business are (*sic*) jeopardized by unfair foreign competition, the Philippines can avail of these measures. There is hardly therefore any basis for the statement that under the WTO, local industries and enterprises will all be wiped out and that Filipinos will be deprived of control of the economy. Quite the contrary, the weaker situations of developing nations like the Philippines have been taken into account; thus, there would be no basis to say that in joining the WTO, the respondents have gravely abused their discretion. **True, they have made a bold decision to steer the ship of state into the yet uncharted sea of economic liberalization. But such decision cannot be set aside on the ground of grave abuse of discretion, simply because we disagree with it or simply because we believe only in other economic policies.** As earlier stated, the Court in taking jurisdiction over this case will not pass upon the advantages and disadvantages of trade liberalization as an economic policy. It will only perform its constitutional duty of determining whether the Senate committed grave abuse of discretion.

x x x

The WTO reliance on 'most favored nation,' 'national treatment,' and 'trade without discrimination' cannot be struck down as unconstitutional as in fact they are rules of equality and reciprocity that apply to all WTO members. **Aside from envisioning a trade policy based on 'equality and reciprocity,' the fundamental law encourages industries that are 'competitive in both domestic and foreign markets,' thereby demonstrating a clear policy against a sheltered domestic trade environment, but one in favor of the gradual development of robust industries that can compete with the best in foreign markets.** Indeed, Filipino managers and Filipino enterprises have shown capability and tenacity to compete internationally. And given a free trade environment, Filipino entrepreneurs and managers in Hong Kong have demonstrated the Filipino capacity to grow and to prosper against the best offered under a policy of *laissez faire*." (Emphasis supplied)

⁴⁵ Wigberto E. Tañada, *et al.* v. Edgardo J. Angara, *et al.*, G.R. No. 118295, *En Banc* Decision dated 02 May 1997 (272 SCRA 18).

Proposed Anti-Trust Legislation

Realizing the deficiencies of the existing legal and regulatory systems for enforcing competition, the Philippine government, through the legislature, has been attempting to pass new anti-trust or competition legislation since the early 1980s. The numerous draft bills have been quite varied, having been adopted from various existing anti-trust and competition laws around the world. Unfortunately, a lack of appreciation and political will have kept these proposed laws out of the government's priority list. Therefore, quite a number of draft anti-trust or competition laws have accumulated over the years, but none of these have actually been acted upon. Both Houses of the present 11th Congress already have a number of draft laws submitted. These latest proposed bills have been attached to this study as Annex B.

In the House of Representatives, there are four draft bills, namely:

House Bill No. 271 – "An Act Providing for Anti-Trust Penalties." - authored by Rep. Roilo Golez;

House Bill No. 1373 - "An Act Penalizing Unfair Trade Practices, and Combinations in Restraint of Trade, Creating the Fair Trade Commission, Appropriating Funds Therefor and For Other Purposes." - authored by Rep. Gerardo Espina;

House Bill No. 3780 -- "An Act Prohibiting Monopolies, Attempt to Monopolize an Industry or Line of Commerce, Manipulations of Prices of Commodities, Asset Acquisition and Interlocking Memberships in the Board of Directors of Competing Corporate Bodies and Price Discrimination among Customers, Providing Penalties Therefor and for Other Purposes," - authored by Reps. Feliciano Belmonte Jr., Jack Enrile, and Oscar Moreno; and

House Bill No. 4455 - "An Act Prescribing a Fair Competition Law, Its Enforcement, the Establishment of a Fair Trade Commission, Delineating its Powers and Functions and for Other Purposes," – authored by Reps. Neptali Gonzales II and Manuel Roxas II.

In the Senate, there are two draft bills, namely:

Senate Bill No. 150 - "An Act Creating the Fair Trade Commission, Prescribing its Powers and Functions in Regulating Trade Competition and Monopolies, and For Other Purposes." - authored by Sen. Sergio Osmena III; and

Senate Bill No. 1792 - "An Act Prohibiting Monopolies, Attempt to Monopolize an Industry or Line of Commerce, Manipulations of Prices of Commodities, Asset Acquisition and Interlocking Memberships in the Board of Directors of Competing Corporate Bodies and Price Discrimination among Customers, Providing Penalties Therefor and for Other Purposes," - authored by Sen. Juan Ponce Enrile.

A comparative discussion of the bills is contained in the last chapter of this study.

According to the Committee on Trade and Industry of the House with which the bills are pending, only one hearing on anti-trust legislation has been conducted and so far, the

measures have been put on hold. No committee report has yet been issued on the subject and it has not even been calendared in the order of business of the House. In the Senate, the Committee on Ways and Means has conducted only one hearing. In the meantime, Sen. Osmena is preparing for a set of Committee hearings, however, these have yet to be scheduled.

Unfortunately, despite the obvious importance of the proposed measure in the economic development program of the government, the proposed measure has not even been declared a priority measure by the executive branch.

IV ASSESSMENT OF ANTI-TRUST REGULATION IN THE PHILIPPINES

Historically, developed countries have used and are using *anti-trust* regulation to foster and maintain competition that will ensure an efficient, working market economy and modern democracy. Competition, through its allocative, distributive, and incentive functions, can prevent undue concentration of economic power and the consequent concentration of political power in the economic elite who use their economic and political powers to have their inefficiencies subsidized by the majority of consumers and taxpayers.

Knowing the existing laws and regulations for *anti-trust* enforcement at the disposal of the Philippine government, what is then the actual effectiveness of these laws and regulations in promoting *competition* in the Philippine economy? This section will analyze the state of *anti-trust* regulation in this country and examine the government's capability to implement its *anti-trust* laws and regulations. It will study the general regulatory structure in place, and identify a number of the regulators and institutions involved in the *anti-trust* process. How have they managed to control the behavior of the players in various industries and sectors? How have they affected the structure of markets in the Philippine economy? What are the major problem areas?

The "Sick Man of Asia"

In the 1950s, the Philippines was the most developed economy in Southeast Asia, but declined to its poorest performer in the 1990s. Thus, the country came to be known as the "Sick Man of Asia." Aside from years of plunder under the Marcos dictatorship, political instability, high crime rates, and natural disasters, the more fundamental reason for the economic decline of the Philippines was an economy characterized by concentrated markets, inefficient allocation of resources, heavy regulation, barriers to entry and exit, and trade protectionism.

In fact during the 1980s, when most Southeast Asian countries achieved their most spectacular growth, annual GNP growth rates averaged only 0.9% and real *per capita* income actually declined 7.2% between 1980 and 1992.

The Philippine economy is characterized by a high concentration of wealth and resources in a few groups comprising the nation's elite class. The top 5.5% of all land-holding families own 44% of all tillable land and the richest 15% of all families account for 52.5% of all the national income.⁴⁶ Moreover, only 10 corporations in 1991 accounted for 26% of all revenues, 40% of all net income, and 34% of total assets of the top 1,000 corporations.⁴⁷

Studies confirm a high concentration ratio in ownership and production, *i.e.* the measure of the market share of the top three (3) or four (4) firms to total market size, in

⁴⁶ Data was obtained from the National Security Council, through then National Security Adviser Jose T. Almonte.

⁴⁷ Data was obtained from the Securities and Exchange Commission.

certain key industries: petroleum, iron and steel manufacturing, fertilizer, pulp and paper, home appliance manufacturing, tobacco and cigarette, and tire manufacturing.

“Diagnosis”

This high concentration ratio is a direct result of the failed economic policies of the past, particularly from a surfeit of regulation and a dearth of competition.

The Philippine government adopted a strategy of import substitution, protectionism and the allocation of resources through regulation. In the guise of "nationalism" predominant in the 1950s and 1960s, domestic enterprises, especially the so-called infant industries, were pampered and protected from foreign competition through the imposition of high tariffs or outright quota restrictions on imported products and similar measures. These measures, which persist up to the present, encouraged the rent-seeking, import-substituting, capital-intensive, and oligopolistic behavior of Philippine domestic enterprises.

The requirement for franchises and licenses was also utilized as a device to protect incumbents by disqualifying competitors. The main purpose and effect of such requirement is to reserve (specific) areas to franchisee or licensee, and hence exclude others. Franchises are awarded by acts of Congress and are distinct from permits to operate, which are dispensed by agencies regulating public utilities. The fact makes the award of franchises potentially open to wider rent-seeking or political considerations.

The high concentration ratio in various industries is also directly attributable to entry barriers that prevent new participants from entering and competing in the same industry.

The Philippine economy, therefore, is largely captive to a small group of economic interests who have succeeded in maintaining market dominance by successfully excluding other firms from entering to participate and compete in the markets.

With this concentration of economic power, political power was likewise concentrated in the hands of a small elite. Only 60 to 100 political clans control all elective positions at the national level. The Philippine Congress, on the basis of reported statements of assets and liabilities submitted by its members, is composed largely of multimillionaires. The marriage of economic and political power presents a formidable hindrance to any form of change that may, or threaten to, alter the existing *status quo*.

Attempts at a “Cure”: Economic Reform

The immediate past two government administrations saw the articulation of plans and programs to reform the economy and open up the markets to competition.

From 1992 to 1998, significant executive and legislative reform measures promoted unexpected advances in economic growth and development for the Philippines. Annual growth rates experienced a dramatic increase from 0.5% in 1992 to 7.1% in 1996. There were also tangible improvements of consumer welfare in key sectors, such as telecommunications, air and water transport, consumer goods, and industrial inputs. The Philippines also joined various multilateral and regional trading and economic cooperation arrangements, such as the ASEAN Free Trade Area (AFTA), the Asia Pacific Economic

Cooperation (APEC), and the World Trade Organization (WTO). All these arrangements sought to liberalize trade and investments, and provide the Philippines with the much-needed external pressure to introduce internal reforms.

However, trade and investment liberalization and deregulation were not sufficient to make the Philippines globally competitive. Merely liberalizing trade and investments is not enough to achieve sustainable and stable competitiveness. One crucial lesson from the success of the recent economic reforms is that *competition* played a key role in improving capital accumulation, factor productivity, efficiency in resource allocation, technological advancement, and innovation.

It should be noted that throughout all these economic reform measures, the issue of maintaining competition and sustaining competitiveness has not been addressed.

Evaluating the "Treatment Regimen"

All these recent reform efforts may be actually be reversed and wasted unless the various measures are rationalized and embraced under an well-articulated and comprehensive competition policy framework. After having enticed and invited investors to do business in the Philippines, measures must also be adopted to make them stay. These involve not only the removal of the barriers to entry but also the enforcement of existing laws and introduction of new measures to foster and maintain fair competition in the Philippine economy.

Present laws for promoting competition in the Philippines have proven inadequate or ineffective to stave off the ill effects of anti-competitive structures and behavior in the market, mainly due to lack of enforcement.

Despite the considerable number of laws and their varied nature, competition has not been fully established in all sectors of the economy, nor has existing competition in other sectors of the market been enhanced. These laws have been hardly used or implemented as may be seen in the lack of cases litigated in court. The same laws have even worked to discourage competition.

Several reasons have been forwarded to explain the lack of enforcement of competition laws⁴⁸ in the Philippines.

"Too Many Cooks"

There is a saying that, "Too many cooks spoil the broth."

With so many enforcement agencies, responsibility is too diffused and accountability for implementation of the laws is difficult to fix.

Some regulators are unable to relate all the different existing laws and regulations.⁴⁹ Moreover, there is a lack of expertise in the appreciation and implementation of competition

⁴⁸ V. Lazatin, *Outline Competition Law Enforcement in the Philippines*, at 11.

⁴⁹ R. Shyam Khemani, *The Role and Importance of Competition Law and Policy in the ASEAN Region*, at 12-15.

laws that rely heavily on economic thought, techniques of analysis, and value preferences as tools of enforcement.⁵⁰

The identification of a single specialized agency, under a specific competition law, with the necessary expertise and authority to oversee the enforcement of competition laws is therefore critical.

“Regulatory Capture”

With a specific agency regulating each industry, the danger of regulatory capture is inevitable. In time and with familiarity, it is the industry that ultimately regulates the regulator.

Lack of a Comprehensive Competition Law and a “User-Friendly” Enforcement Mechanism

Of course, the number of enforcement agencies is a direct result of the many laws that established them. The objectives behind each of these laws are unquestionably noble. However, inasmuch as each law is meant to address specific situations, there runs the risk of one law negating the positive effects of another.

Existing laws and regulations also need to be studied and their proper place in the scheme of competition policy determined.

Since some of these laws are penal in nature, the quantum of evidence required so that the case may prosper -- proof beyond reasonable doubt -- is difficult to obtain. In addition, the witnesses and/or aggrieved parties, because of the long tedious legal processes involved, are not themselves interested in putting the perpetrators behind bars; rather they are more interested in obtaining an injunction or cease and desist orders. Moreover, fines are inadequate to deter would-be criminals.⁵¹ An administrative enforcement mechanism that can be implemented faster with hefty fines as penalties for unfair competition would be more effective.

Although beyond the scope of this study, it must be pointed out that in addition to studying the laws that directly bear on competition and competition policy, it is indispensable to consider the other laws which bear on economic development as these also deal with the elements of competition policy.

Lack of Jurisprudence on Competition

The judiciary has scarcely had the opportunity to pass upon the proper application of the various laws on competition, partly due to lack of enforcement. The silence or ambiguities in these laws have thus remained. The lack of guidance has discouraged full implementation.

⁵⁰ *Id.* at 14-15.

⁵¹ *Ibid.*

Other Considerations

These are other considerations - a few problem areas that must be addressed so that this whole process of formulating a strategy for the introduction of a new regulatory system in the Philippines will not prove to be a futile exercise.

Political Capacity

With major entrenched powerful economic interests involved, the development of a comprehensive competition policy to guide future economic regulation in the Philippines will definitely run into serious political obstacles if these interests are opposed. The accumulation of rents through monopolies over resources, factors of production, and channels for economic activity goes back centuries to the colonial periods.

Political capacity is intricately entwined with financial capacity, public support, and relative autonomy from pressures and influence of vested interest groups.

Budgetary Constraints

Although government agencies may have relatively large budgets, the amount of these resources compared to those at the disposal of vested interests for the purpose of obstructing reform appear quite meager. It is also important to note that the budget is essentially controlled by Congress and may be withheld from agencies involved in the reform effort.

Technical Capacity

Most officials in the bureaucracy, as well as politicians, non-government organization (NGO) members, and consumers, still lack technical knowledge in competition policy. This is the same for bureaucrats involved in the enforcement of fair trade and those who could potentially be involved in competition regulation. A number of officials of the Tariff Commission, Department of Trade and Industry, and the National Economic Development Authority, have been attending various seminars and workshops on competition policy, but all still lack the practical experience.

Management Constraints

Strict rules on the management of government agencies and allocation of agency resources severely limit the organizational capability of these agencies. This makes it difficult for an agency to institute innovations and reforms internally and react swiftly and flexibly to various external situations. Thus, government agencies are rendered ineffective and anti-competitive, especially when compared to private corporations.

Proper Compensation

Finally, low salary scales have a detrimental effect on morale in the bureaucracy. It explains why the agencies are unable to attract and maintain the best graduates from the best schools. It also explains the relatively poor performance of agencies *vis-à-vis* their private sector counterparts. Finally, low levels of compensation render government officials and employees highly vulnerable to corruption and undue influence by vested interests.

The organizational capability assessment may put into question the feasibility of the initiative to develop and enforce anti-trust measures. However, it is necessary, at this point, to take stock of the different obstacles and threats this endeavor faces, as well as the actual capabilities of the key actors and decision-makers. This can then pave the way for the formulation of a more realistic strategy for implementation. There may be a need to rethink the participation of the various key players in the process, as well as the timing and sequencing of measures.

Ultimately, this initiative would still be the most logical next step in the struggle for the economic renewal of the Philippines. If the obstacles appear daunting, this should only strengthen the resolve to push this initiative forward, in the most creative and strategic manner possible.

The Next Step

The above assessment of anti-trust regulation and competition promotion does yield disappointing results. Competition is undoubtedly an integral component of a functioning market economy. Indeed, for a society to reap the benefits of wealth creation, wealth distribution, and the other major objectives of competition, the state must ensure that market forces are constantly at play within an economy.

Over and over, the Philippine government has made pronouncements about its adherence to a modern capitalist market system. Our Constitution clearly declares that it is state policy to protect and promote competition. However, Philippine political and economic histories paint a totally different picture. Ever since the creation of the modern Philippine state, the rule has actually been to prevent and destroy competition in order to protect the dominant political and economic elite of the country. In key industries and services, monopolies and cartels have been the standard vehicles for wealth creation. Hence, laws and regulations were structured in such a way that competition could never flourish. There is an existing legal and regulatory system for promoting competition in this country. Unfortunately, it has proven completely ineffective in meeting its objectives.

The Philippines has yet to craft a truly effective legal and regulatory framework for enforcing competition in the economy. How such a framework is to shape up will depend on the design of a simple and enforceable model and a careful consideration of the political economy realities of this country.

V RECOMMENDATIONS FOR A NEW LEGAL AND REGULATORY FRAMEWORK

In a world that is increasingly integrating economically and adhering to market-based rules and principles, a rational and well-articulated framework for competition-based economic regulation becomes an indispensable developmental tool for all countries.

Recent international and regional developments indicate a pressing need for these new regulatory frameworks in developing and developed countries alike.

Lessons of Seattle, the WTO, and the "Global Economy"

The controversy and confusion surrounding the last WTO ministerial conference in Seattle highlight the urgency for WTO member countries to prepare their respective economic systems for competition in a so-called "Global Economy." This adjustment process includes the introduction of new frameworks for economic regulation which prepare firms and industries for vigorous international competition. In fact, in this last ministerial conference, a very important agenda item was the issue of *trade and competition policy*. Although this topic has been the subject of much controversy due largely to the differences of opinion between the United States and the European Union on the treatment of competition policy within the multilateral trading system, nevertheless, its inclusion as a topic of discussion in the WTO, as well as other international institutions such as the OECD and the World Bank, underscores its crucial role in international economic relations and development.

Lessons of the Asian Financial Crisis

The "shocks" suffered by the financial systems of the East Asian economies illustrated the lack of responsiveness and relevance of existing regulatory frameworks to international economic realities. The Asian financial crisis was in fact a result of these fundamental conflict. Although certain countries, such as Malaysia and the Philippines, chose to impose restrictions on market-based flows of capital and goods, many countries across the region, such as Thailand, chose to review their antiquated economic regulations with the intention of amending and modernizing them. If a similar crisis is to be prevented in the future, then Asian economies would be better advised to choose the latter approach.

Lessons of the Philippine Experience

The Philippines was certainly not spared the negative effects of the Asian financial crisis, despite claims to the contrary. Many firms and industries did suffer from the drastic fluctuations of an unstable currency. Unfortunately, rather than accepting the crisis as a result of market forces conflicting with anti-competitive economic regulations, these firms even cited the crisis as justification for imposing economic controls and trade barriers. For example, the Philippine government has made moves to increase trade protection for its textile, petrochemical, basic steel, and basic agricultural sectors. Such efforts only

aggravate monopoly situations already prevailing in these sectors. What is most disturbing about this is it reveals a highly inconsistent approach in economic development policy, even a reversal of the Philippine government pronouncements about adhering to open markets, liberalization, and competition. The problem is that the Philippines, despite the existence of numerous laws and regulations dealing with competition, really lacks a clear, coherent, comprehensive, and enforceable legal and regulatory framework for anti-trust enforcement and the protection of competition.

Therefore, there is still a need to propose a more effective framework for *anti-trust* regulation in this country. Such a framework should first lay down the basic policy objectives and principles, as well as spell out the basic structure for regulation.

Proposed Framework for a Competition Law

As explained earlier, Philippine laws and regulations bearing on competition are actually numerous and varied. However, there still remains a need to enact an overall law on competition, particularly a comprehensive anti-trust legislation. In this regard, some authors have suggested the requisite features for such legislation:

Competition law should focus on the actual and, or potential business conduct of firms in a given market, and not on the absolute or relative size of firms. It should look at the business conduct of firms and on the business environment in which the firms operate.

Competition law must be effectively harmonized and linked with other government policies. Promoting competition in the business environment constrains anti-competitive behavior by firms and also inculcates sound business practices and ethics.

Competition law should be a law of general application, addressing all sectors of the economy. Exemptions from its application may be allowed if they will not limit competition, are based on sound economic principles and are aimed at facilitating legitimate economic activity.

Competition law should contain provisions explicitly prohibiting business practices that are clearly against economic efficiency and consumer welfare, such as price fixing, bid rigging, restriction of output and market shares, allocation of geographic markets and customers, which should be deemed illegal per se and subject to criminal law and severe penalties.

Competition law should also provide for a "rule of reason" approach with respect to horizontal and vertical mergers, specialization agreements, joint ventures, vertical manufacturing and wholesale, retail distribution arrangements. Prior notification to and approval by the concerned agency of such business arrangements is recommended but only with respect to largest transactions, taking into consideration size thresholds in terms of market share, assets, sales and/or employment of parties involved.⁵²

⁵² R. Shyam Khemani, *The Role and Importance of Competition Law and Policy in the ASEAN Region*, at 12-14.

Ultimately, these measures should seek to establish a new national economic order with the private sector as the primary engine of growth and development, market forces as the determinants of prices and wages, competition as the principal means of economic, political and social control and discipline, and consumer welfare, employment and income expansion, and economic efficiency as the main benchmark.

Anti-trust laws in the Philippines have been largely ineffective because their enforcement is vested in different agencies. This breeds confusion, non-coordination and conflicts. It is not uncommon for benefits from enforcement in one area to be negated by adverse effects from enforcement elsewhere.

The effective implementation and enforcement of anti-competition laws should be vested in a centralized agency with sufficient powers to oversee and monitor the competitive climate in the different sectors of the economy, to formulate and recommend such measures as would ensure the maintenance of the competition in the Philippine domestic market and as would anticipate developments in the international market.

The entity could be called the *Philippine Trade Commission* or the *Philippine Competition Commission*, which may be composed of members with backgrounds in laws, economics, finance and various fields of industry and business. In determining the nature, powers, functions and duties of the Commission, it is proposed that the following guiding principles⁵³ be considered:

The Commission should be independent and insulated from political interference, or influence.

There should be a separation between the investigation, prosecution and adjudication functions.

A system of checks and balances with appropriate rights of appeal and review of decisions and facts on legal and economic grounds should be provided.

The Commission should guarantee the expeditious resolutions of cases and related matter.

The proceedings should be transparent and acceptable to all affected parties.

The Commission should have a statutory role in participating, formulating and commenting on government economic and regulatory policies impacting on competition in the market place.

The Commission should consistently and fairly implement or apply all competition laws in addressing different types of restrictive business practices.

Suggested Scope and Provisions for a Competition Law

A recent report of the World Bank and the Organization for Economic Cooperation and Development (OECD) entitled, A Framework for the Design and Implementation of

⁵³ *Id.* at 14-15.

Competition Law and Policy, provides a suggested structure for a competition law, including wording for its substantive provisions. Some of the suggested provisions are accompanied by a brief commentary. It must be emphasized that the statutory provisions are only suggestions. Competition laws must be drafted to fit the legal and economic contexts of each country.

Scope of competition law

Competition Law is an essential part of the economic constitution of a free market country. It should, as much as possible, apply to all market transactions and to all entities engaged in commercial transactions irrespective of ownership or legal form. All exceptions to the application of the law should be explicitly identified in pertinent legislation.

Suggested provisions:

[Article __] Purpose

This Law is intended to maintain and enhance competition in order ultimately to enhance consumer welfare.

[Article __] Field of application

1. *This Law shall be enforced on the whole territory of the Republic of _____ and applies to all areas of commercial economic activity. The Law shall be applicable to all matters specified in [section(s) of the law containing the prohibitions of restrictive agreements, abuse of dominance, and merger review], having substantial effects in the Republic of _____, including those that result from acts done outside the Republic of _____.*

2. *This Law does not derogate from the direct enjoyment of the privileges and protections conferred by other laws protecting intellectual property, including inventions, industrial models, trademarks, and copyrights. It does apply to the use of such property in such a manner as to cause the anti-competitive effects prohibited herein.*

3. *This Law shall apply neither to the combinations or activities of workers or employees nor to agreements or arrangements between two or more employers when such combinations, activities, agreements, or arrangements are designed solely to facilitate collective bargaining in respect of conditions of employment.*

Definitions

The competition law should define common terms that are used in the law and that are needed to interpret its provisional consistency.

Suggested provisions:

"Competition"—the process by which economic agents, acting independently in a market, limit each other's ability to control the conditions prevailing in that market.

"Firm"—any natural or legal person, governmental body, partnership, or association in any form engaged directly or indirectly in economic activity. Two firms, one of which is controlled by the other, shall be treated as one firm. Two or more firms that are controlled by a single firm shall be treated as one firm. The competition office shall adopt a regulation setting out what constitutes control.

"Good"—all property, tangible and intangible, and services.

"Market"—a collection of goods among which buyers are or would be willing to substitute, and a specific territory, which could extend beyond the borders of the

Republic of _____, in which are located sellers among which buyers are or would be willing to substitute.

Abuse of dominant position

Suggested provisions:

[Article_] Abuse of a Dominant Position

- 1. "Dominant Position"—a firm has a dominant position if, acting on its own, it can profitably and materially restrain or reduce competition in a market for a significant period of time. The position of a firm is not dominant unless its share of the relevant market exceeds 35 percent. A firm having a market share exceeding 35 percent may or may not be found to be dominant depending on the economic situation in that market, including the firm's market share, competing firms' market shares and their abilities to expand those shares, and the potential for new entry into the market.*
- 2. Actions of a dominant firm—including creating obstacles to the entry of competing firms or to the expansion of existing competitors or eliminating competing firms from the market—that have or may probably have as their result a significant limitation of competition are prohibited.*
- 3. Section 2 of this article does not prohibit actions by a firm that create obstacles to the entry of new firms or reduce the competitiveness of existing firms solely by increasing the efficiency of the firm taking those actions, or that pass the benefits of greater efficiency on to consumers.*

[Article_] Power to break up a firm abusing its dominant position

- 1. When a firm has abused its dominant position and no other remedy under this law or under this law or under an applicable regulatory statute would be likely to rectify the situation or prevent recurrence of the abuse, the competition office may reorganize or divide the firm provided there is a reasonable likelihood that the resulting entity or entities would be economically viable.*
- 2. The power to reorganize or divide contained in this article shall be exercised in a manner designed to minimize any increases in costs of providing the good.*

The 35 percent "safe harbor" is found in the competition laws of several countries either expressly or in common law or practice. Although the 35 percent threshold is somewhat arbitrary, it is unlikely that a firm with a much smaller market share could successfully exercise market power unilaterally. There are some valid reasons for raising the threshold. In a small country that is relatively closed to international trade and investment, high concentration may be necessary so that firms can grow large enough to exhaust significant economies of scale and scope.

In some countries' law a market share of 65 or 70 percent creates a presumption of dominance that the firm must rebut. But many think that the better practice is to place the burden of providing dominance on the competition agency. A high market share is a necessary but not sufficient condition.

This provision employs a general legal standard: a "significant limitation of competition." In economic terms this standard typically refers to restrictions that would permit a price increase above what would prevail in a competitive market. It is not possible to legally define a "significant" limitation of competition, however, because the size of an anti-competitive price increase can vary across jurisdictions. It can even vary over time within

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the same country in response to changes in the resources available for anti-trust enforcement and in the efficiency of the competitive agency.

The laws of some countries also list specific types of conduct, such as predatory pricing, tying, or exclusive dealing, that can constitute abuse of dominance. Such provisions are more common in countries that employ a civil code legal system, as opposed to a common law system. It is difficult to define such conduct accurately, however, or to be sufficiently inclusive of potentially abusive conduct. Also, it must always be remembered that the specific conduct is not always abusive or anti-competitive, even if carried through by a dominant firm.

Restrictive agreements

Certain types of horizontal agreements, collectively described as cartel agreements, are subject to stricter control than other types. In many countries this distinction is not found in the law itself but in enforcement practice or regulations. Countries that are first adopting competition laws, however, are better off making the distinction explicitly in the law. Doing so will help to ensure that enterprises learn the seriousness of violating cartel prohibitions and will help business people to understand that although some vertical agreements may hurt individual competitors, they are proscribed only if they harm competition industry-wide.

Not all horizontal agreements are cartel agreements. Competitors may integrate their operations to achieve greater efficiency, and the result may be pro-competitive on balance. Agreements of this type include joint ventures, joint research and development, and the setting of common standards that benefit consumers. These agreements should be subject to a more lenient legal standard and distinguished from cartel agreements in the competition law.

Finally, some horizontal and vertical agreements may be harmful to competition in some sense, but may generate efficiencies that make them beneficial on balance. (Cartel agreements, by definition, cannot generate such efficiencies.) It is helpful if the law sets forth the standards that govern this analysis.

Suggested provisions:

[Article ___] Prohibited agreements between firms

1. *An agreement, concluded in any form including by concerted practice, between competing firms (including firms that could easily become competitors) is prohibited if such an agreement has or would likely have as its principal effect:*
 - (a) *Fixing or setting prices, tariffs, discounts, surcharges, or any other charges;*
 - (b) *fixing or setting the quantity of output;*
 - (c) *fixing or setting prices at auctions or in any other form of bidding,, except for joint bids so identified on their face to the party soliciting bids;*
 - (d) *dividing the market, whether by territory, by volume of sales or purchases, by type of goods sold, by customers or sellers, or by other means;*
 - (e) *eliminating from the market actual or potential sellers or purchasers; or*
 - (f) *refusing to conclude contracts with actual or potential sellers or purchasers.*

2. An agreement, other than those enumerated in section 1 of this article, concluded in any form including by concerted practice, is prohibited if it has or would likely have as its result a significant limitation of competition.
 - (a) *An agreement among competing firms, including firms that could easily become competitors, other than those agreements enumerated in section 1 of this article, cannot be found to significantly limit competition unless the shares of the firms participating in the agreement collectively exceed 20 percent of a market affected by the agreement.*
 - (b) *An agreement solely among non-competing firms cannot be found to significantly limit competition unless:*
 - (i) *At least one of the parties holds a dominant position in a market affected by the agreement; or*
 - (ii) *The limitation of competition results from the fact that similar agreements are widespread in a market affected by the agreement.*

3. (a) *An agreement prohibited under section 2 of this article is nonetheless legal if it has brought about or is likely to bring about gains in real as opposed to merely pecuniary efficiencies that are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the agreement.*
- (b) *The burden of proof under this section lies with the parties seeking the exemption, and includes demonstrating that if the agreement were not implemented it is not likely that the relevant efficiency gains would be realized by means that would limit competition to a lesser degree than the agreement.*

Section 3(a)'s reference to "real, as opposed to merely pecuniary, gains in efficiency" is designed to exclude consideration of benefits such as reductions in income taxes or greater quantity discounts obtained solely through exercising greater purchasing leverage. Such pecuniary gains are transfers rather than increases in the economy's ability to satisfy consumer needs.

Section 3(b) does not require the parties to prove that the agreement is the only way to realize the claimed gains in efficiency, but that there are no practical, less anti-competitive means of doing so.

Section 3(a), and an identical provision in section 9 of the article on concentrations, read together with article 1 (the purpose clause) implicitly applies a total welfare standard to the efficiencies defense or exemption. It does so by giving equal weight to both consumers and producers, thus ignoring any transformation of consumer surplus into producer surplus resulting from the agreement. Section 3(a) permits agreements in which the deadweight loss – that is, the surplus lost to consumers but not transformed into higher producer profits – from the fall in consumption due to a price increase is less than the value of resources saved in more efficiently producing the goods.

Instead of a total welfare standard, some countries might prefer to focus exclusively on consumer welfare, and therefore allow an efficiency defense or exemption only in cases where efficiency gains are expected to be so large that consumers will not be harmed despite the anticipated increase in market power. To articulate such a standard, section 3(a) could be written as follows:

3. (a) An agreement prohibited under section 2 of this article is nonetheless legal if it has brought about or is likely to bring about gains in real as opposed to merely pecuniary efficiencies that are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the agreement.

Mergers and acquisitions

A competition statute's merger provisions should be permissive. In particular, there is no need for systematic review and approval of all mergers. Mergers should be allowed unless the competition authorities can show that they will significantly limit competition. Furthermore, requiring notification of all mergers would unduly burden the authorities and impose unreasonable costs and delays on the merging parties. Only large mergers, which are most likely to present a threat to competition, should be subject to pre-merger notification requirements. In countries with high inflation, it is advisable to measure the minimum-size threshold in terms that rise with inflation, for example as a multiple of a standard minimum wage.

The same competition test should be applicable to all mergers, whether or not notification is required. The competition office should thus have the power to order the dissolution of smaller non-notified mergers. To eliminate the uncertainty created by possible dissolution, merging firms should be permitted to make voluntary notifications.

Suggested provisions:

[Article ___] *Review of concentrations*

Definition

1. "Concentration"—concentration shall be deemed to arise when:
 - (a) Two or more previously independent firms merge, amalgamate, or combine the whole or a part of their businesses; or
 - (b) One or more natural or legal persons already controlling at least one firm acquire, whether by purchase or indirect control of the whole or parts of one or more other firms.
2. "Control"—for the purpose of this article, control is defined as the ability to materially influence a firm, in particular through:
 - (a) Ownership or the right to use all or part of the assets of an undertaking; or
 - (b) Rights or contracts that confer decisive influence on the composition, voting, or decisions of the organs of a firm.

Notification

3. When an agreement or public bid will produce a concentration larger than the minimum size as provided in regulations issued pursuant to section 7 of this article, the parties to the agreement or bid are prohibited from consummating such concentration until ___ days after providing notification to the competition office, in the form and containing the information specified in regulations issued pursuant to section 7.
4. Before the expiration of the ___ day period referred to in section 3 of this article, the competition office may issue a written request for further information. The issuance of such a request has the effect of extending the period within which the

concentration may not be consummated for an additional __ days, beginning on the day after substantially all of the requested information is supplied to the competition office.

5. Parties to an agreement or public bid not subject to the notification requirement in section 3 of this article may voluntarily notify and, if they do so, be subject to the same procedures, restrictions, and rights as are applied to cases of compulsory notification.
6. If, before consummation of a concentration, the competition office determines that such concentration is prohibited by section 8 of this article and does not qualify for exemption under section 9 of this article, the competition office may:
 - (a) Prohibit consummation of the concentration;
 - (b) prohibit consummation of the concentration unless and until it is modified by changes specified by the competition office;
 - (c) prohibit consummation of the concentration unless and until the pertinent party or parties enter into legally enforceable agreements specified by the competition office.

Regulations regarding concentrations

7. The competition office shall from time to time adopt and publish regulations stipulating:
 - (a) The minimum size or sizes of concentrations subject to the notification requirement in section 3 of this article;
 - (b) the information that must be supplied for notified concentrations;
 - (c) exceptions or exemptions from the notification requirement of section 3 for specified types of concentrations;
 - (d) other rules relating to the notification procedures in sections 3,4, and 5 of this article.

Permitted and prohibited concentrations

8. Concentrations that will probably lead to a significant limitation of competition are prohibited.
9. Concentrations prohibited under section 8 of this article shall nonetheless be free from prohibition by the competition office if the parties establish that either:
 - (a) The concentration has brought about or is likely to bring about gains in real as opposed to merely pecuniary efficiencies that are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the concentration; or
 - (b) One of the parties to the concentration is faced with actual or imminent financial failure, and the concentration represents the least anti-competitive among the known alternative uses for the failing firm's assets.

The burden of proof under this section lies with the parties seeking the exemption.

A party seeking to rely on the exemption specified in (a) must demonstrate that if the concentration were not consummated it is not likely that the relevant efficiency gains would be realized by means that would limit competition to a lesser degree than the concentration.

A party seeking to rely on the exception specified in (b) must:

(i) Demonstrate that reasonable steps have been taken within the recent past to identify alternative purchasers for the failing firm's assets;

(ii) fully describe the results of that search.

10. The competition office may determine, within three years after consummation, that either a non-notified concentration or a notified concentration in which the provisions of sections 3-5 of this article are not fully complied with, has led or will probably lead to a significant limitation of competition and does not qualify for either of the two exemptions set out in section 9 of this article. If it so determines, the competition office may:

(a) Undo the concentration by dissolving it into its constituent elements;

(b) Require other modifications of the concentration, including sale of a portion of its operations or assets;

(c) Require the surviving firm or firms to enter into legally enforceable agreements specified by the competition office and designed to reduce or eliminate the competition-limiting effects of the concentration.

11. Notifiable concentrations that the competition office determines are prohibited by section 8 of this article and do not qualify for exemption under section 9 may subsequently be authorized by a published decision of the Government of _____ for overriding reasons of public policy involving a unique and significant contribution to the general welfare of the citizens of _____.

Because delaying a merger can generate high costs for the parties involved and increase the risk that confidential business plans might become public knowledge, it is important to keep the delays mandated in sections 3 and 4 as short as possible.

Although sections 6 and 10 provide for both structural and behavioral remedies, the competition office should favor structural remedies. Behavioral remedies are generally ineffective unless they are easy to monitor and the competition office has effective means of ensuring compliance.

The basis for the efficiencies defense or exemption in section 9(a) is discussed in the commentary accompanying the article on restrictive agreements. If, as discussed there, it is decided that a consumer surplus standard is to be applied to this exemption, the alternative provision provided there may be used in this Article as well.

Unfair competition

In enforcing this rubric of the law, the competition office could end up spending an inordinate amount of time arbitrating what are really private disputes having little influence on the competitive process. To reduce that risk, the law should provide for enforcement through private actions. Every effort should also be made to ensure that the unfair competition provisions are as clear as possible. Note that countries could address this issue in their general consumer protection laws instead of in their competition statute.

Suggested provisions:

[Article __] Prohibition of unfair competition

Unfair competition is prohibited, including:

1. The distribution of false or misleading information that is capable of harming the business interests of another firm;
2. the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;
3. false or misleading comparison of goods in the process of advertising;
4. fraudulent use of another's trademark, firm name, or product labeling or packaging;
5. unauthorized receipt, use, or dissemination of confidential scientific, technical, production, business, or trade information.

Organizational and enforcement matters

This section concerns a series of diverse provisions intended to improve the general effectiveness of a competition statute. Where applicable, comments will be followed by suggested statutory wording.

Specialized courts and rights of appeal

In most countries the judiciary is involved with enforcing competition laws. The competition authority may be required to apply to the courts for orders that would implement its decisions. More commonly, the competition agency's decisions may be appealed to the courts by the parties involved. If private parties have the right to institute competition cases, these cases may be brought before the courts.

Because the judiciaries in transition and developing economies are inexperienced in dealing with free market problems, it may be advisable to set up specialized courts to hear competition cases. Such courts could hear all commercial disputes or be specialized to hear only competition cases. Concentrating these cases before specially trained judges should speed up the acquisition of expertise and produce more consistent, predictable decisions. Specialized competition courts could adopt procedures and rules of evidence specifically suited to competition cases. The composition of the court could be tailored to the requirements of competition cases. For example, at least one economist could be included in each tribunal.

Private enforcement

In some countries private actions for redress of injury resulting from violations of the competition law may be instituted before an appropriate court or tribunal by people harmed. Such private actions have at least two benefits: they supplement and reinforce public enforcement of the competition law, and they free the competition authority from having to obtain such redress on behalf of private parties. To facilitate private rights of action, provisions could be added to the competition statute to:

- Allow private plaintiffs to bring actions in courts for damages they can prove they sustained as a result of either a violation of the competition statute or a party's failure to comply with orders made under it, plus all reasonable costs they may have incurred investigating and prosecuting the case.
- Allow private plaintiffs to bring actions for injunctive relief (for example, to prohibit mergers or to cease using certain anti-competitive contract terms).

- Require the competition office to transfer to private plaintiffs all non-confidential information gathered in the course of the office's investigations.
- Facilitate the use of court records in cases brought by the competition authority as evidence in private damage suits.
- Allow group damage claims in competition cases.

Relationships between the competition office and other government bodies

Independence from other parts of the government is important to the proper functioning of the competition office. Decisions of the office may affect the interests of entrenched businesses, which may have strong influence in one or more government ministries. The competition office should be free from the political influence of these interests.

Suggested provisions:

[Article ___] Independence of the competition office

1. *The competition office is under the authority of the [President of _____], and receives its budget directly from and reports directly to the [legislature of _____].*
2. *The [head] of the competition office is appointed by the [President of _____], for a renewable term of [a minimum of three] years, and can only be removed by a [vote of the legislature] for patent inability to discharge his functions.*

Though the competition office should be organizationally independent from other parts of the government, it should also have the power to participate in government decisions directly affecting competition. The competition office should thus have the power to make recommendations or presentations, and in some situations to intervene when government bodies are making decisions affecting competition policy.

Suggested provision:

[Article ___] Representations and interventions by the competition office

1. *The competition office shall have the right to make submissions to state administrative authorities engaged in designing or administering legislation or regulations that could affect competition in any market in [the Republic of _____]. When hearings are held with regard to the adoption or administration of such laws or regulations, the competition office shall have the right to intervene in such proceedings.*
2. *The competition office shall have the right to publish the submissions and interventions referred to in section 1 of this Article provided that confidential information is not divulged.*

Prohibition and remedial orders

The appropriate remedy for many types of anti-competitive practices is to simply demand that the offending party stop engaging in the conduct or to take other actions to eliminate the effects of the unlawful practice. Punishment is also appropriate if the conduct is egregious. But some competitive harms are not readily apparent to business people, who may have engaged in the conduct initially in good faith. Such cases may include non-cartel restrictive agreements, some abuses of a dominant position, and some acts of unfair

competition. The competition law should empower the competition agency to prohibit the conduct or redress the harm from it.

Suggested provision:

[Article __] Prohibition and remedial orders

The competition office [or appropriate court or tribunal] may issue orders prohibiting firms from carrying on the anti-competitive or unfair practices referred to in this act and, if necessary, requiring such firms to take other specified actions to eliminate the harmful effects of such practices and to ensure against recurrence of such practices.

Fines and Penalties

The competition office should have the authority to impose fines for cartel agreements, serious or repeated abuse of dominance, non-cartel agreements, and unfair competition and to ensure compliance with merger notification requirements and competition office decisions.

To deter cartel agreements, fines must be considerably larger than the extra profits that firms anticipate earning through their illegal behavior: for example, consider companies A and B that think they will be able to raise their profits by \$500,000 by agreeing to increase prices. If they also believe that there is only a 10 percent probability of being punished for collusion, the anticipated fine must be approximately \$5 million to effectively dissuade them. Some countries have found that the deterrent effect of penalties is enhanced considerably if the anti-competitive acts are characterized as criminal and if individuals as well as enterprises are liable.

Interim injunctions

The power to obtain interim injunctions, or temporary orders to stop a particular practice, is frequently necessary to preserve the status quo pending investigation. Interim injunctions are particularly useful in merger cases, in which it is difficult to break apart a merged entity, and in cases involving other types of conduct in which prohibition orders rather than fines are relied on to eliminate or to prevent anti-competitive practices.

Suggested provisions:

[Article __] Interim injunctions

- 1. The head of the competition office may apply to [appropriate court of tribunal] for an order to suspend business practices under investigation by the competition office or the consummation of concentrations. Before making the order, the [court or tribunal] shall be satisfied that the proposed measures are urgently required to avoid serious, imminent, and irreparable harm to the economic interests of the Republic of _____, as expressed in this act. When the effectiveness of the order would not thereby be prejudiced, the [court or tribunal] shall permit the firms that would be subject to the order to present their views regarding the proposed order.*

2. *Within three days of the issuance of an order by the [court or tribunal] pursuant to this Article, the competition office shall deliver the order to the parties subject to it, together with reasons for the order and notice of the right to appeal.*
3. *All orders made under this article lose effect twenty-one days after they are issued, unless renewed by express decision of the [court or tribunal].*
4. *Orders issued under this section may be appealed to the [pertinent appeal court], but do not lose their effect pending the outcome of the appeal.*

Enforcement guidelines and advance rulings

Parties subject to the law should be helped to comply with it and to plan their activities accordingly. Much of this assistance could come through the publication of enforcement guidelines articulating how the competition office will interpret and apply the law. In addition, while protecting confidentiality, the competition office should be required to publish all prohibition orders and decisions imposing sanctions along with supporting reasons.

There is also a need for a process whereby parties can obtain advance rulings from the competition office concerning planned courses of action. This information would be particularly helpful for exemptions given to horizontal or vertical agreements.

Suggested provisions:

[Article __] Advance rulings

1. *Parties may apply to the competition office for advance rulings, binding on that office, regarding eligibility for exemptions from the prohibitions of articles _____ [relating to restrictive agreements and abuse of a dominant position]. If it chooses to grant an advance ruling, the competition office may include in it specified conditions and requirements. The advance ruling shall by its terms exist for a specified period of time.*
2. *Advance rulings may be renewed upon application by the parties. An advance ruling may be revoked or modified if:*
 - (a) *A significant change in circumstances has occurred since the ruling;*
 - (b) *The applicant infringed on a condition or a requirement specified in the ruling;*
 - (c) *The decision to grant the ruling was materially influenced by inaccurate, fraudulent, or misleading evidence; or*
 - (d) *The applicant abused the exemption granted to it.*
3. *The competition office shall arrange for publication of its advance rulings, omitting any confidential information. It may arrange similar publication of all other decisions taken under this act, again omitting any confidential information.*

Investigative powers

To ensure sufficient investigative capability, the competition office requires the production of information. The office should be able to require that parties under investigation and third parties produce documents (in paper or other form), written answers to questions, and oral testimony. In addition, the competition office should have the power to search the premises of subjects of an investigation and to take away evidence discovered in the search.

Such broad investigative powers should be subject to strict procedural safeguards. In most countries searches can be conducted only after authorization of a court or tribunal—and the competition agency must show probable cause. The competition office should be required to permit any party submitting evidence to have reasonable access to that evidence, and it should be required to return the evidence after the investigation and subsequent enforcement proceedings. These powers should be reinforced with severe fines for willful destruction or withholding of evidence or persistent refusal to supply requested information in a timely fashion.

Protection of confidential information and avoidance of conflicts of interest

If the competition office is to enjoy the confidence and cooperation of the business sector, it must protect the confidentiality of all nonpublic information that it acquires in the course of an investigation or proceeding. Also, it must ensure that its officials are not tempted to profit privately from knowledge acquired in the course of their duties.

Suggested provisions:

[Article ___] Confidentiality and conflict of interest rules

1. Officials of the competition office, as well as their agents and consultants, shall maintain the confidentiality of all business, commercial, or official information of which they become aware during the course of their official activities, except that which is otherwise public. Disclosure of such confidential information may occur in the course of administrative or judicial proceedings arising under this act, or otherwise as permitted by [the court or tribunal].

2. All members of the competition office shall inform the head of the competition office of any position held or activity carried out in an economic field by the member, including all agents thereof. The head of the competition office shall take all necessary steps to ensure there is no conflict of interest arising from such positions or activities, including requiring that such positions be resigned or activities cease.

To strengthen these provisions, fines and possible dismissal should be imposed if government employees willfully disclose confidential data or engage in conflicts of interest.

Taking into consideration the suggested provisions above, a proposed anti-trust/competition law has been prepared and attached hereto as Annex C.

Reality Check

Given the central importance of competition in economic development, as well as the basic lack of capacity for enforcing competition in the Philippines, there is a need to engage in a general overhaul of the legal and regulatory system. Ideally, therefore, the introduction of true competition policy in this country should be done in a centralized and comprehensive manner. This would necessarily involve the introduction of a new comprehensive law, that would outline the anti-competitive structures and behavior which need to be curtailed and the procedures for enforcing this, as well the creation of a new competition agency to implement the new law.

The prime objective of this special reform effort is the institutionalization of a "competition culture" in the Philippines. If society as a whole accepts and even promotes competition as an integral part of economic reality, then anti-trust regulation can actually become self-sustaining. However, it will still require a legal and regulatory framework in which to operate. Furthermore, this framework will have to play that central role in an over-arching competition policy for the whole economy. This framework will have to be imbued with the level of importance that would command the respect of the highest leadership as official state policy.

First Option: Comprehensive Approach

Therefore, the first option in introducing an effective legal and regulatory framework for anti-trust enforcement will be the passage of a new law which is comprehensive in scope and central to economic policy. This new law will have to contain all the major provisions governing the conduct of anti-trust enforcement and it will, in effect, modify the manner in which the government regulates the economic activities in the Philippines. The new law will centralize the different interventions of the government which relate to competition policy.

Under this first option, the various draft bills, as well as the proposed version suggested in this study, take this comprehensive and centralized approach. However, these proposed laws take very different approaches to applying the basic provisions of an anti-trust/competition law outlined above.

Among the House bills, the Espina bill is the strictest and most comprehensive. Specifically, it penalizes the spreading of false rumors and the setting of high prices. It likewise prohibits government officials from supporting monopolies or combinations in restraint of trade with concomitant penalties. Interestingly, it even has a divestment requirement for erring firms, forcing them to offer to public ownership certain percentages of their capital stock.

The Belmonte bill covers the monopolization of trade both within and outside of the country, and contains more detailed provisions on various antitrust activities. However, both the Belmonte and Gonzales-Roxas bills contain more exception

clauses than the Espina bill, with the Gonzales-Roxas bill providing the most exceptions.

The Belmonte bill prohibits discriminatory pricing but allows two exceptions: differentials in the cost of manufacture, sale, or delivery, or when the Trade and Industry or Agriculture Secretary fix and establish quantity limits to prevent monopolies. The Gonzales-Roxas bill also prohibits price discrimination with five exceptions: socialized pricing, volume discounts, competitive pricing, bona fide selection of customers, and changing market conditions or prices of goods. Any and all of these exceptions may provide effective loopholes in the hands of creative law dodgers to circumvent the intent of the law.

The Gonzales-Roxas bill affixes the adverb "knowingly" before the word "monopolize" to punish only an entity which "knowingly monopolizes" any kind of service or article of trade, but enumerates four broad exceptions: monopolies authorized by law, monopoly attained or maintained through superior skill, and intellectual property monopoly by reason of contractual rights. The Belmonte bill provides only for the exception of a patent or copyright holder. The Espina bill brooks for no exceptions.

The Espina and Gonzales-Roxas bills both provide for the establishment of a Fair Trade Commission. However, the Espina bill provides for a more powerful Commission compared to the Gonzales-Roxas version. The Espina Commission can administratively adjudicate violations of the Act as well as conduct formal investigations independent of civil and criminal action. As soon as a formal charge is filed, it may issue a preliminary order requiring a person to restrain from a particular act. Likewise, it may issue writs of execution, cease and desist orders, and condemnation and seizure of products. The Gonzales-Roxas bill only enables the Commission to investigate violations and prosecute these violations before the proper court. It has no adjudicatory powers to issue writs, cease and desist order or condemnation and seizure of products.

In terms of penalties, the Belmonte bill provides the stiffest fines, with P10 million for corporations and P1 million fine for individuals. However, in terms of administrative and criminal penalties, the Espina bill is imprisonment of not less than five years to not more than 20 years, including possible closure and dissolution of the erring firm. The Belmonte bill provides only for imprisonment not exceeding five years. As for the Gonzales-Roxas bill, it only contains provisions for fines.

The two Senate bills also take very different approaches to anti-trust enforcement. The Enrile version is the same as the Belmonte House bill, since Enrile's son, Rep. Jack Enrile is also a co-author of that bill. This version is more of a penal law. It strengthens the existing penal provisions prohibiting monopolies and combinations in restraint of trade. It does not create an independent commission, but leaves anti-trust enforcement to the Courts and the Departments of Justice, Agriculture, and Trade and Industry.

The Osmena version, on the other hand, is more of an administrative measure. It creates a Fair Trade Commission and outlines the various anti-competitive practices which the Commission is supposed to regulate. It includes definitions of monopolies, trusts, and relevant markets, and provides for price regulation and threshold values for notification, as well as fines, based on minimum wage levels.

These different draft bills have certain similarities to the proposed law in this study. There are also certain significant differences. Many of these are actually combinations of provisions copied from the laws in other countries. The problem is that there is really no single model that will ensure success in the Philippines. That is why it is better to keep the proposed law as simple as possible to allow room for evolution within the unique context of the Philippine economy. The law proposed under this study is actually drawn from certain basic principles and provisions discussed above. This includes provisions on defining the relevant market, monopolies and abuse of dominant market position, horizontal agreements, mergers, other unfair trade practices, and the administrative mechanism for enforcement.

One unique feature of this proposed law is that, instead of creating a new anti-trust/competition agency from scratch, the existing Tariff Commission be converted into a Philippine Trade Commission or Fair Trade Commission. First of all, this will address the problem of the current government policy that no new agencies or bodies can be created unless it also involves the abolition of existing ones. Second, to a certain extent, the problem of capability may be partially addressed since the research and investigation personnel of the Tariff Commission are already involved in studying market access issues, defining relevant markets, and analyzing industry structure. Finally, it will bring under one roof trade policy formulation and international fair trade enforcement (trade measures) and competition analysis and enforcement and consumer welfare promotion, which are all closely related.

Second Option: Piecemeal Approach

Unfortunately, the political economy realities, as well as the administrative and other problems outlined above make the passage of a comprehensive anti-trust/competition law in the near future rather difficult. Although it is the more ideal approach, the comprehensiveness of the proposed new law may make it difficult to understand and appreciate, attract all kinds of political interventions, give rise to various obstacles to its timely passage, and render its actual implementation unwieldy.

First of all, the proposed law may be difficult to understand and appreciate because of its more technical provisions. It may also be hard to absorb in its entirety. This means that potential supporters in the government, business sector, and civil society may not be able to rise in its defense against those who would oppose it. Secondly, a proposed law of this nature would attract much public attention, and those sectors opposed to its passage might conspire together to ensure its non-passage or delay, or they may intervene to insert exceptions or other onerous provisions. Thirdly, such public attention and political interventions would

only lead to other obstacles to the timely passage of the new law, such as endless public debates and media hype. Finally, a comprehensive approach to anti-trust/competition law enforcement, especially if it involves the creation of a new agency or institution may run into significant implementation problems. As discussed above, the lack of capacity on the part of our bureaucracy will most probably present the important challenge.

Therefore, even if the comprehensive approach may be the ideal option, it may not be the most practical. This means we need to explore other possibilities if only to ensure that this country still introduces some form of improved legal and regulatory framework for anti-trust enforcement. One other possibility is to approach the problem in a more "piecemeal" manner.

For example, rather than introduce a single comprehensive law, this could be divided into components and introduced as separate draft bills. The portion outlining the list of anti-trust violations may be separated from the list of remedies and the portion creating a new anti-trust body. The technical details of implementing these laws could then be contained in rules and regulations.

Also, rather than introducing completely new legislation, the government could instead introduce only amendatory legislation and revise various existing laws relating to anti-trust/competition. The main objective would still be to operationalize the constitutional provisions promoting competition. The following existing laws could be amended for more effective anti-trust enforcement:

Revise Penal Code: shifting the burden of proof from "beyond reasonable doubt" to a less strict "preponderance of evidence," increasing the penalties for violations, and providing the administrative mechanism for effective enforcement;

Civil Code: providing greater ease for an aggrieved party to file a civil case and collect damages from parties guilty of anti-competitive practices;

Consumer Act: providing the legal mechanism for consumers to file cases for anti-competitive practices; and

Tariff and Customs Code: amending the charter of the Tariff Commission to convert it into a Philippine Trade Commission or some other anti-trust body.

These are merely examples of existing laws which could be amended as part of a piecemeal introduction of an effective improved legal and regulatory framework for anti-trust enforcement. There are many other laws and also executive issuances which will have to be reviewed and amended.

Special mention should also be made of the role of foreign investments in competition enforcement. Opening economic sectors to increased investment flows have the effect of creating more dynamic operating environments for businesses, wherein technology transfers and innovation are encouraged. Investment

liberalization may also have the effect of providing local economic sectors with access to new and larger regional and global markets. Therefore, this piecemeal approach should also include the passage of laws and issuance of regulations which encourage the entry of more foreign investments.

There may be many different approaches to achieving our main objectives. What this study attempts to present are the features of an effective legal and regulatory framework for anti-trust enforcement. It should also be emphasized that there is indeed a need for such a framework for the Philippines. Competition policy is an essential element for economic reform in this country. The lack of competition is precisely one of the most significant reasons for our persistent underdevelopment. Therefore, one of the most important roles of government in promoting more equitable development is enforcing and preserving competition. The inadequacy of mere market-opening measures has been highlighted. In the end, the government will have to intervene to enforce competition, and this requires effective laws and regulations. The passage of new legislation, whether comprehensive or merely amendatory, will be a necessary first step in working towards our goal of institutionalizing that much-needed "competition culture" in Philippine society.

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ANNEX A

PHILIPPINE LAWS AND REGULATIONS AFFECTING COMPETITION

CONSTITUTION AND STATUTES

Philippine Constitution.

Act No. 3815 (1930), Revised Penal Code.

Republic Act No. 7394 (1932), Consumer Act of the Philippines.

Commonwealth Act No. 146 (1936), An Act to Reorganize the Public Service Commission, Prescribe its Powers, Duties, Define and Regulate Public Services, Provide and Fix the Rates and Quota of Expenses to be Paid by the Same, and for Other Purposes.

Commonwealth Act No. 541 (1940), An Act to Regulate the Awarding of Contracts for the Construction or Repair of Public Works.

Republic Act No. 337 (1948), An Act Regulating Banks and Banking Institutions and for Other Purposes (General Banking Act).

Republic Act No. 386 (1949), An Act to Ordain and Institute the Civil Code of the Philippines.

Republic Act No. 529 (1950), An Act to Assure Uniform Value to Philippine Coin and Currency.

Republic Act No. 3018 (1960), An Act Limiting the Right to Engage in the Rice and Corn Industry to Citizens of the Philippines, and for Other Purposes.

Republic Act No. 3247 (1961), An Act to Prohibit Monopolies and Combinations in Restraint of Trade.

Republic Act No. 4566 (1965), An Act Creating the Philippine Licensing Board for Contractors, Prescribing its Powers, Duties and Functions, Providing Funds therefor, and for Other Purposes (Contractors' License Law).

Republic Act No. 5487 (1969), An Act to Regulate the Organization and Operation of Private Detective, Watchmen or Security Guard Agencies.

Republic Act No. 5980 (1969), An Act Regulating the Organization and Operation of Financing Companies.

Presidential Decree No. 194 (1973), Authorizing Aliens, as well as Associations, Corporations or Partnerships Owned in Whole or in Part by Foreigners to Engage in the Rice and Corn Industry, and for Other Purposes.

Presidential Decree No. 442 (1974), Labor Code of the Philippines.

Batas Pambansa Bilang 68 (1980), Corporation Code of the Philippines.

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Presidential Decree No. 442 (1974), Labor Code of the Philippines.

Batas Pambansa Bilang 68 (1980), Corporation Code of the Philippines.

Batas Pambansa Bilang 178 (1982), Revised Securities Act.

Presidential Decree No. 1853 (1982), Requiring Deposits of Duties at the Time of Opening of Letters of Credit Covering Imports and for Other Purposes.

Republic Act No. 6938 (1990), An Act to Ordain a Cooperative Code of the Philippines.

Republic Act No. 7042 (1991), An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes (Foreign Investments Act of 1991).

Republic Act No. 7076 (1991), An Act Creating a People's Small-scale Mining Program and for Other Purposes (People's Small-scale Mining Act of 1991).

Republic Act No. 7160 (1991), Local Government Code of 1991.

Republic Act No. 7181 (1991), An Act Extending the Life of the Committee on Privatization and the Asset Privatization Trust.

Republic Act No. 7581 (1991), An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities and by Prescribing Measures Against Undue Price Increases During Emergency Situations and Like Occasions (Price Act).

Republic Act No. 7227 (1992), An Act Accelerating the Conversion of Military Reservations into other Productive Uses, Creating the Bases Conversion and Development Authority for this Purpose, Providing Funds Therefor, and for Other Purposes (Bases Conversion Act).

Republic Act No. 7642 (1992), An Act Increasing the Penalties for Tax Evasion, Amending for this Purpose the Pertinent Sections of the National Internal Revenue Code, as Amended.

Republic Act No. 7661 (1992), An Act Amending Republic Act No. 7181 entitled "An Act Extending the Life of the Committee on Privatization and Asset Privatization Trust."

Republic Act No. 7648 (1993), An Act Prescribing Urgent Related Measures Necessary and Proper to Effectively Address the Electric Power Crisis and for Other Purposes.

Republic Act No. 7650 (1993), An Act Repealing Section 1404 and Amending Sections 1401 and 1403 of the Tariff and Customs Code of the Philippines, as amended, Relative to the Physical Examination of Imported Articles.

Republic Act No. 7652 (1993), An Act allowing the long-term Lease of Private Lands by Foreign Investors (Investors' Lease Act).

Republic Act No. 7653 (1993), The New Central Bank Act.

Republic Act No. 7660 (1993), An Act Rationalizing Further the Structure and Administration of the Documentary Stamp Tax, Amending for the Purpose Certain Provisions of the National Internal Revenue Code, as Amended, Allocating Funds for Specific Programs and for Other Purposes.

Republic Act No. 7691 (1994), An Act expanding the jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts, Amending for this Purpose Batas Pambansa Blg. 129, Otherwise Known as the "Judiciary Reorganization Act of 1980."

Republic Act No. 7700 (1994), An Act Providing for Concurrent Jurisdiction Between and Among the First, Second and Third Divisions of the National Labor Relations Commission to Further Ensure Speedy Disposition of Cases, Amending for this Purpose Article 213 of Presidential Decree No. 442, as Amended, and for Other Purposes.

Republic Act No. 7717 (1994), An Act Imposing a Tax on the Sale, Barter or Exchange of Shares of Stock Listed and Traded Through the Local Stock Exchange or Through Initial Public Offering, Amending for the Purpose of the National Internal Revenue Code, as Amended, by Inserting a New Section and Repealing Certain Sub-sections Thereof.

Republic Act No. 7716 (1994), An Act Restructuring the Value-Added Tax (VAT) System, Widening its Tax Base and Enhancing its Administration, and for these Purposes Amending and Repealing the Relevant Provisions of the National Internal Revenue Code, as Amended, and for Other Purposes.

Republic Act No. 7718 (1994), An Act Amending Certain Sections of Republic Act No. 6957, entitled "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by Private Sector, and for Other Purposes.

Republic Act No. 7721 (1994), An Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines and for Other Purposes.

Republic Act No. 7844 (1994), An Act to Develop Exports as a Key Towards the Achievement of the National Goals Towards the Year 2000 (Exports Development Act of 1994).

Republic Act No. 7886 (1994), An Act Extending the Term of the Committee on Privatization and the Asset Privatization Trust Amending for the Purpose of Republic Act Numbered Seven Thousand Six Hundred Sixty-One.

Republic Act No. 7888 (1995), An Act to Amend Article 7 (13) of Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987.

Republic Act No. 7903 (1995), An Act Creating a Special Economic Zone and Free Port in the City of Zamboanga Creating for this Purpose the Zamboanga City Special Economic Zone Authority, Appropriating Funds therefor and for Other Purposes (Zamboanga City Special Economic Zone Act of 1995).

Republic Act No. 7909 (1995), An Act Granting a Franchise to Pacific Airways Corporation to Establish and Maintain Rural Air Transport System and Allied Services in the Philippines.

Republic Act No. 7916 (1995), An Act Providing for the Legal Framework and Mechanism for the Creation, Operation, Administration, and Coordination of Special Economic Zones in the Philippines, Creating for this Purpose the Philippine Economic Zone Authority (PEZA) and for Other Purposes (the Special Economic Zone Act of 1995).

- Republic Act No. 7918 (1995), An Act Amending Article 39, Title III of Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987, as amended.
- Republic Act No. 7922 (1995), An Act Establishing a Special Economic Zone and Free Port in the Municipality of Sta. Ana and Other Neighboring Islands in the Municipality of Aparri, Province of Cagayan, Providing Funds therefor, and for Other Purposes.
- Republic Act No. 7925 (1995), An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunication Services (Public Telecommunications Policy Act of the Philippines).
- Republic Act 7942 (1995), An Act Instituting a New System of Mineral resources Exploration, Development, Utilization and Conservation (Philippine Mining Act of 1995).
- Republic Act No. 7902 (1995), An Act Expanding the Jurisdiction of the Court of Appeals, Amending for the Purpose of Section Nine of Batas Pambansa Blg. 129, as amended, known as the Judiciary Reorganization Act of 1980.
- Republic Act No. 7906 (1995), An Act Providing for the Regulation of the Organization and Operations of Thrift Banks, and for Other Purposes (Thrift Banks Act of 1995).
- Republic Act No. 7975 (1995), An Act to Strengthen the Functional and Structural Organization of the Sandiganbayan, amending for that purpose Presidential Decree No. 1606, as amended.
- Republic Act No. 8041 (1995), An Act to Address the National Water Crisis (Water Crisis Act).
- Republic Act No. 8047 (1995), An Act Providing for the Development of the Book Publishing Industry through the Formulation and Implementation of a National Book Policy and National Book Development Plan (Book Publishing Industry Development Act).
- Republic Act No. 8103 (1995), An Act Granting a Franchise to All Asia Airlines Co., Inc. to Establish and Maintain Air Transportation Services Throughout the Philippines and/or Between the Philippines and Other Countries.
- Republic Act No. 8178 (1996), An Act Replacing Quantitative Imports Restrictions on Agricultural Products Except Rice, with Tariffs, Creating the Agricultural Competitiveness Enhancement Fund, and for Other Purposes.
- Republic Act No. 8179 (1996), An Act to Further Liberalize Foreign Investments, Amending for the Purpose Republic Act No. 7042, and for Other Purposes.
- Republic Act No. 8180 (1996), An Act Deregulating the Downstream Oil Industry, and for Other Purposes.
- Republic Act No. 8181 (1996), An Act Changing the Basis of Dutiable Value of Imported Articles Subject to an Ad Valorem Rate of Duty from Home Consumption Value (HCV) to Transaction Value (TV), Amending for the Purpose Section 201 Title 2, Part I of Presidential Decree No. 1464, otherwise known as the Tariff and Customs Code of the Philippines, as amended, and for Other Purposes.
- Republic Act No. 8293 (1997), The Intellectual Property Code of the Philippines.
- Republic Act No. 8424 (1997), The Tax Reform Act of 1997.

Republic Act No. 8751 (1999), An Act Providing the Rules for the Imposition of an Countervailing Duty, Amending for the Purpose Section 302, Part 2, Title II, Book 1 of the Tariff and Customs Code of the Philippines, as amended, and for Other Purposes, (Countervailing Duty Act of 1999).

Republic Act No. 8752 (1999), An Act Providing the Rules for the Imposition of an Anti-dumping Duty, Amending for the Purpose Section 301, Part 2, Title II, Book 1 of the Tariff and Customs Code of the Philippines, as amended by Republic Act No. 7843 and for Other Purposes, (Anti-Dumping Act of 1999).

Republic Act No. 8762 (2000), An Act Liberalizing the Retail Trade, Repealing for the Purpose Republic Act No. 1180, as amended, and for Other Purposes, (Retail Trade Liberalization Act of 2000).

EXECUTIVE ORDERS

Central Bank Circular No. 1389 (1983), Consolidated Foreign Exchange Rates and Regulations.

Proclamation No. 50, Series of 1986, Proclaiming and Launching a Program for the Expeditious Disposition and Privatization of Certain Government Corporations and/or the Assets thereof, and Creating the Committee on Privatization and the Asset Privatization Trust.

Proclamation No. 50-A, Series of 1986, Modifying Proclamation No. 50.

Executive Order No. 215, Series of 1987, Amending Presidential Decree No. 40 and Allowing the Private Sector to Generate Electricity.

Executive Order No. 226, Series of 1987, Omnibus Investment Code.

Executive Order No. 309, Series of 1987, Reorganizing the Peace and Order Council.

Department of Finance Order No. 100-94, Series of 1994, Guidelines on Entry of Foreign Insurance or Reinsurance Companies or Intermediaries.

Executive Order No. 1, Series of 1992, Reducing the Rates of Import Duty on Electric Generating Sets under Presidential Decree No. 1464, otherwise known as the Tariff and Customs Code of 1978, as amended.

Executive Order No. 2, Series of 1992, Extending the Effectivity of the Zero Rate of Import Duty on Cement and Cement Clinker under Section 104 of Presidential Decree No. 1464, Otherwise Known as the Tariff and Customs Code of 1978, as provided under Executive Order No. 387.

Executive Order No. 3, Series of 1992, Creating a Presidential Anti-Crime Commission to identify and cause the investigation and prosecution of criminal elements in the country.

Executive Order No. 8, Series of 1992, Restructuring the Rates of Import Duties and Amending the Classification of Certain Articles under Section 104 of the Tariff and Customs Code of 1978, as amended.

Executive Order No. 59, Series of 1993, Prescribing the Policy Guidelines for Compulsory Interconnection of Authorized Public Telecommunications Carriers in order to Create a Universally Accessible and Fully Integrated Nationwide Telecommunications Network and thereby Encourage Greater Private Sector Investment in Telecommunications.

Executive Order No. 79, Series of 1993, Modifying The Rates of Duty on Certain Imported Articles as provided under the Tariff and Customs Code of 1978, as amended, in order to implement the Minimum 50% Margin of Preference on Certain Products Included in the Brand-To-Brand Completion scheme in the Automotive Industry under the Basic Agreement on ASEAN Industrial Complementation.

Executive Order No. 94, Series of 1993, Reducing the Import Duty on Cement Clinker under Section 104 of Presidential Decree No. 1464, otherwise known as the Tariff and Customs Code of 1978.

Executive Order No. 98, Series of 1993, Reorganizing the Export and Investment Development Council into the Export Development Council.

Executive Order No. 106, Series of 1993, Lifting the Suspension of the Application of the Tariff Concessions Granted by the Philippines on Refractory Bricks under the ASEAN Preferential Trading Arrangements.

Executive Order No. 109, Series of 1993, Policy to Improve the Provision of Local Exchange Carrier Service.

Executive Order No. 110, Series of 1993, Strengthening the Export Development Council (EDC) amending for this purpose Executive Order No. 98 to Increase the Government and Private Sectors Members of the Council.

Executive Order No. 115, Series of 1993, Increasing the Special Duties on Crude Oil and Oil Products under Section 104 of the Tariff and Customs Code of the Philippines, as amended.

Executive Order No. 116, Series of 1993, Amending Section 1 of Executive Order No. 94, dated 01 June 1993.

Executive Order No. 145, Series of 1993, Modifying The Rates of Duty on Certain Imported Articles as provided for under the Tariff and Customs Code of 1978, as amended; in order to Implement the 1994 Philippine Schedule of Tariff Reductions on Articles Included in the Accelerated and Normal Programs of the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA).

Executive Order No. 146, Series of 1993, amending Executive Order No. 43 of 1992, by modifying the margins of the preference and the applicable ASEAN preferential tariffs on certain items included in the coverage thereof.

Executive Order No. 147, Series of 1993, Modifying The Rates of Duty on Certain Imported Articles as provided under the Tariff and Customs Code of 1978, as amended, in order to Implement the 10% Margin of Preference (MOP) Granted by the Philippines under the Agreement on the Global System of Trade Preferences among Developing

Countries as set forth in the Philippine Schedule of Concessions Annexed to the Agreement.

Executive Order No. 148, Series of 1993, Modifying the Rates of Import Duty on Certain Imported Articles as provided under Presidential Decree No. 1464, as amended, otherwise known as the Tariff and Customs Code of the Philippines of 1978.

Executive Order No. 153, Series of 1994, Modifying the Rates of Duty on Certain Imported Articles as provided for under the Tariff and Customs Code of 1978, as amended, in order to Implement the Ninety *Per Centum* Margin of Preference on Certain Products Included in the Nestle ASEAN Industrial Joint Venture (AIJV) Projects, as provided for in Article III, Paragraph 1 of the Revised Basic Agreement of AIJV.

Executive Order No. 160, Series of 1994, Reducing the Special Duties on Crude Oil and Oil Products Prescribed in Executive Order No. 115, Series of 1993.

Executive Order No. 172, Series of 1994, Increasing the Minimum Tariff Rate From Zero to Three Percent on Articles under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended.

Executive Order No. 173, Series of 1994, Amending Executive Order No. 153, Series of 1994 entitled Modifying the rates of duty on certain imported articles as provided under the tariff and customs code of 1978, as amended, in order to implement the minimum ninety *per centum* (90%) margin of preference on certain products included in the Nestle Asean Industrial Joint Venture (AIJV) Projects, as provided for in Article III, paragraph 1 of the Revised Basic Agreement on AIJV.

Executive Order No. 180, Series of 1994, Strengthening the Export Development Council (EDC) amending for this purpose Executive Order (E.O.) No. 110, Further Amending E.O. No. 98.

Executive Order No. 151, Series of 1994, Creating a Presidential Commission to Investigate Administrative Complaints Involving Graft and Corruption.

Executive Order No. 185, Series of 1994, Opening the Domestic Water Transport Industry to New Operators and Investors.

Executive Order No. 189, Series of 1994, Modifying the nomenclature and Rates of Import Duty on Certain Imported Articles under Section 104 of the Tariff and Customs Code of 1978, as amended.

Executive Order No. 204, Series of 1994, Modifying the nomenclature and rates of import duty on certain articles under Section 104 of the Tariff and Customs Code of 1978.

Executive Order No. 212, Series of 1994, Accelerating the Demonopolization and Privatization Program for Government Ports in the Country.

Executive Order No. 213, Series of 1994, Deregulating Domestic Rate.

Executive Order No. 219, Series of 1995, Establishing the Domestic and International Civil Aviation Liberalization Policy.

Executive Order No. 227, Series of 1995, Reducing the Rates of Import Duty on Cement and Cement Clinker under Section of Presidential Decree 1464, otherwise known as the Tariff and Customs Code of 1978, as amended.

Executive Order No. 237, Series of 1995, Modifying the Rates of Import Duty on Certain Imported Articles as amended, in order to Implement the Decision Taken by the 35th meeting of the Committee on Industry Minerals and Energy (COIME) to Constant Velocity Joint Driveshafts Assembly and Parts Thereof Under the Agreement on Asean Industrial Joint Venture (AIJV).

Executive Order No. 264, Series of 1995, Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles Under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended.

Executive Order No. 287, Series of 1995, Modifying the Rates of Duty on Certain Imported Articles as Provided for Under the Tariff and Customs code of 1978, as amended, in order to implement the 1996 Philippine Schedule of Tariff Reduction Under the New Time Frame of the Accelerated Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA).

Executive Order No. 288, Series of 1995, Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles Under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended.

Executive Order No. 298, Series of 1996, Providing for Alternative and/or Intermediate Modes of Privatization Pursuant to Proclamation No. 59 (s. 1986).

Executive Order No. 311, Series of 1996, Encouraging Private Sector Participation in the Operations and Facilities of the Metropolitan Waterworks and Sewerage System.

Executive Order No. 313, Series of 1996, Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles Under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended.

Executive Order No. 328, Series of 1996, Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles Under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended.

Executive Order No. 465, Series of 1998, Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles Under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended.

Executive Order No. 486, Series of 1998, Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles Under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended.

Executive Order No. 63, Series of 1999, Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles Under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended.

Executive Order No. 208, Series of 2000, Modifying the Nomenclature and the Rates of Import Duty on Certain Imported Articles Under Section 104 of the Tariff and Customs Code of 1978 (Presidential Decree No. 1464), as amended.

ANNEX B

(Draft bills in Congress)

ANNEX C

(Draft bill for discussion purposes)

Republic of the Philippines
SENATE/HOUSE OF REPRESENTATIVES
Manila/ Quezon City

11th Congress

Introduced by _____

AN ACT CREATING THE PHILIPPINE TRADE COMMISSION,
REGULATING AND PENALIZING THE ABUSE OF DOMINANT POSITION,
RESTRICTIVE AGREEMENTS, UNLAWFUL MERGERS, ACQUISITIONS AND
COMBINATIONS IN RESTRAINT OF TRADE, UNFAIR COMPETITION AND
OTHER ANTI-COMPETITIVE PRACTICES AND CONDUCT, AND
APPROPRIATING FUNDS THEREFOR, AND FOR OTHER PURPOSES

Be it enacted by the Senate and the House of Representatives in Congress assembled:

Article I
Title and Policy

Section 1. *Title* -- This Act shall be known as the "Philippine Fair Trade Act."

Section 2. *Declaration of Policy* -- It is the policy of the State to maintain and enhance free and full competition in trade, industry and all commercial economic activity; penalize all forms of unfair trade, anti-competitive conduct and combinations in restraint of trade, in order to ultimately enhance consumer welfare.

Article 2
Scope of the Law and Definition of Terms

Section 1. *Applicability* - This Act shall be enforceable in the whole territory of the Republic of the Philippines and applies to all areas of trade, industry and commercial economic activity. The Act shall be applicable to all matters specified in Articles 3, 4, 5 and 6, having substantial effects in the Republic of the Philippines, including those that result from acts done outside the Republic of the Philippines.

Section 2. *Limitations* - This Act does not derogate from the direct enjoyment of the privileges and protections conferred by Republic Act No. 8293 (1997), otherwise known as the Intellectual Property Code, and other laws protecting intellectual property, including inventions, industrial models, trademarks and copyrights. It does, however, apply to the use of such property in such a manner as to cause the anti-competitive effects prohibited herein.

This Law shall apply neither to the combinations or activities of workers or employees, nor to agreements or arrangements between two or more employers, when such combinations, activities, agreements or arrangements are designed solely to facilitate collective bargaining in respect of conditions of employment.

Section 3. **Definition of terms** – Whenever used in this Act, the following terms shall be taken to mean as follows:

- (a) "Competition" - the process by which economic agents, acting independently in a market, limit each other's ability to control the conditions prevailing in that market.
- (b) "Commission" – the Philippine Trade Commission created in Article 7 of this Act.
- (c) "Firm" - any natural or legal person, governmental body, partnership or association in any form, engaged directly or indirectly in economic activity. Two firms, one of which is controlled by the other, shall be treated as one firm. Two or more firms that are controlled by a single firm shall be treated as one firm. The Commission shall, from time to time, adopt a regular setting of what constitutes control.
- (d) "Goods" - all property, tangible and intangible, and services.
- (e) "Market" - a collection of goods that are capable of being substituted for each other and that buyers are or would be willing to substitute, and a specific territory, which may extend beyond the borders of the Republic of the Philippines, in which are located sellers among whom buyers are or would be willing to substitute from whom they would buy.

Article 3 Abuse of Dominant Position

Section 1. **Dominant Position** – A firm shall be deemed to have a dominant position if, acting on its own, it can profitably and materially restrain or reduce competition in a market for a significant period of time.

Section 2. **Safe Harbor** – A firm shall not be deemed to have a dominant position unless its share of the relevant market exceeds the percentage set by the Commission in its guidelines. A firm having a market share exceeding a percentage set by the Commission, may or may not be found to be dominant, depending on the economic situation in that market, including the competing firms' market shares and their abilities to expand those shares, and the potential for new entry into the market.

Section 3. **Prohibited Acts of a Dominant Firm** - Actions of a dominant firm, including, but not limited to:

- (a) creating obstacles to the entry of competing firms or to the expansion of existing competitors; or

- (b) eliminating competing firms from the market that have resulted or may probably result in a significant limitation of competition,

are prohibited.

Section 4. *Permissible Acts* -- Section 3 of this Article does not prohibit actions by a firm which, solely by increasing the efficiency of the firm taking those actions, or which pass the benefits of greater efficiency on the consumers, create obstacles to the entry of new firms, or reduce the competitiveness of existing firms.

Section 5. *Power to Break Up a Firm Abusing Its Dominant Position* - Where a firm has abused its dominant position and no other remedy under this Act or under an applicable regulatory statute would be likely to rectify the situation or prevent recurrence of the abuse, the Philippine Fair Competition Commission may reorganize or divide the firm, provided there is a reasonable likelihood that the resulting entity or entities would be economically viable.

The power to reorganize or divide contained in this Article shall be exercised in a manner designed to minimize any increases in the costs of providing the goods supplied by the abusive firm.

Article 4 Restrictive Agreements

Section 1. *Restrictive Agreements that are Illegal Per Se* - An agreement, concluded in any form, including by concerted practice, between competing firms or firms that could easily become competitors, having or likely to have any of the following principal effects, is conclusively presumed to significantly limit competition and is, thus, prohibited:

- (a) fixing or setting prices, tariffs, discounts, surcharges or any other charges; or
- (b) fixing or setting quantity of output; or
- (c) fixing or setting prices at auctions or in any other form of bidding, except for joint bids so identified on their face to the party soliciting the bids; or
- (d) dividing the market, whether by territory, by volume of sale or purchases, by type of goods sold, by customers or sellers, or by other means; or
- (e) eliminating from the market actual or potential sellers or purchasers; or
- (f) refusing to conclude contracts with actual or potential sellers or purchasers.

Section 2. *Other Restrictive Agreements* - An agreement, other than those enumerated in Section 1 of this Article, concluded in any form, including by concerted

practice, may likewise be prohibited by the Commission if said agreement has, or would likely have, as its result a significant limitation of competition.

An agreement, other than those enumerated in Section 1 of this Article, shall be presumed to significantly limit competition, if:

- (a) it is entered into by and among competing firms or firms that could easily become competitors and the firms participating in the agreement collectively exceed twenty (20) percent of a market affected by the agreement; or
- (b) it is entered into solely by and among non-competing firms and -
 - (1) at least one of the parties holds a dominant position in a market affected by the agreement; or
 - (2) the limitation of competition results from the fact that similar agreements are widespread in a market affected by the agreement.

Section 3. **Balancing Efficiencies** - An agreement prohibited under Section 2 of this Article may nevertheless be permissible and allowed by the Commission if said agreement has brought about, or is likely to bring about, gains in real, as opposed to merely pecuniary, efficiencies that -

- (a) are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the agreement; or
- (b) consumer well being is expected to be enhanced as a result of the agreement.

Section 4. **Burden of proof** - The burden of proof to show that the agreement is not prohibited lies with the parties seeking the exemption pursuant to Section 3. Such parties are required to, among others, demonstrate that if the agreement were not implemented, it is not likely that the relevant real efficiency gains would be realized by means that would limit competition to a lesser degree than the agreement.

Article 5 Mergers and Acquisitions

Section 1. **Review of Concentrations** - A concentration shall be deemed to arise when:

- (a) two or more previously independent firms merge, amalgamate or combine the whole or a part of their business; or
- (b) one or more natural or legal persons already controlling at least one firm, acquire, whether by purchase of securities or assets, by contract or by other means, direct or indirect control of the whole or parts of one or more other firms.

Section 2. **Control** - For the purpose of this Article, control is defined as the ability to materially influence a firm, in particular through:

- (a) ownership or the right to use all or part of the assets of an undertaking; or
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of a firm.

Section 3. **Compulsory Notification** - Parties to an agreement that will produce a concentration larger than the minimum size as may be provided in regulations issued pursuant to Section 7 of this Article, are prohibited from consummating such concentration until thirty (30) days after providing notification to the Commission, in the form and containing the information specified in regulations issued pursuant to section 7. An agreement consummated in violation of this requirement shall be considered void and subject the parties to the corresponding penalties therefor.

Section 4. **Further Information** - The Commission may, in writing, request the parties to the agreement, for further information, before the expiration of the thirty (30) day period referred to in section 3 of this Article. The issuance of such a request has the effect of extending the period within which the concentration may not be consummated for an additional thirty (30) days, beginning on the day after substantially all of the requested information is supplied to the Commission.

Section 5. **Voluntary Notification** - Parties to an agreement who are not subject to the notification requirement in Section 3 of this Article may voluntarily notify and, if they do so, be subject to the same procedures, restrictions and rights as are applied to cases of compulsory notification.

Section 6. **Effect of Notification** - If, before consummation of a concentration, the Commission determines that such concentration is prohibited under Section 8, and does not qualify for exemption under Section 9, of this Article, the Commission may:

- (a) prohibit consummation of the concentration;
- (b) prohibit consummation of the concentration unless and until it is modified by changes specified by the Commission; or
- (c) prohibit consummation of the concentration unless and until the pertinent party or parties enter into legally enforceable agreements specified by the Commission.

Section 7. **Regulations of the Commission** - The Commission shall from time to time adopt and publish regulations stipulating:

- (a) the minimum size or size of concentrations subject to the notification requirement of Section 3 of this Article;
- (b) the information that must be supplied for notified concentrations;
- (c) exceptions or exemptions from the notification requirements of Section 3 for specified types of concentrations; and

- (d) other rules relating to the notification procedures in Sections 3, 4 and 5 of this Article.

Section 8. ***Prohibited Concentrations*** - Concentrations that will significantly limit competition as may be determined by the Commission are prohibited.

Section 9. ***Permissible Concentrations***. Concentrations prohibited under Section 8 of this Article shall, nonetheless, be free from prohibition by the Commission where the parties establish that either:

- (a) the concentration has brought about or is likely to bring about gains in real, as opposed to merely pecuniary, efficiencies that are greater than or more than offset the effects of any limitation on competition that result or are likely to result from the concentration; or
- (b) a party to the concentration is faced with actual or imminent financial failure, and the concentration represents the least anti-competitive arrangement among the known alternative uses for the failing firm's assets.

Section 10. ***Burden of Proof*** - The burden of proof under Section 9 lies with the parties seeking the exemption.

A party seeking to rely on the exemption specified in Section 9 (a) must demonstrate that if the concentration were not consummated it is not likely that the relevant real efficiency gains would be realized by means that would limit competition to a lesser degree than the concentration.

A party seeking to rely on the exceptions specified in Section 9 (b) must:

- (a) demonstrate that reasonable steps have been taken within the recent past to identify alternative purchasers for the failing firm's assets; and
- (b) fully describe the results of that search.

Section 11. ***Prescription*** - The Commission may determine, within three (3) years after consummation, that either:

- (a) a non-notified concentration; or
- (b) a notified concentration in which the provisions of Sections 3 to 5 of this Article are not fully complied with,

has led or will probably lead to a significant limitation of competition and does not qualify for exemption set out in Section 9 of this Article. If it so determines, the Commission may:

- (a) undo the concentration by dissolving it into its constituent elements;
- (b) require other modifications of the concentration, including sale of a portion of its operations or assets; or

- (c) require the surviving firm or firms to enter into legally enforceable agreements specified by the Commission and designed to reduce or eliminate the competition limiting effects of the concentration.

Article 6 Unfair Competition

Section 1. *Unfair Competition* - Unfair competition is prohibited, including:

- (a) the distribution of false or misleading information which is capable of harming the business interests of another firm;
- (b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;
- (c) false or misleading comparison of goods in the process of advertising;
- (d) fraudulent use of another's trademark, firm name, or product labeling or packaging; or
- (e) unauthorized receipt, use, or dissemination of confidential scientific, technical, production, business or trade information.

Article 7 The Commission

Section 1. *Philippine Trade Commission* - There is hereby created (The existing Tariff Commission of the Philippines is hereby reconstituted into) an independent collegial body to be known as the Philippine Trade Commission. The Commission shall be composed of a Chairman and four (4) Associate Commissioners, all of whom shall be appointed by the President for a term of seven (7) years without reappointment. The Chairman and two (2) of the Associate Commissioners first appointed shall serve for a period of seven (7) years, while the other two (2) Associate Commissioners shall serve for five (5) years as shall be indicated in their respective appointments.

Appointment to any vacancy shall only be for the unexpired term of the predecessor. In no case shall a member of the Commission be designated or appointed in a temporary or acting capacity. The Chairman of the Commission can only be removed for patent disability to discharge his/her functions.

Section 2. *Qualifications* - The Chairman and the Associate Commissioners shall be citizens of the Philippines, at least forty (40) years of age, of recognized probity, integrity, and competence in the field of law, economics, finance banking, commerce, industry and/or consumer welfare, and must not have been a candidate for an elective national or local office in the immediately preceding election, whether regular or special.

Section 3. **Rank and Salary** - The members of the Commission shall have the same rank, privileges, and salaries as the Chairman and members of a Constitutional Commission. Their salaries shall be set, and from time to time be adjusted by the President. In no case shall their salaries be decreased during their term of office.

Section 4. **Prohibitions and Disqualifications** - The members of the Commission shall not, during their tenure, hold any other office or employment. They shall not during their tenure, directly or indirectly, practice any profession, participate in any business or financially interested in any contract or any franchise, or special privilege granted by the government of any subdivision, agency or instrumentality thereof, including government-owned and controlled corporations or their subsidiaries: *Provided*, however, that they may, with the prior permission of the President, teach part time in any institution of learning. They shall, at all times, strictly avoid conflict of interest situations in the conduct of their office. They shall not be qualified to run for any office in any public election, regular or special, immediately preceding their cessation from office. They shall not be allowed to appear or practice before the Commission for a period of one (1) year following their cessation from office.

Section 5. **Meetings, Notice, and Quorum** - The Commission shall meet as often as may be necessary on such days as the Chairman, or in his/her absence, as a majority of the Commissioners may fix. The notice of meeting shall be given to all members at least one (1) day before the scheduled date of the meeting.

The presence of at least three (3) Commissioners shall constitute a quorum. In the absence of the Chairman, one of the Associate Commissioner chosen by those present shall act as the presiding officer of the meeting.

Section 6. **Secretariat** - The Commission shall have a Secretariat with a staff complement as may be determined by the Chairman in consultation with the Department of Budget and Management.

The Secretariat shall be headed by an Executive Director who shall be appointed by the President. He/she shall act as the secretary of the Commission and shall be responsible for the effective implementation of the policies, rules and standards set by the Commission and oversee and coordinate the day-to-day activities of the different operating units of the Commission.

Article 8

Powers and Functions of the Commission

Section 1. **Powers and Functions** - To carry out the objectives of this Act, the Commission shall have and exercise the following powers and functions:

- (a) To enforce and effectively administer the provisions of this Act and other fair trade laws, subject to the powers vested in the courts and other administrative agencies under this Act;
- (b) undertake and prepare industry studies to determine industry structures, and the state of competition and competitiveness of Philippine industries, and collate, compile, distribute and disseminate

resource materials on competition policy, with the end in view of creating a national database on competition;

- (c) conduct workshops and seminars, information campaigns for the public, and train or develop a pool of experts on competition;
- (d) extend technical assistance to the Philippine delegations to international bodies and meetings in regard to trade and competition law and policy;
- (e) draft and recommend proposed administrative and legislative measures for respective consideration and adoption/enactment by the Executive or Legislative Branch of government;
- (f) make submissions to the government authorities engaged in designing or administering legislation or regulations which could affect competition in any market in the Philippines, intervene in hearings and proceedings held with regard to the adoption or administration of such laws or regulations, and publish the submissions and interventions above referred to, *provided* that confidential information is not divulged;
- (g) administratively adjudicate violations of this Act and rules and regulations issued pursuant thereto, by conducting a formal investigation, independent of the corresponding criminal and civil action for said violation(s). The imposition of administrative penalties in the formal investigation is without prejudice to the imposition of penalties in the criminal action and/or judgment in the civil action and *vice versa*.

As soon as a formal charge is filed with the Commission and even prior to the commencement of the formal investigation, the Commission may *motu proprio* or upon verified application of any person, issue preliminary orders prohibiting firms from carrying on the anticompetitive or unfair practices referred to in this Act and, if necessary, requiring such firms to take other specified actions to eliminate the harmful effects of such practices and to ensure against recurrence of such practices. Before issuing any orders, the Commission shall be satisfied that the proposed measures are urgently required to avoid serious, imminent and irreparable harm to the economic interests of the Philippines, as expressed in this Act. Where the effectiveness of the order would not thereby be prejudiced, the Commission may permit the firms that would be subject to the order to present their views regarding the proposed order. The Commission shall provide by rules and regulations the other procedures and restrictions for the issuance of such preliminary orders.

All orders may, under this Section, lose effect twenty one (21) days after they are issued, unless renewed by express decision of the Commission.

Upon its decision becoming final and executory, the Commission on its own initiative or upon motion of the winning party shall issue a writ of execution. The Commission shall deputize the Philippine National Police, National Bureau of Investigation or Armed Forces of the Philippines in the enforcement of any of its decisions and orders. Orders and decisions issued under this Section may be appealed to the pertinent appeal court, but do not lose their effect pending the outcome of the appeal;

- (h) conduct its own administrative investigations for the purpose of:
 - (1) obtaining information relative to any activity that constitutes any past or present violation of this Act and other fair trade laws; and
 - (2) gathering and compiling trade information relative to:
 - (i) the nature, organization and resources of any person, firm, entity or association doing business in and/or with the Philippines or a Philippine firm;
 - (ii) determining and evaluating the practices, acts, methods, schemes, arrangements and other trade conditions prevailing in an industry.
- (i) the officials authorized to conduct the preliminary or administrative investigations, including formal investigations for purposes of administrative adjudication referred to in the Section 1 (g) of this Article, shall have the power to administer oaths, issue subpoena *duces tecum* to compel the attendance of witnesses and the production of necessary papers and documents, and to punish direct and indirect contempt as granted to superior courts under the Rules of Court;
- (j) initiate or institute the appropriate civil action or proceeding before the proper court or administrative agency in the implementation of the provisions of this Act and other fair trade laws or restrain any threatened violations thereof;
- (k) institute the appropriate information and prosecute criminal cases for any and all violations of this Act and other fair trade laws after conducting a preliminary investigation *motu proprio* or upon complaint of any person, when there is sufficient ground to engender a well founded belief that the violation(s) complained of is/are being or has/have been committed, and in addition, and subject to the rules on prosecution of civil action under the Rules of Court, institute the appropriate action for the recovery of civil liability;
- (l) To recommend the amendment of existing franchises when, based on its own evaluation, the same has adversely affected the growth of the relevant market or industry;

- (m) To periodically conduct an inspection of any pertinent:
- (1) factory, shop, laboratory, establishment, store, warehouse, any means of transportation, and the like;
 - (2) papers, documents, and records found in such factory, shop, laboratory, establishment, store, warehouse, means of transportation, and the like;
 - (3) equipment, finished or unfinished products, raw materials, containers, labeling and other pertinent properties found in such factory, shop, laboratory, establishment, store, warehouse, means of transportation, and the like;
 - (4) activity being undertaken in such factory, shop, laboratory, establishment, store, warehouse, means of transportation and the like, which may be necessary to determine violations or which may aid in the enforcement of this Act, other fair trade laws, or rules and regulations issued pursuant thereto.

The officials authorized to conduct said inspection may obtain a reasonable quantity of samples of the properties (except equipment) mentioned in Section 1 (m) (3) of this Article, to take pictures or video tapes of the places things mentioned in Section 1 (m) (1) and 3 of this Article; and secure copies of the papers mentioned in Section 1 (m) (2) of this Article.

All acts authorized under this subsection shall be conducted at reasonable promptness, in a professional manner and without undue disturbance to any legitimate work or activity being undertaken inside the premises of such places. Receipts shall be issued for samples which may thereafter be so obtained;

- (n) require any person, firm, entity or association to submit to it periodically or whenever necessary, such report, data, information, paper or document in such form as may be prescribed by the Commission;
- (o) request the different government agencies for assistance in obtaining information necessary for the proper discharge of its responsibilities under this Act, and examine, if necessary, the pertinent records and documents in the possession of such government agency;
- (p) promulgate such rules and regulations as may be necessary to implement the provisions and intent of this Act. Such rules shall be take effect fifteen (15) days following their publication in at least two (2) newspaper of general circulation or in the Official Gazette; and
- (q) To perform such other functions as it may deem appropriate for the proper enforcement of this Act.

Section 2. **Advance Rulings** - Parties may apply to the competition office for advance rulings, binding on that office, regarding eligibility for exemptions. If it chooses to grant an advance ruling, the competition office may include in it specified conditions and requirements. The advance ruling shall by its terms exist for a specified period of time.

Advance rulings may be renewed upon application by the parties. An advance ruling may be revoked or modified if:

- (a) a significant change in circumstances has occurred since the ruling;
- (b) the applicant infringed a condition or a requirement specified in the ruling;
- (c) the decision to grant the ruling was materially influenced by inaccurate, fraudulent or misleading data; or
- (d) the applicant abused the exemption granted to it.

The competition office shall arrange for publication of its advance rulings, omitting any confidential information. It may arrange similar publication of all other decisions taken under this Act, again omitting any confidential information.

Section 3. **Rules on Confidentiality and Conflict of Interest** - Officials of the Commission, as well as their agents and consultants, shall maintain the confidentiality of all business, commercial or official information of which they become aware during the course of their official activities, except that which is otherwise public. Disclosure of such confidential information may occur in the course of administrative or judicial proceedings arising under this Act, or otherwise as permitted by a court of competent jurisdiction.

All members of the Commission shall inform the Office of the Chairman of the Commission of any position held or activity carried out in an economic field by the member, including all agents thereof. The Chairman shall take all necessary steps to ensure there is no conflict of interest arising from such positions or activities, including requiring that such positions be resigned or activities cease.

Article 9 Penalties

Section 1. **Administrative Penalties** - After formal investigation, the Commission may impose one or more of the following administrative penalties:

- (a) censure of the erring firm(s); and/or
- (b) issuance of a Cease and Desist order which must specify the acts that the respondent shall cease and desist from and shall require him to submit a report of compliance therewith a reasonable time which shall be fixed in the order; and/or
- (c) condemnation or Seizure of Products or Property, in such manner as may be deemed appropriate by the Commission and in coordination with the proper authorities and remain in the custody of the

Commission subject to the finality of the decision: *Provided, That* perishable goods shall be disposed of and the proceeds of such disposition shall be subject to the final order or decision of the Commission in the case; and/or

- (d) other analogous penalties as may be deemed proper by the Commission.

Section 2. **Imposition of Administrative Fines** - Administrative fines may be imposed in such an amount deemed reasonable by the Commission, which, in the case of an individual, shall not be less than Three Hundred Thousand Pesos (P300,000.00) nor more than One Million Pesos (P1,000,000.00), and in the case of a corporation or other juridical entity, not less than Three Million Pesos (P3,000,000.00) nor more than One Hundred Million Pesos (P100,000,000.00), and in both instances, an additional fine of Ten Thousand Pesos (P10,000.00) for each day of continuing violation: *Provided, That* in case of violations by corporations, associations, partnership or other juridical entities, individual fines may still be imposed on the officers directly or indirectly responsible for the implementation of the prohibited act. The fine imposed herein shall be regardless of the limit on the criminal fine in this Act and other fair trade laws violated.

Section 3. **Criminal Penalties** - Any person who shall commit a prohibited act defined under Articles 3, 4, 5, and 6 or shall violate any provision of this Act shall be guilty of a felony and, upon conviction thereof, shall suffer the penalty of imprisonment of not less than five (5) years but not more than twenty (20) years and a fine of not less than Three Hundred Thousand Pesos (P300,000.00) in the case of an individual, and not less than Three Million Pesos (P3,000,000.00) in the case of a corporation or other juridical entity: *Provided, That* in case of violation by corporations, associations, partnerships or other juridical entities, the penalty of imprisonment shall be imposed on the officers directly or indirectly responsible for the implementation of the prohibited act.

In addition to the foregoing penalties, the court may order the closure or dissolution of the establishment or firm where circumstances warrant and any property owned under any contract or by any combination, or pursuant to any conspiracy, and subject thereof as mentioned in the preceding sections, shall be forfeited in favor of the government.

Section 4. **Award Of Damages** - Any person who shall be injured in his/its business or property by any other person or corporation shall recover the amount of damages sustained by reasoned of the act declared to be unlawful by this Act, including the costs of suit and reasonable attorney's fees: *Provided, That* this Section shall be without prejudice to the filing of the appropriate criminal action against the offending party.

Section 5. **Alien Violation** -- If the person committing the violation of this Act be an alien or a foreign firm, he/its foreign officers/representatives shall, in addition to the above penalties, be deported after paying his/its fine and/or serving his sentence without need of any further proceedings.

Section 6. **Public Officer as Offender** - If the offender is a public officer, he shall, in addition, suffer the penalty of perpetual disqualification from holding a public office.

Article 10 Final Provisions

Section 1. **Appropriations** - The amount necessary to carry out the provisions of this Act shall be included in the General Appropriations Act of the year following its enactment into law and thereafter.

Section 2. **Repealing Clause** - All laws, decrees, orders, rules and regulations and all other issuance or parts thereof inconsistent with the provisions of this Act are hereby repealed or amended accordingly.

Section 3. **Separability Clause** - If any part or provision of this Act is held unconstitutional or invalid, other parts or provisions hereof which are not affected thereby shall remain in full force and effect.

Section 4. **Effectivity Clause** - This Act shall take effect immediately upon publication in the Official Gazette or at least two (2) newspapers of general circulation approved.

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REFERENCES

BOOKS, TREATISES, AND REPORTS

Abrenica, Ma. Joy V., et al., 1995: A Tale of Two Semesters A Policy Paper (February 1996) Philippine Exporters Confederation, Inc. 38p.

American Jurisprudence 2d, Vol 19.

Campos, Jr., Jose C. The Corporation Code: Comments, Notes and Selected Cases. Central Lawbook Publishing Co., Inc., 1981.

Centesimus Annus (Text).

Chamberlin, Edward Hastings. The Theory of Monopolistic Competition. Cambridge, Massachusetts: Harvard University Press, 1942.

Cini, Michelle and McGowan, Lee, Competition Policy in the European Union. New York, New York: St. Martin's Press, Inc., 1998.

Competition Policy in a Social Market Economy 51p.

Dejillas, Leopoldo J., Christian Democracy & Social Market Economy: An Alternative Program of Government. Logos Publications, Inc., 1993.

Friedman, James W. Oligopoly Theory. Cambridge, Massachusetts: Cambridge University Press, 1993.

Institute for Research into International Competitiveness. A Policy Framework for Competition Policy in the Philippines. Perth, Western Australia: Curtin University of Technology, 1999.

Khemani, R. Shyam. The Role and Importance of Competition Law and Policy in the ASEAN Region. 23p.

Nicholson, Walter. Microeconomic Theory: Basic Principles and Extensions (6th edition). Fort Worth, Texas: The Dryden Press, 1995.

Pacific Economic Cooperation Council, Milestones in APEC Liberalization: A Map of Market Opening Measures by APEC Economies. Study for the Asia Pacific Economic Cooperation Secretariat (1995) (Singapore) 180p.

Patalinghug, Epictetus E., Setting the National Agenda for Consumer Protection Through Competition Policy. Paper presented to a forum on "Protecting the Filipino Consumer Through Competition Policy" (18 March 1996) 6p.

Patalinghug, Epictetus E., Competition Policy: Some Suggested Ideas. Paper presented to the APEC Governors' Workshop (28 February 1996) 4p.

- Porter, Michael E. The Competitive Advantage of Nations. New York: The Free Press, 1990.
- Price Waterhouse Coopers, APEC Competition Law Study. Prepared for the Asia Pacific Economic Cooperation Senior Officials (July 1999) 129p.
- Samuelson, Paul A. and William D. Nordhaus. Economics (15th edition). New York: McGraw-Hill, Inc., 1995.
- SGV Consulting, Philippines. Barriers To Entry Study, Final Report 1. Study prepared for the United States Agency for International Development (April 1992) (Philippines) 156p.
- Swann, D. Competition and Consumer Protection. London, England, 1979.
- The Pocket Oxford Dictionary of Current English (8th edition). Oxford, England: Clarendon Press, 1992.
- Varian, Hal R. Intermediate Microeconomics: A Modern Approach (3rd edition). New York: W.W. Norton and Company, 1993.
- Whish, Richard, Competition Law (3rd edition). London: Butterworth & Co (Publishers) Ltd., 1993.
- World Bank and OECD. A Framework for the Design and Implementation of Competition Law and Policy. Washington, D.C.: World Bank and OECD, 1998.

ARTICLES

- Baumol, Panzar, and Willing, "Contestable Markets and the Theory of Industry Structure" (1982). Bailey, "Contestability and the Design of Regulatory and Anti-Trust Policy (1981) 71 Am Ec Rev 178-183.
- Campos, Robert Alexander O. and Arlegui, Anna Liza A., Toward A Pro-Competition And Pro-Consumer Anti-trust Policy. Economic Policy Paper 9 (Center for Research and Communication, Philippines) (1993) 4p.
- Clark, "Toward a Concept of Workable Competition" (1940) 30 Am Ec Rev 241-256.
- Dejillas, Leopoldo J. "Competition Policy and the Market Economy: The Philippine Experience" in Economic Policy and the Market Economy – The Philippine Setting (1996). Leopoldo J. Dejillas, ed., 1996. (Institute for Development Research and Studies [IDRS] Konrad Adenauer Foundation [KAF], Makati City, Philippines) 190p.
- Janow, Merit E., Public and Private Restraints that Limit Access to Markets. (April 1995) 16p.

Jara, Marifi S., PLDT Commits 2 Interim Solutions to "link" Problems. *Business World* 8 (Philippine Press Institute) (22 July 1996)

Khemani, R. Shyam. "The Role and Importance of Competition Law and Policy in the ASEAN Region." 23p.

Lazatin, Victor. "Outline of Competition Law Enforcement in the Philippines." 26p.

Meyerman, Gerald E. and Cuevas, Mario A. "Competition Policy in a Global Economy - An Interpretive Summary," *The International Bank for Reconstruction and Development/The World Bank* (1998), Washington, D.C., U.S.A.

Sosmeña, Gaudioso, Streamlining the Bureaucracy, in Vol. II No. 1 *Konrad Adenauer Stiftung (Philippines) Occasional Papers* 55. (Konrad Adenauer Stiftung, Philippines, March 1994) 9p.

Stockmann, Kurt, The Function of Competition in a Social Market Economy, in *Social Market Economy: An Economic System for Developing Countries* 27. (Winfried Jung, ed., 1991) (Logos Publications, Inc.). 192p.

Vergara, Bess F., Victor. "Anti-Trust Legislation in the House of Representatives."

Villanueva, Othel J., PLDT to Address Voice Channel Problem of ICC. *The Manila Chronicle* 11 (Chronicle Securities Corporation) (22 July 1996).

Watson, Peter. "Practical Implications of the Post-GATT Order: Considerations for the Future Multilateral Agenda," in *The World Trade Congress* (1996). 12p. Singapore.

CONSTITUTION AND STATUTES

Philippine Constitution.

Act No. 3815 (1930), Revised Penal Code.

Republic Act No. 7394 (1932), Consumer Act of the Philippines.

Republic Act No. 337 (1948), An Act Regulating Banks and Banking Institutions and for Other Purposes (General Banking Act).

Republic Act No. 386 (1949), An Act to Ordain and Institute the Civil Code of the Philippines.

Republic Act No. 1180 (1954), An Act to Regulate the Retail Business.

Republic Act No. 3247 (1961), An Act to Prohibit Monopolies and Combinations in Restraint of Trade.

Presidential Decree No. 442 (1974), Labor Code of the Philippines.

Batas Pambansa Bilang 68 (1980), Corporation Code of the Philippines.

Batas Pambansa Bilang 178 (1982), Revised Securities Act.

Republic Act No. 6938 (1990), An Act to Ordain a Cooperative Code of the Philippines.

Republic Act No. 7042 (1991), An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes (Foreign Investments Act of 1991).

Republic Act No. 7160 (1991), Local Government Code of 1991.

Republic Act No. 7181 (1991), An Act Extending the Life of the Committee on Privatization and the Asset Privatization Trust.

Republic Act No. 7581 (1991), An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities and by Prescribing Measures Against Undue Price Increases During Emergency Situations and Like Occasions (Price Act).

Republic Act No. 7227 (1992), An Act Accelerating the Conversion of Military Reservations into other Productive Uses, Creating the Bases Conversion and Development Authority for this Purpose, Providing Funds Therefor, and for Other Purposes (Bases Conversion Act).

Republic Act No. 7661 (1992), An Act Amending Republic Act No. 7181 entitled "An Act Extending the Life of the Committee on Privatization and Asset Privatization Trust."

Republic Act No. 7648 (1993), An Act Prescribing Urgent Related Measures Necessary and Proper to Effectively Address the Electric Power Crisis and for Other Purposes.

Republic Act No. 7650 (1993), An Act Repealing Section 1404 and Amending Sections 1401 and 1403 of the Tariff and Customs Code of the Philippines, as amended, Relative to the Physical Examination of Imported Articles.

Republic Act No. 7653 (1993), The New Central Bank Act.

Republic Act No. 7721 (1994), An Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines and for Other Purposes.

Republic Act No. 7844 (1994), An Act to Develop Exports as a Key Towards the Achievement of the National Goals Towards the Year 2000 (Exports Development Act of 1994).

Republic Act No. 7886 (1994), An Act Extending the Term of the Committee on Privatization and the Asset Privatization Trust Amending for the Purpose of Republic Act Numbered Seven Thousand Six Hundred Sixty-One.

Republic Act No. 7888 (1995), An Act to Amend Article 7 (13) of Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987.

Republic Act No. 7916 (1995), An Act Providing for the Legal Framework and Mechanism for the Creation, Operation, Administration, and Coordination of Special Economic

Zones in the Philippines, Creating for this Purpose the Philippine Economic Zone Authority (PEZA) and for Other Purposes (the Special Economic Zone Act of 1995).

Republic Act No. 7918 (1995), An Act Amending Article 39, Title III of Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987, as amended.

Republic Act No. 7922 (1995), An Act Establishing a Special Economic Zone and Free Port in the Municipality of Sta. Ana and Other Neighboring Islands in the Municipality of Aparri, Province of Cagayan, Providing Funds therefor, and for Other Purposes.

Republic Act No. 7925 (1995), An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunication Services (Public Telecommunications Policy Act of the Philippines).

Republic Act No. 8178 (1996), An Act Replacing Quantitative Imports Restrictions on Agricultural Products Except Rice, with Tariffs, Creating the Agricultural Competitiveness Enhancement Fund, and for Other Purposes.

Republic Act No. 8179 (1996), An Act to Further Liberalize Foreign Investments, Amending for the Purpose Republic Act No. 7042, and for Other Purposes.

Republic Act No. 8180 (1996), An Act Deregulating the Downstream Oil Industry, and for Other Purposes.

Republic Act No. 8293 (1997), The Intellectual Property Code of the Philippines.

CASES

G.R. Nos. 14360 and 127867, Decision *En Banc* dated 03 December 1997 on the Motion for Reconsideration, citing the State of the Nation Address of President Fidel V. Ramos, 3rd Session of the Ninth Congress, July 25, 1994.

G.R. No. L-45911, 89 SCRA 339 (1979).

G.R. Nos. 124360 and 127867, Decision *En Banc* dated 05 November 1997.

G.R. No. 118295, *En Banc* Decision dated 02 May 1997 (272 SCRA 18).

G.R. Nos. 124360 and 127867, Decision *En Banc* dated 05 November 1997.

Case T-7/89 *Re* Polypropylene Cartel SA Hercules (1991) ECR II-1711

Case 48/69 ICI vs Commission (Dyestuffs case 1972) ECR 619

Case T-7/89 *Re* Polypropylene Cartel SA Hercules (1991) ECR II-1711

Case T-11/89 Shell v. Commission [1992] ECR II-757.

Case 107/82 AEG-Telefunken v. Commission [1983] ECR 3151.

Case 26/75 General Motors Continental NV v Commission [1976] ECR 1367.

G.R. Nos. 14360 and 127867, Decision *En Banc* dated 03 December 1997 on the Motion for Reconsideration.

Matsushita Electric Industrial Co. Ltd., et al. v. Zenith Radio Corporation, et al., 475 US 574 (1986).