Demystifying Dominance: Establishing Legal Parameters for Abuse of Dominance

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I. INTRODUCTION

> *Like many businessmen of genius he learned that free competition was wasteful, monopoly efficient. And so he simply set about achieving that efficient monopoly.*
>
> — Mario Puzo[1]

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Cite as 60 ATENEO L.J. 183 (2015).

1. MARIO PUZO, THE GODFATHER 237 (2005).

In 2007, Cebu Pacific began implementing its Piso-fare promotion.[2] As its name suggests, a one-way airline ticket costs only one peso. Only a year prior, Cebu Pacific proudly proclaimed that it had become "the No. 1 domestic airline in terms of flying the most passengers."[3] Since then, Cebu Pacific has consistently reported an increasing market share.[4] Naturally, as Cebu Pacific's market share grew steadily, those of competing domestic firms began to fall.[5] Currently, Cebu Pacific has the largest market share in the domestic airline market.[6]

Is Cebu Pacific really the best and most efficient domestic airline? Or was its assent to the top of the domestic airline industry a result of predatory practices? Stated otherwise, did Cebu Pacific fortify its market power through acts constituting abuse of its dominant position?

Until recently, the legal system of the Philippines was not equipped with the proper tools necessary to make such a determination. On 21 July 2015, however, Republic Act (R.A.) No. 10667 or the Philippine Competition Act[7] (Competition Act) was signed into law. Without a doubt, the enactment of the Competition Act represents a significant step towards eliminating anti-competitive practices on the Philippine market. But are its provisions adequate to curtail anti-competitive behavior?

In answering this query, it is necessary to first discuss the current state of the Philippine economy. Also, to appreciate the need for an effective competition law, economic theory will be explored. Second, it will be demonstrated that pursuant to the Philippines' treaty obligations under the Association of Southeast Asian Nations (ASEAN) Charter, there is a need to interpret and implement the Competition Act in substantial compliance with

2. Cebu Pacific, Cebu Pacific Offers P1 Fare to all domestic & International destinations, *available at* https://www.cebupacificair.com/about-us/pages/news.aspx?id=758 (last accessed Aug. 29, 2015).

3. Cebu Pacific, Cebu Pacific is now the No. 1 domestic airline, *available at* https://www.cebupacificair.com/about-us/pages/news.aspx?id=787 (last accessed Aug. 29, 2015).

4. *See* Civil Aeronautics Board (CAB), Domestic Schedule Passenger Traffic, *available at* http://www.cab.gov.ph/statistics/category/domestic-3 (last accessed Aug. 29, 2015) [hereinafter CAB Domestic Data].

5. *Id.*

6. *Id.*

7. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefore [Philippine Competition Act], Republic Act No. 10667 (2015).

the ASEAN Guidelines. Third, in order to fulfill this obligation, the definitions and standards in the ASEAN Guidelines, as well as the laws of other States, will be discussed in relation to one class of abuse of dominance, predatory pricing. Finally, the effectivity of the provisions of the Competition Act concerning abuse of dominance — specifically predatory pricing — will be evaluated, and recommendations in the interpretation and implementation of the law will be made.

A. The Policy Need for an Effective Competition Law

The Constitution provides that "[t]he State shall regulate or prohibit monopolies when the public interest so requires."[8] According to the Supreme Court in *Tatad v. Secretary of the Department of Energy*,[9] this provision does not only apply to monopolies, but is "anti-trust in history and spirit."[10] Given the current state of the Philippine economy,[11] public interest desperately requires the proper implementation of a competition law.

The socio-economic landscape of the Philippines has been aptly described as the "arena of the privileged."[12] The richest 40 families in the country hold 76% of the nation's gross domestic product.[13] Out of the top 1,000 corporations, 10 corporations earned 40% of the net income, and held 34% of total assets of the group in 1991.[14] In fact, the Philippines has the

8. PHIL. CONST. art. XII, § 19.

9. Tatad v. Secretary of the Department of Energy, 281 SCRA 330 (1997).

10. *Id.* at 358.

11. Norma B. Patacsil, et al., *Philippines: Overview*, *in* THE ASIA-PACIFIC ANTITRUST REVIEW 140 (2014) & Butch Gamboa, *Local anti-trust law*, PHIL. STAR, June 7, 2014, *available at* http://www.philstar.com/business/2014/06/07/1331871/local-anti-trust-law (last accessed Aug. 29, 2015).

12. Patacsil, et al., *supra* note 11, at 140.

13. *Id.* (citing Agence France-Presse, *Philippines' elite swallow country's new wealth*, PHIL. DAILY INQ., Mar. 3, 2013, *available at* http://business.inquirer.net/110413/philippines-elite-swallow-countrys-new-wealth (last accessed Aug. 29, 2015)).

14. Anthony R.A. Abad, *Recommendations for Philippine Antitrust Policy and Regulation*, *in* TOWARDS A NATIONAL COMPETITION POLICY FOR THE PHILIPPINES 357 (Erlinda Medalla ed., 2002).

second highest level of market dominance of corporations in the ASEAN region.[15]

The market structure of developing countries, such as the Philippines, lends itself to market concentration.[16] Market concentration results from the fact that markets in developing countries tend to be smaller.[17] Consequently, only a few firms can successfully achieve economies of scale.[18] Further, because of the low-income level prevailing in the Philippines, only a select number of firms can engage in industries that require high capitalization and/or investment.[19]

Given these realities, Congress already sought to mitigate these effects even prior to the passage of the Competition Act by deregulating most sectors and opening the economy up to globalization.[20] Nevertheless, certain industries continue to be insulated from domestic and foreign competition.

In *Batangas Transportation Co. v. Orlanes*,[21] for instance, the Supreme Court overturned the decision of the Public Service Commission issuing a license to operate to Cayetano Orlanes, since the route was already being serviced by Batangas Transportation Co.[22] The Supreme Court reasoned that had it issued a license to Orlanes, "the first licensee would not have protection on his investment[ ] and would be subject to ruinous competition[.]"[23]

15. Makati Business Club, Towards a Comprehensive Competition Law (A Research Report by the Makati Business Club), *available at* http://www.mbc.com.ph/engine/wp-content/uploads/2014/07/MBCRR-115.pdf (last accessed Aug. 29, 2015).

16. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT SECRETARIAT, THE EFFECTS OF ANTI-COMPETITIVE BUSINESS PRACTICES ON DEVELOPING COUNTRIES AND THEIR DEVELOPMENT PROSPECTS xvii (Hassan Qaqaya & George Lipimile eds., 2008) [hereinafter UNCTAD Secretariat].

17. *Id.*

18. *Id.*

19. *Id.*

20. *See* Abad, *supra* note 14, at 357.

21. Batangas Transportation Co. v. Orlanes, 52 Phil. 455 (1928).

22. *Id.* at 472.

23. *Id.* at 466.

The Philippines also has certain laws that insulate the market from foreign competition. Republic Act No. 8800,[24] for instance, provides —

> Section 5. Condition the Application of General Safeguard Measure. [—] The Secretary shall apply a general safeguard measure upon a positive final determination of the [Tariff] Commission that a product is being imported [into] the country in increased quantities, whether absolute or relative to the domestic production, as to be a substantial cause of serious injury or threat thereof to the domestic industry; however in the case of non-agricultural products; the Secretary shall first establish that the application of such safeguard measure will be in the public interest.[25]

Foreign competition is especially desirable in industries wherein high costs limit the market to only a few players. Unfortunately, the above provision is utilized to eliminate foreign competition in certain industries.[26] The cement industry, for instance, vehemently opposed the entry into the market of foreign cement, which had lower prices than domestic alternatives.[27] In 2001, the Department of Trade and Industry caved to the lobbying of domestic producers by temporarily imposing an extra duty of ₱20.60 on imported cement.[28] To promote competition, safeguard measures should only be granted in limited circumstances constituting dumping.[29]

Due to these factors, the benefits of liberalization and globalization on the Philippine economy have yet to trickle down to the lowest socio-economic strata. An effective competition law can achieve this by "expanding the entrepreneurial base[.]"[30]

B. The Benefits Competition Law

Economically, a sound competition law could:

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24. An Act Protecting Local Industries by Providing Safeguard Measures to be Undertaken in Response to Increased Imports and Providing Penalties for Violation Thereof [Safeguard Measures Act], Republic Act No. 8800 (2000).

25. *Id.* § 5.

26. *See* Rafaelita A. Mercado-Aldaba, *Of Cartels and Collusion: An Analysis of the Philippine Cement Industry*, *in* TOWARDS A NATIONAL COMPETITION POLICY FOR THE PHILIPPINES 84 (Erlinda Medalla ed., 2002).

27. *Id.* at 83.

28. *Id.* at 84.

29. *Id.* at 96.

30. UNCTAD SECRETARIAT, *supra* note 16, at xi.

(1) improve economic efficiency;

(2) increase consumer welfare; and

(3) hasten economic growth and development.[31]

1. Economic Efficiency

According to economic theory, the enactment of anti-trust laws will result in productive and allocative efficiency.[32] In a perfectly competitive market,[33] a firm would set prices where marginal cost[34] or supply meets demand.[35] At this point — hereinafter referred to as the competitive market equilibrium — the buyer and the seller see eye to eye in terms of both price and quantity.[36]

In this setting, no profit-maximizing firm would attempt to raise its price above the market equilibrium, as buyers would turn to suppliers who sell their goods at the equilibrium price.[37] Consequently, such firm would suffer a decrease in revenue[38] notwithstanding the increase in price, as an increase in price will entail an even larger decrease in quantity demanded. In a perfectly competitive market, firms have no incentive to raise prices above the equilibrium.[39]

31. ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN), ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY 3-4 (2010) [hereinafter ASEAN GUIDELINES].

32. *See* Erlinda Medalla, *Overview and Integrative Report*, *in* TOWARDS A NATIONAL COMPETITION POLICY FOR THE PHILIPPINES 5 (Erlinda Medalla ed., 2002).

33. *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, MICROECONOMICS 148 (18th ed. 2005). A perfectly competitive market is characterized by numerous firms devoid of power to influence the market price, low barriers to entry, and homogenous products. *Id.*

34. *Id.* at 125-26. Marginal cost defined as "the extra or additional cost of producing one extra unit of output." *Id.*

35. PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 7-8 (4th ed. 1988).

36. EINER R. ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 4 (2011).

37. AREEDA & KAPLOW, *supra* note 35, at 16.

38. *See* ARLEEN J. HOAG & JOHN H. HOAG, INTRODUCTORY ECONOMICS 155 (4th ed. 2006). Total revenue is defined as price multiplied by quantity. *Id.*

39. *Id.* at 153.

In a perfectly competitive market, both productive and allocative efficiency obtain.[40] There is productive efficiency because less efficient firms, whose cost structures exceed the market equilibrium, are ejected from the market by more efficient firms.[41] Allocative efficiency, on the other hand, results due to the fact that the market prices reflect consumer preference; consequently, producers can allocate resource accordingly.[42]

The situation is completely different in the extreme case of monopoly.[43] In such a market, the single firm is a price-maker — it has the ability to dictate a price above the competitive market equilibrium.[44] Since a monopolist is the only producer in a given market, it can increase prices without fear that sales will be diverted to other suppliers.[45] Since any increase in price compensates for a decrease in quantity demanded, a profit-maximizing monopolist will raise prices beyond the competitive market equilibrium. In order to raise prices, the monopolist will set output where marginal cost equals marginal revenue,[46] as opposed to where marginal cost equals demand.[47] A comparison between the equilibrium price and quantity in a perfectly competitive market and a monopoly is illustrated in Figure 1.

40. AREEDA & KAPLOW, *supra* note 35, at 8.

41. *Id.*

42. Medalla, *supra* note 32, at 5.

43. *See* ROBERT H. FRANK & BEN S. BERNANKE, PRINCIPLES OF ECONOMICS 234 (4th ed. 2009). A monopoly is defined as a market where the supplier is "the only supplier of a unique product with no close substitutes." *Id.*

44. ELHAUGE, *supra* note 36, at 186.

45. *Id.* at 2.

46. *See* FRANK & BERNANKE, *supra* note 43, at 242. Marginal revenue is the change in a firm's total revenue that results from a one-unit change in output. *Id.*

47. ELHAUGE, *supra* note 36, at 2.

Figure 1: Equilibrium in a Perfectly Competitive Market v. Monopoly Market

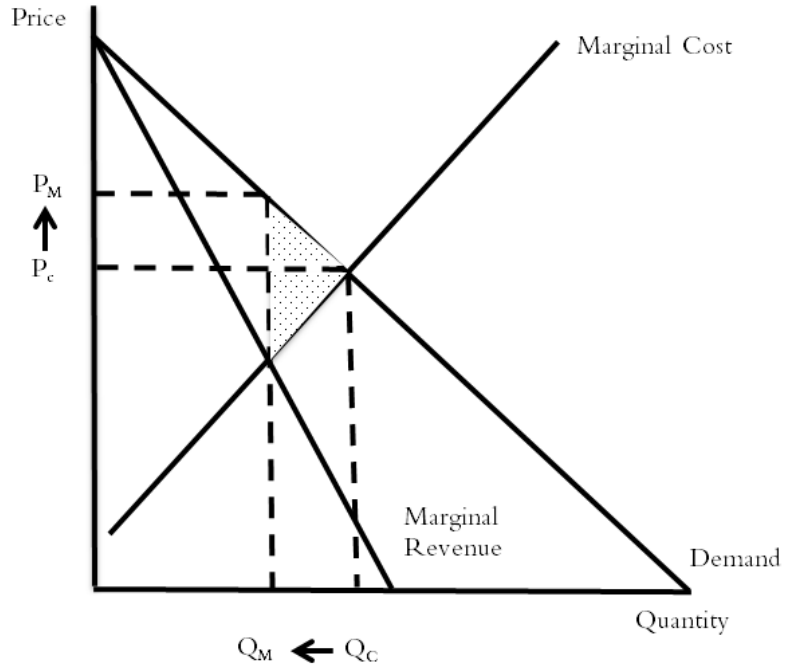


Figure 1 illustrates the differences in equilibria between perfect competition and monopoly. In a monopolized market, prices will be higher than those in a perfectly competitive market, because a monopolist "contrive[s] a scarcity of its product."[48] Due to this decrease in quantity supplied, there is a resulting allocative inefficiency, represented by the dead weight loss triangle, shaded in Figure 1.[49] There is allocative inefficiency because consumers located on the demand curve between Qm and Qc, who are unwilling to pay more than marginal cost, will not purchase the goods.[50] Instead, these consumers will divert their spending to less-preferred goods.[51] In response, astute producers will allocate their resources to the production of these less-preferred goods.[52] Consequently, the economy will no longer

48. AREEDA & KAPLOW, *supra* note 35, at 18.

49. FRANK & BERNANKE, *supra* note 43, at 248.

50. ELHAUGE, *supra* note 36, at 6.

51. AREEDA & KAPLOW, *supra* note 35, at 21.

52. *Id.*

reflect consumer tastes, as resources will be allocated to less-preferred goods, notwithstanding consumer preference for the monopolist's good.[53] Figure 1, therefore, demonstrates that perfectly competitive markets are more efficient than monopolies.

2. Consumer Welfare

The presence of numerous producers in a competitive market ultimately redounds to the benefit of consumers. Since products in a perfectly competitive market are homogenous, producers constantly strive to reduce costs, innovate, and improve their product to attract customers.[54] Ultimately, the consuming public benefits from this interplay between producers, as innovation leads to a wider selection of better products at lower costs.[55] The resulting benefit that accrues to consumers is called consumer surplus.[56] The difference between consumer surplus in a competitive setting vis-à-vis a monopoly market is illustrated below in Figure 2.

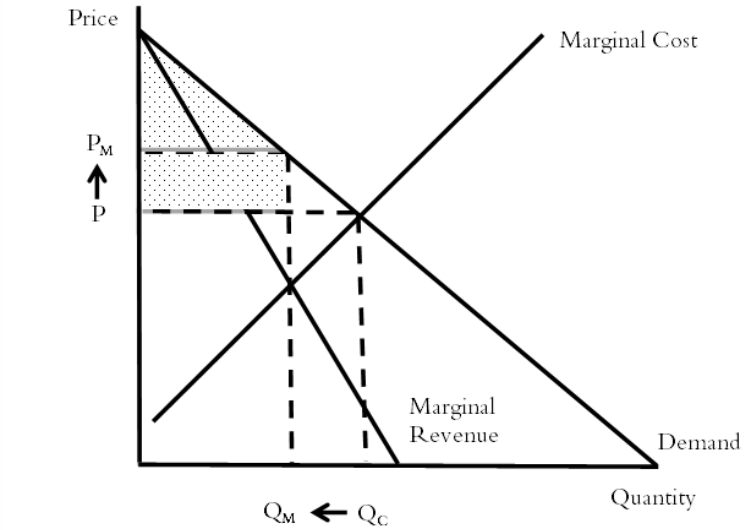
53. *Id.*

54. Medalla, *supra* note 32, at 4.

55. ASEAN GUIDELINES, *supra* note 31, at 4.

56. *See* FRANK & BERNANKE, *supra* note 43, at 142. Consumer welfare is defined as "the difference between a buyer's reservation price for a product and the price actually paid." *Id.*

Figure 2: Consumer Welfare in a Perfectly Competitive Market v. Monopoly Market



The shaded triangle located above P_M represents consumer surplus in a monopoly market. The horizontally shaded rectangle found below the triangle and between P_M and P_C is the amount of additional consumer surplus that would accrue to consumers in a perfectly competitive market. In a monopoly market, however, the monopolist captures this additional amount as producer surplus[57] in the form of profits.[58] Evidently, monopoly pricing causes a reduction in consumer welfare.

3. Economic Growth and Development

A sound competition law can spur economic growth and development. Economic growth and development result from improved economic efficiency and consumer welfare.[59] Since resources will be allocated more efficiently, national productivity will increase, causing economic growth. Sustained economic growth, in turn, leads to economic development.[60]

In order to realize the aforementioned benefits flowing from competition law, there is a special need to carefully and cautiously delineate

57. *Id.* at 168. Producer surplus is defined as "the amount by which price exceeds the seller's reservation price." *Id.*

58. ELHAUGE, *supra* note 36, at 6.

59. ASEAN GUIDELINES, *supra* note 31, at 3.

60. *Id.* at 4.

standards in prohibiting acts constituting abuse of dominance. Significantly, acts that seem abusive of dominance may have pro-competitive effects.[61] Hence, the implementation of the Competition Act is accompanied by the daunting task of striking a precarious balance between encouraging and inhibiting competition. Those charged with the interpretation and implementation of the law must be wary not to produce a chilling effect on the type of behavior it intends to encourage.[62] Thus, the interpretation of the provisions on abuse of dominance must be drawn with utmost precision, so as only to punish those acts that are truly anti-competitive, and with flexibility, so as to encompass even the most innovative anti-competitive behavior.

II. EVALUATING THE COMPETITION ACT VIS-À-VIS THE ASEAN GUIDELINES

The Philippines became a party to the ASEAN Charter[63] in 2007.[64] The ASEAN Charter lists as one of its purposes the creation of a "single market and production base which is stable, prosperous, highly competitive[,] and economically integrated with effective facilitation for trade and investment[.]"[65] To achieve these objectives, the ASEAN Economic Community Blueprint (Blueprint) was created on the same day the ASEAN Charter was signed.[66] As a means of realizing ASEAN's goal of becoming a competitive economic region, the Blueprint states that all ASEAN Member States should "[e]ndeavor to introduce competition policy [...] by 2015."[67] To aid ASEAN Member States in formulating and/or implementing their

61. *See* Cynthia Roxas-del Castillo & Patricia Cristina T. Ngochua, *A Merger Control and Competition Law in the Philippines*, 56 ATENEO L.J. 241, 273 (2011).

62. *See generally* Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) & Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993).

63. Charter of the Association of Southeast Asian Nations, *signed* Nov. 20, 2007, 2624 U.N.T.S 223 [hereinafter ASEAN Charter].

64. United Nations Treaty Series Online Collection, *available at* https://treaties.un.org/pages/showDetails.aspx?objid=080000028025f1e4 (last accessed Aug. 29, 2015) It states that the Philippines ratified the ASEAN Charter. *Id.*

65. ASEAN Charter, *supra* note 63, ch. 1, art. 1, (5).

66. ASEAN, ASEAN ECONOMIC COMMUNITY BLUEPRINT 2 (2008) [hereinafter ASEAN BLUEPRINT].

67. *Id.* at 18.

respective competition laws, the Blueprint directed the creation of the ASEAN Guidelines.[68] Hence, while the Philippines has indeed passed a competition law, its obligation does not end there. Its treaty obligations under the ASEAN Charter, in conjunction with the Blueprint, likewise entail the implementation of its obligations in good faith.[69] As a consequence, the Philippines must ensure that the Competition Act is at least capable of deterring anti-competitive behavior in the manner prescribed by the ASEAN Guidelines.[70]

Admittedly, the Blueprint is not itself a treaty; however, when read in conjunction with the ASEAN Charter, particularly Article 5 (2) in relation to Articles 2 (1) and 1 (5) thereof,[71] its language imposes obligations on the Philippines in accordance with the Vienna Convention on the Law of Treaties (VCLT).[72]

Good faith is the very underpinning of treaty law.[73] The principle of good faith is embodied in the doctrine of *pacta sunt servanda*[74] enshrined in Article 26 of the VCLT, which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[75] As a corollary to the observance of good faith in the performance of treaty obligations, the VCLT provides that good faith should also inform the interpretation thereof.[76]

Article 31 of the VCLT states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[77]

In expounding on the first paragraph of Article 31 of the VCLT, the second paragraph does not limit the term "context" to the contents of the

68. *Id.* at 19. *See also* ASEAN GUIDELINES, *supra* note 31.

69. ASEAN Charter, *supra* note 63, ch. 3, art. 5 (2).

70. ASEAN GUIDELINES, *supra* note 31, at 3-4.

71. *Id.* ch. 1, arts. 1 (5), 2 (1), & ch. 3, art. 5 (2).

72. Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, 1155 U.N.T.S 331 [hereinafter VCLT].

73. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 106 (2006).

74. *Id.* at 112.

75. VCLT, *supra* note 72, art. 26.

76. INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON THE LAW OF TREATIES WITH COMMENTARIES, at 221, U.N. Sales No. 67.V.2 (1966).

77. VCLT, *supra* note 72, art. 31, ¶ 1.

four corners of a treaty.[78] Instead, the second paragraph of Article 31 provides that "context" includes:

> (a) Any agreement relating to the treaty which was made between all the parties in [connection] with the conclusion of the treaty; [and]
>
> (b) Any instrument which was made by one or more parties in [connection] with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[79]

The Blueprint is an agreement made in connection with the ASEAN Charter, like the WTO agreements in the *India-Turkey Case*,[80] the Administrative Commission of the River Uruguay or "CARU Digests" in the *Pulp Mills Case*,[81] and the Terms of Reference in *Lim v. Executive Secretary*.[82] The Blueprint is a subsequent, more specific agreement that clarifies the ambiguous terms of an earlier treaty.[83] In a recent interview, Senate President Franklin M. Drilon acknowledged that indeed the passage of a competition law is a duty under the Blueprint.[84]

With regard to the content of such competition law, the Philippines is given wide latitude in determining the prohibited acts, penalties, and enforcement mechanisms.[85] As previously mentioned, ASEAN Member States are guided by the ASEAN Guidelines.[86] Admittedly, the ASEAN Guidelines state that they "serve only as a reference and are not binding"

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78. *See* Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 195, WT/DS269/AB/R (Sep. 12, 2005) [hereinafter Chicken Cuts Report] & ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 103 (2007).

79. VCLT, *supra* note 72, art. 31, ¶ 2.

80. Panel Report, Turkey — Restrictions on Imports of Textile and Clothing Products, WT/DS34/R (May 31, 1999).

81. Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14 (Apr. 20).

82. Lim v. Executive Secretary, 380 SCRA 739 (2002).

83. *See* LINDERFALK, *supra* note 78, at 104.

84. Amita O. Legaspi, Fair Competition Act to boost PHL readiness for ASEAN integration, *available at* http://www.gmanetwork.com/news/story/503050/news/nation/fair-competition-act-to-boost-phl-readiness-for-asean-integration (last accessed Aug. 29, 2015).

85. ASEAN GUIDELINES, *supra* note 31, at 1.

86. ASEAN BLUEPRINT, *supra* note 66, at 19.

with respect to the specifics of a competition statute.[87] Nevertheless, a *good faith interpretation* of the ASEAN Charter in conjunction with the Blueprint reveals that the Philippines is bound to implement a competition law that is capable of effectively deterring anti-competitive behavior in the manner envisioned by the ASEAN Guidelines. If the Competition Act were to curtail anti-competitive behavior no better than a blank sheet of paper, then it could not be said that the Philippines exercised good faith in the performance of its treaty obligations.[88] When the ASEAN Economic Community is established, there is a heightened risk that undesirable domestic policies of other Member States will spill over national boundaries. For instance, if a firm in a Member State seeks to establish a monopoly in an industry by depressing its prices to a level that firms in other Member States cannot match, all Member States will suffer from such firm's anti-competitive behavior. Thus, in keeping with the principle of *pacta sunt servanda*, the Philippines should implement the Competition Act in an effectual manner, and in substantial compliance with the ASEAN Guidelines.

III. DOMINANCE

In order to ensure that the Competition Act is interpreted and implemented in keeping with the Philippines' treaty obligations, it is necessary to first analyze the definitions and parameters in the ASEAN Guidelines. Since the ASEAN Guidelines are based on "country experience and international best practices,"[89] United States (U.S.) and European Union (E.U.) law and jurisprudence will also be discussed to clarify the provisions of, and to supply deficiencies in, the ASEAN Guidelines.

A. An Overview of Dominance

Mere dominance is not illegal.[90] Instead, it is the *abuse* of such dominant position that renders a firm's unilateral acts reprehensible.[91] Thus, the prohibition against abuse of dominance entails two elements: first, dominance or market power; and second, abusive conduct. When these two

87. ASEAN GUIDELINES, *supra* note 31, at 1.

88. *See* LAURENCE BOULLE, THE LAW OF GLOBALIZATION: AN INTRODUCTION 139 (2009).

89. ASEAN GUIDELINES, *supra* note 31, at 1.

90. *See* ASEAN, HANDBOOK ON COMPETITION POLICY AND LAW IN ASEAN FOR BUSINESS 9 (2010) [hereinafter ASEAN HANDBOOK 2010].

91. *Id.*

requisites concur, their combined effect serves to hinder competition, and/or exploit or discriminate against the consuming public.[92]

From an economic and a practical viewpoint, dominance is a necessary requisite. To borrow the words of Professor Einer R. Elhauge, dominance is both a shield and a sword when it comes to anti-trust legislation.[93] The requisite of dominance serves as a shield, as only firms whose unilateral behavior can produce anti-competitive effects on the market are considered. In economic terms, only a firm that possesses sufficient market share can single-handedly affect prices, and induce certain types of market behavior.[94]

A firm with a strong market share is therefore a price-maker. Practically speaking, it is more prudent to limit this class of offenses to firms with sufficient market power. Otherwise, it would not be administratively feasible to monitor every firm in the economy. Even if it were possible to monitor all the firms on the Philippine market, it would not be worthwhile to do so. If an undertaking is not a dominant player, it probably does not have the ability to affect prices or competition on the market.[95] Thus, its behavior will have a miniscule effect on the market.

In the example given in the beginning of this Note, Piso-fare would be ineffective as a means to eliminate competitors from the market if Cebu Pacific were not a dominant player in the airline industry. First, a firm that is not dominant may not have the capacity to capture all its rivals' customers. Thus, its predatory prices will merely divert some of its competitor's customers, but will be insufficient to induce such firm to exit the market.[96] Second, a non-dominant firm may not have the wherewithal to incur losses in the short-run without risking permanent closure, which is one of the elements of predatory pricing.[97]

92. GEORGE BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 866 (3d ed. 2010).

93. ELHAUGE, *supra* note 36, at 183.

94. *Id.* at 186.

95. AREEDA & KAPLOW, *supra* note 35, at 708.

96. Peter Lee U, *Competition Policy and the Philippine Downstream Oil Industry*, *in* TOWARDS A NATIONAL COMPETITION POLICY FOR THE PHILIPPINES 117-18 (Erlinda Medalla ed., 2002).

97. *Id.* at 117.

The element of dominance also serves as a sword.[98] It is often difficult to obtain direct proof demonstrating that a firm's unilateral act indeed produced anti-competitive effects in the market.[99] Instead, anti-competitive effects can be inferred from the fact that the firm engaging in abusive conduct possesses sufficient market power.[100]

B. Market Power

Dominance contemplates a "position of economic strength."[101] The Regional Guidelines define dominance as

> a situation of market power, where an undertaking, either individually or together with other undertakings, is in a position to unilaterally affect the competition parameters in the relevant market for a good(s) or service(s), [e.g.,] able to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels.[102]

Under this definition of dominance, both the ability to affect prices or competition on the market, and market share are given consideration. This is substantiated by the ASEAN Handbook on Competition Policy and Law in ASEAN for Business (ASEAN Handbook),[103] which provides that "market shares and/or a series of other indicators, such as the structure of the market, vertical integration, technological advantages, financial resources, [and] brand name" may be determinant of market power.[104]

1. Ability to Affect the Market

The ASEAN Guidelines define dominance as the ability to affect the prices, quantity, and quality of the goods in a given market.[105] Similarly, the Court of Justice of the European Union (E.C.J.) defines dominance as

> a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market

98. ELHAUGE, *supra* note 36, at 183.

99. *Id.*

100. *Id.* at 184.

101. BERMANN ET AL., *supra* note 92, at 868.

102. ASEAN GUIDELINES, *supra* note 31, at 10.

103. ASEAN HANDBOOK 2010, *supra* note 90.

104. *Id.* at 9.

105. ASEAN GUIDELINES, *supra* note 31, at 10.

> by giving it the power to behave to an appreciable extent independently of its competitors, customers[,] and ultimately of its consumers.[106]

Under the above definition, dominance entails the ability to affect the level of competition in the market and to act independently of its rivals, customers, and consumers.[107]

The U.S. Supreme Court has likewise expressed market power as the ability to affect the market. In some cases, the U.S. Supreme Court defined market power as the power to price above competitive levels.[108] In others yet, the U.S. Supreme Court has defined it as "the power to constrain total market output in order to raise market prices and profits."[109]

2. Market Share

The ASEAN Guidelines define market share as "the quantity or value of the relevant products or services sold or purchased by one or more undertakings in the relevant market, as a percentage of the total quantity or value of those products or services in the relevant market."[110]

Although the ASEAN Guidelines mention a "market share threshold test"[111] to determine dominance, it clarifies that the same can either be "prescriptive or indicative."[112] On one hand, if market share is merely prescriptive, then mere market share alone is insufficient to form a conclusion of dominance. Instead, other conditions would have to be satisfied in order to determine whether a firm is indeed dominant. On the other hand, if market share were indicative of dominance, then a firm with a market share above the statutorily defined threshold would be presumed dominant.

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106. United Brands Company v. Commission on European Communities, Case 27/76, 1978 E.C.R 207, ¶ 65.

107. Organisation for Economic Co-Operation and Development (OECD), *Policy Roundtables: The Essential Facilities Concept*, at 9, OCDE/GD(96)113 (1996) [hereinafter OECD, *Policy Roundtables*].

108. *See* Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 27 (1984); National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 109 (1984); & *Brooke Group Ltd.*, 509 U.S. at 235.

109. ELHAUGE, *supra* note 36, at 187.

110. ASEAN GUIDELINES, *supra* note 31, at 8.

111. *Id.* at 10 & Patacsil, et. al., *supra* note 11, at 143.

112. ASEAN GUIDELINES, *supra* note 31, at 10.

In the E.U., the treaty creating the European Community (EC Treaty)[113] does not establish definite thresholds for determining dominance.[114] In *Hoffmann-La Roche & Co. AG v. Commission of the European Communities*,[115] the E.C.J. recognized that there are clear-cut cases wherein "large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position."[116] The E.C.J. has stated that firms with market shares consistently above 50% can be presumed dominant in the absence of contrary evidence.[117] The E.C.J. has also held that with high barriers to entry and a sizeable gap in market share with the next largest firm, market shares in excess of 39% raise the presumption of dominance.[118] This was precisely the situation in *Hoffmann-La Roche & Co. AG*, wherein Hoffman-La Roche & Co. held 47% of the market share, while the next two largest firms only possessed 27% and 18%, respectively.[119]

Similarly, U.S. law and jurisprudence have not established bright-line market share thresholds for defining dominance. The U.S. Supreme Court, however, has ruled that market shares exceeding two-thirds are indicative of monopoly power.[120] In another case, the U.S. Supreme Court ruled that a firm with a market share of 30% did not possess market power.[121]

It is worthy to note that the E.U. Commission cautions that market share is merely "a useful first indication but their meaningfulness will be

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113. Treaty Establishing the European Economic Community, *signed* Mar. 25, 1957, 298 U.N.T.S. 11.

114. Office of Fair Trading, Abuse of a Dominant Position (A Competition Law Guideline of the Office of Fair Trading of the United Kingdom) 13, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf (last accessed Aug. 29, 2015).

115. Hoffmann-La Roche & Co. AG v. Commission of the European Communities, Case 85/76, 1979 E.C.R. 461.

116. *Id.* ¶ 41.

117. AKZO Chemie BV v. Commission of the European Communities, Case C-62/86, 1991 E.C.R. I-03359, ¶ 60 (citing *Hoffmann-La Roche & Co. AG*, 1979 E.C.R. 461, ¶ 41.)

118. BERMANN ET AL., *supra* note 92, at 869 (citing *Hoffmann-La Roche & Co. AG*, 1979 E.C.R. 461).

119. *Hoffmann-La Roche & Co. AG*, 1979 E.C.R. 461, ¶ 50.

120. *See* American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946); Eastman Kodak Co. v. Image Technical Services, Inc., et al., 504 U.S. 451, 481 (1992); & United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

121. *Jefferson Parish Hospital District No. 2*, 466 U.S. at 26. The U.S. Supreme Court stated that the 30% is "far from overwhelming." *Id.*

interpreted in light of market dynamics and trends over time."[122] Instead, the E.U. Commission takes into consideration both market share and the ability to affect the market in determining dominance. Hence, the E.U. Commission has stated that a firm cannot be conclusively excluded, notwithstanding a market share of only 20-40%.[123] While the U.S. Supreme Court has also defined dominance as the possibility of affecting the market, it has inferred this ability from the fact of market share.[124] This is done for the sake of convenience, since the power to constrain output and raise prices can be difficult to determine.[125]

B. Relevant Market

Defining the relevant market is of primary importance in determining market power. In fact, delineating the relevant market should be the initial step in determining dominance.[126] As previously mentioned, market share is defined with reference to the "percentage of the total quantity or value of those products or services in the *relevant market*."[127] Therefore, a narrow or expansive definition of the market is determinative of market share.

To illustrate, in 2013, Cebu Pacific accounted for 10,244,910 of domestic scheduled passenger traffic,[128] and 2,819,559 of international scheduled passenger traffic.[129] In the same year, the total amount of domestic scheduled passenger traffic was 20,334,850,[130] while the total amount of international scheduled passenger traffic was 17,322,963.[131] Using the definition of market share provided in the ASEAN Guidelines, if domestic

122. BERMANN ET AL., *supra* note 92, at 870 (citing European Union Commission, Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. C 372/03, ¶¶ 11-13 [hereinafter E.U. Commission Notice]).

123. OECD, *Policy Roundtables*, *supra* note 107, at 8.

124. ELHAUGE, *supra* note 36, at 192.

125. *Id.*

126. BERMANN ET AL., *supra* note 92, at 871.

127. ASEAN GUIDELINES, *supra* note 31, at 8 (emphasis supplied).

128. CAB Domestic Data, *supra* note 4.

129. *See* CAB, International Scheduled Passenger Traffic, *available at* http://www.cab.gov.ph/statistics/category/international-3 (last accessed Aug. 29, 2015) [hereinafter CAB International Data].

130. CAB Domestic Data, *supra* note 4.

131. CAB International Data, *supra* note 129.

flights and international flights were to be treated as separate markets, then Cebu Pacific would have a market share of 50.38% in the domestic market, and only 16.28% in the international market. If, however, domestic and international flights were treated as a single market, then Cebu Pacific would possess 34.69% market share. The difference in market shares resulting from varying the definition of the market is not trivial. If the thresholds established by the E.C.J. were to be adopted in the Philippines, then Cebu Pacific would be presumed dominant in the first scenario but not in the next. It is, therefore, imperative to properly identify the relevant market.

According to the ASEAN Guidelines, the term "relevant market" is defined as "the product range and the geographic area where competition takes place between undertakings."[132] Based on this definition, the determination of the relevant market involves two lines of inquiry. First, the product or service must be defined.[133] Second, the geographic boundaries must be delineated.[134]

1. Product Market

The ASEAN Guidelines state that determining the relevant product market entails "identifying the range of products or services which are regarded as interchangeable or substitutable by the customers, by reason of their characteristics, price[,] and intended use."[135]

The ASEAN Guidelines, however, do not specify the manner in which to determine the interchangeability or substitutability of a certain product. Thus, a survey of international best practice is necessary.

U.S. jurisprudence has developed four tests for determining the relevant product market:

(1) Demand Side Substitutability test (Du Pont test);

(2) Hypothetical Monopolist test (SSNIP test);

(3) Submarkets; and

(4) Supply Side Substitutability test.[136]

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132. ASEAN GUIDELINES, *supra* note 31, *supra* note 31, at 8.

133. EARL W. KINTNER & MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 22 (1974).

134. *Id.* at 86.

135. ASEAN GUIDELINES, *supra* note 31, at 9.

136. *See generally* JOHN J. FLYNN ET AL., FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST (7th ed. 2014).

a. Demand Side Substitutability (Du Pont Test)

The U.S. Supreme Court first developed the Demand Side Substitutability test in *United States v. E. I. Du Pont de Nemours & Co.*[137] The U.S. Supreme Court succinctly summarized this test by stating that "commodities reasonably interchangeable by consumers"[138] comprise the products in a given market.[139]

In *Du Pont*, E.I. Du Pont de Nemours & Co. (Du Pont) produced 75% of the cellophane in the U.S.; however, cellophane only accounted for 20% of the broader flexible packaging material market.[140] The U.S. government argued that Du Pont had a monopoly of the cellophane market.[141] After examining the relevant market conditions, the U.S. Supreme Court ruled that Du Pont did not possess monopoly power, as cellophane was only a part of a larger packaging materials market.[142] In making such determination, the U.S. Supreme Court relied on the cross-elasticity of demand, and rejected attempts by the U.S. government to place reliance on physical differences, price differences, and profits between cellophane and other packaging materials.[143]

The U.S. government argued that, since cellophane was neither "substantially fungible" nor priced similarly to other packaging materials, Du Pont was a monopolist.[144] The U.S. Supreme Court held that it would be unreasonable to require all products in a market to be identical.[145] It reasoned that "[e]very manufacturer is the sole producer of the particular commodity it makes, but its control in the above sense of the relevant market depends upon the availability of alternative commodities for buyers[.]"[146]

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137. United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377 (1956).

138. *Id.* at 395.

139. *Id.*

140. *Id.* at 379.

141. *Id.* at 380.

142. *Id.* at 404.

143. ELHAUGE, *supra* note 36, at 199-205.

144. *E. I. Du Pont de Nemours & Co.*, 351 U.S. at 380.

145. *Id.*

146. *Id.*

Thus, the U.S. Supreme Court stated that it was necessary to examine the cross-elasticity of demand.[147] The cross-elasticity of demand is a measure of the sensitivity of demand for a given product to a price change in the price of another.[148] Cross-elasticity of demand is the quotient of a percentage change in quantity of one good and a one percent change in price of another (full equation shown in Equation 1 of Annex).[149]

A relatively high quotient indicates that the two products are indeed part of the same market, since small changes in the price of one good, yield large changes in the quantity demanded of the other.[150] Thus, the U.S. Supreme Court concluded that if a small increase in the price of cellophane leads to a large shift in quantity demanded of other flexible packaging materials, then other flexible packaging materials are in the same market as cellophane.[151] Since the data demonstrated that cellophane was highly interchangeable with other flexible packaging materials, the U.S. Supreme Court eventually ruled that Du Pont did not have a monopoly.[152]

The decision in *Du Pont*, however, was highly criticized.[153] The main controversy with the decision was that cross-elasticity of demand was calculated on the basis of *current prices*.[154] This error — now popularly referred as the cellophane fallacy — caused the U.S. Supreme Court to find that cellophane belonged to the same market as other flexible packaging materials.[155] The error consisted in the fact that the U.S. Supreme Court did not consider that current prices might have already been set at monopoly levels.[156] If the prices were indeed already at a monopolist's profit-maximizing point, then by the very definition of profit-maximization, a further increase in price could only lead to a decrease in profits.[157]

147. *Id.*

148. E.U. Commission Notice, *supra* note 122, ¶ 58 (5).

149. *See* OECD, *Policy Roundtables Market Definition*, at 35, DAF/COMP(2012)19 (Oct. 11, 2012) [hereinafter OECD, *Market Definition*].

150. George J. Stigler & Robert A. Sherwin, *The Extent of the Market*, 28 J.L. & ECON. 555, 566 (1985).

151. *E. I. Du Pont de Nemours & Co.*, 351 U.S. at 400.

152. *Id.* at 404.

153. OECD, *Market Definition*, *supra* note 149, at 40; ELHAUGE, *supra* note 36, at 201-02; & Kaushal Sharma, *SSNIP Test: A Useful Tool Not A Panacea*, 1 COMPETITION LAW REPORT 188, 190-91 (2011).

154. OECD, *Market Definition*, *supra* note 149, at 40.

155. *Id.*

156. *Id.*

157. SAMUELSON & NORDHAUS, *supra* note 33, at 177.

Necessarily, therefore, an increase in the price of cellophane led to an increase in quantity demanded of other packaging materials. This error could have led to an erroneous finding that cellophane and other flexible packaging materials belonged to the same market. In order to ameliorate this mistake, the U.S. Supreme Court should have increased the price of cellophane from its competitive level.[158]

b. Hypothetical Monopolist Test

The Hypothetical Monopolist test or the small but significant non-transitory price test (SSNIP test) devised by the U.S. Department of Justice (U.S. DOJ) and the Federal Trade Commission (FTC),[159] is currently utilized in the E.U., Australia, Brazil, Bulgaria, Canada, Israel, Netherlands, and New Zealand.[160] Although this test was originally developed for scrutinizing anti-competitive mergers, its use has been extended to defining the market in general.[161] The Guidelines created by the U.S. DOJ and the FTC (DOJ-FTC Guidelines) describe the SSNIP test as follows —

> A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and non-transitory' increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy the test.[162]

A small but significant and non-transitory increase in price (SSNIP) of five percent is usually employed,[163] although a SSNIP of 10% is used when explicit or implicit prices can be identified.[164] With respect to the duration

158. OECD, *Market Definition*, *supra* note 149, at 41.

159. ELHAUGE, *supra* note 36, at 205.

160. Sharma, *supra* note 153, at 189.

161. John D. Harkrider, Operationalizing the Hypothetical Monopolist Test (An Unpublished Paper Submitted to the U.S. Department of Justice) 1, *available at* http://www.justice.gov/atr/public/workshops/docs/202598.pdf (last accessed Aug. 29, 2015).

162. U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines, § 1.10 (Apr. 2, 1992) [hereinafter DOJ/FTC Guidelines].

163. OECD, *Market Definition*, *supra* note 149, at 30.

164. *Id.*

of the price increase, a period of at least one year is considered non-transitory.[165]

The effect of this SSNIP on the profits of the hypothetical monopolist (HM) will then be analyzed in order to define the market. If the substitution induced by a SSNIP is unprofitable for the HM due to the diversion of demand to other goods, then such goods form part of the market.[166] If there is a finding that such price increase is unprofitable, more products will be added to the market until any further addition of products to the market will be profitable in that demand is not diverted to other goods.[167] The mechanics of implementing the SSNIP test are outlined below.

In performing the SSNIP test, substitutes of the HM's products must be determined by first deriving the cross-elasticity of demand between HM's products and substitute products (Equation 1 of Annex). As stated earlier, the cross-elasticity of demand is a means to test the substitutability of the HM's goods with other goods.

The cross-elasticity of demand will then be compared to the HM's own-elasticity of demand (Equation 2 of Annex)[168] to find the Diversion Ratio between the HM's goods and other goods (Equation 3 of Annex). The Diversion Ratio is a measure of diversion of demand for the HM's good redirected to other goods in response to a price increase of the HM's good.[169]

Critical loss analysis will then be conducted on the substitute goods, singled out by the cross-elasticity of demand and the Diversion Ratio in order to determine the profitability of the SSNIP. The profitability of the SSNIP is ascertained by comparing the Actual Loss, represented by the Diversion Ratio (Equation 3 of Annex), to the break-even Critical Loss point (Equation 4 of Annex).[170] If the Actual Loss exceeds the Critical Loss point, then the price increase is not profitable (Equation 6 of Annex).[171] Hence, the product is included in the market for the HM's good.[172] This

165. *Id.*

166. BERMANN ET AL., *supra* note 92, at 873.

167. *Id.*

168. *See* E.U. Commission Notice, *supra* note 122, at ¶ 58 (5). Own elasticity of demand measures the responsiveness of demand for the hypothetical monopolist's goods to a change in its own price. *Id.*

169. OECD, *Market Definition*, *supra* note 149, at 35.

170. *Id.* at 39.

171. *Id.* at 36.

172. *Id.* at 36-37.

process will be iterated until a price increase becomes profitable,[173] i.e., when Critical Loss exceeds Actual Loss.[174] If, conversely, the addition of a certain product is profitable, then such product should be excluded from the market.

To illustrate, suppose that Cebu Pacific were to raise the price of its tickets from Manila to Caticlan by five percent, then many customers would switch to other airlines flying the same route. Such flights will, therefore, be included in the relevant product market. The scope of the market will be increased to include other forms of transportation to which demand might be diverted in the event of an increase in price. In this example, flights to Kalibo (a neighboring island) and ferry tickets would also make it unprofitable for Cebu Pacific to increase prices by five percent. On the other hand, analyzing the five percent price increase vis-à-vis a rowboat, will likely fail to divert demand away from Cebu Pacific; thus, rowboat rides will not be included in the market.

In applying the SSNIP test, historic data,[175] econometric derived data,[176] consumer affidavits,[177] and surveys data[178] have been used in defining the market.[179] Of the four sources of data, econometric data seems to be the most preferred.[180] In *Menasha Corporation v. News America Marketing In-Store Inc.*,[181] on one hand, the Seventh U.S. Circuit Court faulted Menasha

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173. Sharma, *supra* note 153, at 190.

174. OECD, *Market Definition*, *supra* note 149, at 39.

175. Federal Trade Commission v. Tenet Health Care Corporation, 186 F.3d 1045, 1050 (8th Cir. 1999) (U.S.). *See also* Harkrider, *supra* note 161, at 3-8.

176. State of New York v. Kraft General Foods, Inc., 926 F. Supp. 321, 333 (N.Y. Dist. Ct., 1995) (U.S.). This case relied on a "consistent and 'robust' pattern of statistically significant positive cross-price elasticities." *Id. See also* Harkrider, *supra* note 161, at 8-9.

177. United States v. Engelhard Corp., 126 F.3d 1302, 1306 (11th Cir. 1997) (U.S.). *See also* Harkrider, *supra* note 161, at 10-15.

178. *Kraft General Foods, Inc.*, 926 F. Supp. at 327. *See also* Harkrider, *supra* note 161, at 15-16.

179. *See generally* Harkrider, *supra* note 161, at 3-16.

180. *Id.* at 9. Stating that despite some issues, "there is general agreement that in appropriate circumstances econometric estimation of elasticities can provide perhaps the best evidence on market definition[.]" *Id.*

181. Menasha Corporation v. News America Marketing In-Store Inc., 354 F.3d 661 (7th Cir. 2004) (U.S.).

Corporation for failing to produce econometric evidence to prove its definition of the market.[182] In *United States v. Mercy Health Services*,[183] on the other hand, the District Court of Iowa admonished the U.S. government's heavy reliance on historical data, stating that historical evidence is but a "snapshot of the market as it exists under current conditions."[184] Consumer affidavits[185] and surveys[186] have also been criticized for failing to provide a representative sample of the market. Econometric data presents "a controlled and scientific manner" of determining the market, notwithstanding the fact that it uses historical evidence as input data to derive econometric data.[187]

Although SSNIP provides for a more subjective definition of the market than the Du Pont test, it likewise suffers from the cellophane fallacy.[188] Thus, the benchmark price should be the competitive prices obtaining on the market before the conduct of abusive behavior.[189]

c. Submarkets

A submarket or aftermarket exists in cases of complementary goods — two goods that "form a system that works properly only if it comprises both products."[190] Since by nature the two are inseparable, the decisive issue is whether the two goods should be considered to comprise the same or separate markets.[191] The U.S. Supreme Court, in *Brown Shoe Co. Inc. v. United States*,[192] acknowledged the possibility of submarkets, stating that

> [t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand

182. *Id.* at 664.

183. United States v. Mercy Health Services, 902 F. Supp. 968, (N.D. Iowa Dist. Ct. 1995) (U.S.).

184. *Id.* at 978.

185. *Engelhard Corp.*, 126 F.3d at 1306. Stating that "[n]o matter how many customers in each end-use industry the [g]overnment may have interviewed, those results cannot be predictive of the entire market if those customers are not representative of the market." *Id.*

186. Federal Trade Commission v. Tenet Healthcare Corp., 17 F. Supp. 2d 937, 945 (Mo. Dist. Ct. 1998) (U.S.). Stating that the surveys "failed to control for other variables that may influence a consumer's choice[.]" *Id.*

187. Harkrider, *supra* note 161, at 8.

188. Sharma, *supra* note 153, at 190.

189. OECD, *Market Definition*, *supra* note 149, at 42.

190. *Id.* at 45.

191. *Id.*

192. Brown Shoe Co. Inc. v. United States, 370 U.S. 294 (1962).

> between the product itself and substitutes for it. However within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes.[193]

In *Eastman Kodak Co. v. Image Technical Services, Inc., et al.*,[194] the U.S. Supreme Court found that Kodak had a monopoly in the replacement parts for Kodak photocopier and micrographic equipment.[195] Kodak argued that it could not possibly have a monopoly for spare parts, since the photocopier and micrographic equipment were competitive.[196] Although spare parts for Kodak machines could only be purchased from Kodak, it reasoned that it did not have any market power, since any increase in the price of its spare parts would be met by a decrease in quantity demanded for its photocopier and micrographic equipment.[197]

The U.S. Supreme Court rejected Kodak's argument for two reasons. First, consumers may not necessarily be aware of the costs of such spare parts.[198] Such determination requires a high level of sophistication and a great deal of information that Kodak's customers may not necessarily have at the time of purchase.[199] Second, the U.S. Supreme Court stated that once the equipment had already been purchased, the price of switching to another brand far outweighed the cost of obtaining Kodak's spare parts, albeit at a high price.[200] Thus, the argument of Kodak that the cost of its spare parts affects the demand for its equipment was found erroneous.

Thus, the U.S. Supreme Court held that the relevant market was the aftermarket consisting of spare parts for machines, since lack of market power in one market does not preclude a finding of monopoly in a derivative aftermarket.[201]

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193. *Id.* at 325.

194. Eastman Kodak Co. v. Image Technical Services, Inc., et al., 504 U.S. 451 (1992).

195. *Id.* at 481.

196. *Id.* at 465–66.

197. *Id.*

198. *Id.* at 473–76.

199. *Id.*

200. *Eastman Kodak Co.*, 504 U.S. at 476.

201. *Id.* at 477.

d. Supply Side Substitutability

As its name suggests, supply side substitutability is concerned with other suppliers' responses to an increase in price, measured by the elasticity of supply.[202] In certain cases, supply side substitutability can be just as effective at disciplining other firms, as demand substitutability.[203] Under this determinant of the product market, the pertinent query is whether "suppliers are able to switch production to the relevant products[,] and market them in the short term[.]"[204] If a firm is capable of making the transition "without incurring significant additional costs or risks[,]" then such product should be included in the market.[205] Supply side substitutability is relevant in industries that prepare a wide array of "products or grades" for a single good, e.g., paper.[206]

2. Geographic Market

The ASEAN Guidelines provide the following definition of a relevant geographic market as —

> [T]he area in which the enterprises concerned are involved in the supply and demand of the relevant products or services, which customers view as interchangeable or substitutable, and in which the conditions of competition are sufficiently homogeneous and can be distinguished from those of neighboring areas because the conditions of competition are appreciably different than in those areas.[207]

The ASEAN Guidelines further provide that the geographic market may be local, national, international, or global, depending on the nature of the good.[208] Despite this expansive view of the geographic market, the ASEAN Guidelines also acknowledge that certain markets could be constrained by "transportation costs [...], language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability."[209] Unfortunately, the ASEAN Guidelines do not expound on this definition,

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202. *See* NATIONAL ECONOMIC RESEARCH ASSOCIATION, THE ROLE OF MARKET DEFINITION IN MONOPOLY AND DOMINANCE INQUIRIES: PREPARED FOR THE OFFICE OF FAIR TRADING 9 (2001).

203. *Id.*

204. E.U. Commission Notice, *supra* note 122, at ¶ 20.

205. *Id.*

206. *Id.*

207. ASEAN GUIDELINES, *supra* note 31, at 9.

208. *Id.* at 9.

209. ELHAUGE, *supra* note 36, at 211.

nor offer further guidance in the interpretation of the same. Thus, it is necessary to turn to the laws of other jurisdictions for assistance.

The U.S. Supreme Court itself has admitted that it is difficult to describe the market in "metes and bounds."[210] It has nonetheless defined the geographic market as the area wherein producers "effectively compete."[211] Thus, in a case involving exclusive dealing, the U.S. Supreme Court held that the geographic market consisted of seven states, since there were over 700 suppliers located in those states that could provide coal to Tampa Electric.[212]

Similarly, the U.S. Supreme Court, in limiting the geographic area to a four-county area in *United States v. Philadelphia National Bank*,[213] took into consideration the fact that "inconvenience localizes banking competition as effectively as high transportation costs in other industries."[214] Given that location and convenience are of primary importance in the banking industry, the U.S. Supreme Court concluded that customers would not switch to branches outside the four-county area in response to a change in the price of bank services.[215]

In 1992, the U.S. DOJ and FTC created a more objective test to determine the geographic market — the SSNIP test. Notably, the SSNIP test is not limited to the determination of the relevant product market; instead, it clearly encompasses the geographic market as well.[216] The DOJ-FTC Guidelines state that the pertinent inquiry should be —

> [W]hat would happen if a hypothetical monopolist of that [relevant] product [at that point] imposed at least a 'small but significant and nontransitory increase in price, but the terms of sale at all other locations remained constant[?][217]

...

210. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 611 (1953).

211. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 332 (1961).

212. *Id.* at 332-33.

213. United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

214. *Id.* at 358.

215. *Id.* at 358-60.

216. *See* DOJ/FTC Guidelines, *supra* note 162, § 1.0. It states that "a market is defined as a product or group of products and a geographic area[.]" *Id.*

217. *Id.* § 1.11.

> If, in response to the price increase, the reduction in sales of the product at that location would be large enough that a hypothetical monopolist producing or selling the relevant product at the [ ] firm's location would not find it profitable to impose such an increase in price, then the Agency will add the location from which production is the next-best substitute for production at the [ ] firm's location.[218]

In implementing the E.C. Treaty, the Office of Fair Trade (OFT), the regulatory agency in the United Kingdom,[219] and the E.U. Commission[220] have likewise adopted a similar test in determining the geographic market.

IV. ABUSE OF DOMINANT POSITION

Once again, it must be stressed that it is not dominance per se that is punished by anti-trust law.[221] Instead what is punished is conduct that hinders competition and/or discriminates against buyers or sellers.[222] Care must be taken in drafting prohibitions against abuse of dominance, as widely drawn laws could discourage firms from expanding, innovating, and lowering cost.[223] Thus, in drafting a competition law for the Philippines, legislators should be wary not to cross the fine line between discouraging abusive practices and encouraging business growth.

To illustrate, if Cebu Pacific is found to have market power, its Piso-fare program may constitute predatory pricing, a form of abusive conduct. At first glance, it seems contrary to logic to charge only a single peso for an airline ticket. Such scheme may be calculated to eliminate infant airline corporations out of the industry by dropping prices in the short run to a level that nascent airline companies cannot hope to match. Once these airlines have left the market, Cebu Pacific will then be at liberty to raise its prices to highly profitable levels, and to recoup the losses it sustained while implementing the Piso-fare program.

On the contrary, if Cebu Pacific had no intention to drive its competitors out of the market through the implementation of the Piso-fare program, penalizing Cebu Pacific for such conduct would negatively affect consumers, who would be deprived of low airfare. More importantly, penalizing Cebu Pacific could discourage other airlines from innovating to lower their prices.

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218. *Id.* § 1.21.

219. Office of Fair Trading, *supra* note 114, at 13.

220. E.U. Commission Notice, *supra* note 122, at ¶ 17.

221. Office of Fair Trading, *supra* note 114, at 3.

222. BERMANN ET AL., *supra* note 92, at 866.

223. *See* Roxas-del Castillo & Ngochua, *supra* note 61, at 273.

The ASEAN Guidelines, which were specifically formulated to serve as a benchmark for ASEAN Member States,[224] divide abuse of dominance into four broad categories:

(1) exclusionary behavior towards competitors;

(2) exploitative behavior towards consumers, customers, or competitors;

(3) discriminatory behavior; and

(4) limiting production, markets, or technical development to the prejudice of consumers.[225]

Predatory pricing falls under the first classification. In order to properly discuss predation, it is helpful to first analyze the category of abusive conduct to which it belongs.

A. Exclusionary Behavior Towards Competitors

These types of behavior are calculated to deprive "effective access of actual or potential competitors to supplies or markets [...] as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices."[226] Through this type of acts, the dominant firm is able to reinforce its dominant position in the market. It must be stated, however, that causing a firm to exit the market does not in every case constitute abuse of dominance. In fact, it is more in keeping with competition policy that firms compete on the basis of quality and efficiency; thus, competition on these bases do not fall within the ambit of the prohibition against exclusionary behavior.[227] Firms engaged in predation or predatory pricing oust competitors from the market by undercutting them through abuse of market power.

1. Predatory Pricing

The ASEAN Guidelines explain under a predatory pricing scheme "an undertaking which deliberately incurs losses in the short run by setting prices

224. ASEAN GUIDELINES, *supra* note 31, at 1.

225. *Id.* at 10.

226. BERMANN ET AL., *supra* note 92, at 880 (citing the European Union Commission Guidance Document).

227. *AKZO Chemie BV*, 1991 E.C.R. I-03359, ¶ 70.

so low that it forces one or more undertakings out of the market, so as to be able to charge higher prices in the longer run[.]"[228]

The U.S. Supreme Court has defined predatory pricing in a similar manner. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[229] the U.S. Supreme Court stated that predatory pricing occurs when "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market."[230]

While this scheme initially lowers prices available to consumers, predatory pricing ultimately works to their detriment once the predator has induced its rival to exit the market.[231] First, predatory pricing leads to an increase of prices in the long-run. Second, consumer choice will be limited to the products supplied by the predator firm, thereby decreasing consumer welfare. Thus, although consumers will benefit from the lower prices in the short-run, they will more than pay for such benefit in the long-run.[232]

Using the example of Cebu Pacific once more, if Piso-fare is a predatory pricing scheme then it is reasonable to expect to see an increase in ticket prices when Cebu Pacific's competitors exit the market.

Unfortunately, the ASEAN Guidelines do not offer further guidance in prescribing the legal requisites of predatory pricing. Since the ASEAN Guidelines are based on "country experiences, and international best practices,"[233] the domestic anti-trust laws of the U.S. and the E.C. Treaty will be consulted to supply the deficiencies in the ASEAN Guidelines. According to U.S. jurisprudence, the following requisites must concur in order to constitute predatory pricing — first, the predator's prices must be:

(1) First, "below an appropriate measure of its [...] costs[;]"[234] and

(2) Second, there must be a "dangerous probability" of recoupment.[235]

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228. ASEAN GUIDELINES, *supra* note 31, at 10.

229. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

230. *Id.* at 222.

231. ELHAUGE, *supra* note 36, at 236.

232. *Id.*

233. Surin Pitsuwan, *Foreword* to ASEAN GUIDELINES, *supra* note 31.

234. *Brooke Group Ltd.*, 509 U.S. at 222.

235. *Id.* at 224.

a. Below an Appropriate Measure of its Own Costs

The ASEAN Guidelines provide that with respect to predatory pricing a firm must incur losses by setting its prices "so low."[236] The ASEAN Guidelines, however, fail to establish a test for determining when prices may be deemed "so low." Under U.S. anti-trust law and E.U. competition law, a firm's prices are compared with such firm's own costs in order to determine whether a pricing scheme is predatory.[237]

Although it is settled that a firm's own cost is the benchmark, as of yet, the U.S. Supreme Court has not categorically defined which measure of a firm's costs is most appropriate.[238] In *Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp.*,[239] on one hand, the U.S. Supreme Court merely stated that only "below-cost prices" fall within the prohibition against abuse.[240] In *Brooke*, on the other hand, the U.S. Supreme Court held that average variable cost was the appropriate measure of cost. *Brooke* categorically stated that the decision was intended to set a precedent for lower courts.[241]

In *Matsushita*, the U.S. Supreme Court cited Professors Phillip E. Areeda and Donald F. Turner, who argue that prices below average variable cost create a conclusive presumption that a firm is engaged in predatory pricing.[242] The average variable cost of a firm is also known in economics as the "shutdown point." Variable costs are those that increase with output,[243] such as "materials, fuel, labor, maintenance, [and] licensing fees[.]"[244] Unlike other measures of cost, average variable cost does not fall as output increases.

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236. *See* ASEAN GUIDELINES, *supra* note 31, at 10.

237. *Brooke Group Ltd.*, 509 U.S. at 210.

238. United States v. AMR Corp., 335 F.3d 1109, 1115 (10th Cir. 2003) (U.S.).

239. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

240. *Id.* at 591. *See* Atlantic Richfield Co v. USA Petroleum Co, 495 U.S. 328, 340 (1990).

241. *Brooke Group Ltd.*, 509 U.S. at 222. The U.S. Supreme Court said that the decision should "resolve the conflict among the lower courts over the appropriate measure of cost." *Id.*

242. *See generally Matsushita Electric Industrial Co., Ltd.*, 475 U.S. at 582.

243. SAMUELSON & NORDHAUS, *supra* note 33, at 125.

244. Northeastern Telephone Company v. American Telephone and Telegraph Company, 651 F.2d 76, ¶ 35 (2d Cir. 1981) (U.S.).

Thus, when prices fall below average variable cost a firm would minimize losses by simply closing.[245]

In the U.S. Appellate Courts, "an appropriate measure of its [...] costs" was understood to mean variable cost, prior to the decision in *Brooke*.[246] This meant that prices below variable costs raised a presumption of predatory pricing, while prices above variable costs but below average total cost[247] raised a rebuttable presumption of the absence of such practices.[248] Subsequent to *Brooke*, U.S Appellate Courts have not been unanimous in deciding whether prices above variable costs foreclose the possibility of predation.[249] The U.S. Court of Appeals 10th Circuit, however, held that average variable cost is an adequate measure of costs, since it is a good proxy for marginal cost, which is difficult to approximate.[250]

Similar to the pre-*Brooke* view, the E.U. regards prices below average variable cost as abusive.[251] In the E.U., however, prices above average variable cost may be considered abusive, as well.[252] If prices were below average total costs, but higher than average variable costs, then such scheme would only be treated as abusive if they were calculated to eliminate a competitor.[253] In the latter situation, it is necessary to prove intent to diminish competition.[254]

b. Dangerous Probability of Recoupment

In U.S. jurisprudence, this element is of prime importance, as without the possibility of recoupment, consumers will not suffer from the pricing scheme.[255] The definition in the ASEAN Guidelines suggests that probability of recoupment is an element of predation, since the Guidelines state that

245. SAMUELSON & NORDHAUS, *supra* note 33, at 151.

246. *Brooke Group Ltd.*, 509 U.S. at 210.

247. *AKZO Chemie BV*, 1991 E.C.R. I-03359, ¶ 72. Average total cost is defined as fixed costs plus variable cost. *Id.*

248. ELHAUGE, *supra* note 36, at 248.

249. *Id.*

250. *AMR Corp.*, 335 F.3d at 1116.

251. *AKZO Chemie BV*, 1991 E.C.R. I-03359, ¶ 71.

252. *Id.* ¶ 72.

253. P, Tetra Pak International v. Commission of European Communities, Case C-333/94, 1996 E.C.R. I-5951, ¶ 94.

254. *Id.*

255. *AMR Corp.*, 335 F.3d at 1115.

such predation must be undertaken in order to eventually raise prices.[256] This second requisite is not present in E.U. law or jurisprudence.[257] In fact, in *France Telecom SA v. Commission of the European Communities*,[258] the E.U. Court rejected the defendant's claim that it was necessary to prove a "realistic chance of recoupment of losses."[259] The probability of recoupment consists of two elements: (a) the likelihood that predatory pricing produce its intended effect; and (b) the likelihood that the scheme would impair competition.[260]

i. Probability of Producing its Intended Effects

The purpose of a predatory pricing scheme is the elimination of competitors from the market.[261] By ejecting other firms from the market, the predatory firm establishes itself as the monopolist, thereby enabling it to set prices above competitive levels.[262] In order for predatory pricing to be rational, the predator firm must be capable of effectually raising prices for a prolonged period of time in order to recoup losses.[263] More importantly, if the predator firm fails to raise prices in the market for whatever reason, consumers benefit from low prices.

ii. Probability of Impairing Competition

In determining whether a predatory price scheme is capable of impairing competition, it is necessary to examine the conditions of the relevant market.[264] If, for instance, barriers to entry are low, then the exit of one firm from the market could easily be followed by the entry of another.[265] This would hamper the ability of the predator firm to charge supra-competitive

256. ASEAN GUIDELINES, *supra* note 31, at 10.

257. *P, Tetra Pak International*, 1996 E.C.R. I-5951, ¶ 94.

258. France Telecom SA v. Commission of the European Communities, Case T-340/03, 2007 E.C.R. II-00107.

259. BERMANN ET AL., *supra* note 92, at 923 (citing *France Telecom SA*, 2008 E.C.R. II-00107).

260. *Brooke Group Ltd.*, 509 U.S. at 225.

261. ELHAUGE, *supra* note 36, at 245.

262. *Matsushita Electric Industrial Co., Ltd.*, 475 U.S. at 591.

263. *See* Lee U, *supra* note 96, at 120.

264. *See Brooke Group Ltd.*, 509 U.S. at 226.

265. *Id.* at 118.

prices for a sustained period of time.[266] In markets with low barriers to entry, the predator firm will be constantly preoccupied with fending off new competitors from the market, that it may never have an opportunity to recoup its losses.[267] If the predator firm never raises its prices, then competition is not impaired.

V. ANALYSIS

The Philippines is in dire need of an effective competition law not only due to its treaty obligations, but, more importantly, because of its pervasive economic inequality. The advent of the Competition Act is no guarantee that the objectives of the law will be met. As early as 1932, there were already scattered laws and regulations that dealt with anti-competitive behavior. These laws, however, failed to curb anti-competitive behavior. Thus, before evaluating the Competition Act, it would be enlightening to look back at the law's predecessors in order to learn from their shortcomings. To test the effectivity of the law, as well as its compliance with the ASEAN Guidelines, the specific provisions of the Competition Act will then be analyzed in light of the definitions of dominance and predation established in Sections III and IV, respectively.

A. An Overview of Anti-trust Provisions of Philippine Law Prior to the Competition Act

Prior to the Competition Act, the Philippines did not have a complete and comprehensive anti-trust law.[268] Nevertheless, there were scattered provisions and industry-specific legislation dealing with competition law.[269] There were three laws in the Philippines that generally proscribed anti-competitive behavior — the Constitution, the Civil Code,[270] and the Revised Penal Code.[271] Due to the broad and vague terms in which these

266. *Matsushita Electric Industrial Co., Ltd.*, 475 U.S. at 592.

267. Lee U, *supra* note 96, at 118.

268. Medalla, *supra* note 32, at 9; Aris L. Gulapa, *Proposing a Philippine Merger Regulatory Regime in Light of Emerging Norms under International Competition Law: How to Balance Public Interest Concerns vis-à-vis Antitrust Goals?*, 56 ATENEO L.J. 274, 276 (2011); Roxas-del Castillo & Ngochua, *supra* note 61, at 248; Makati Business Club, *supra* note 15, at 7; & Patacsil et al., *supra* note 11, at 140.

269. Gulapa, *supra* note 268, at 283. *See* Roxas-del Castillo & Ngochua, *supra* note 61, at 248 & Abad, *supra* note 14, at 342-45.

270. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950).

271. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act. No 3815 (1932).

laws were cast, they have proved inadequate to prevent anti-competitive conduct. Unfortunately, none of the provisions of these laws regarding competition have been directly tested by the Supreme Court.[272]

1. The 1987 Constitution

Article XII, Section 19 of the Constitution provides that "[t]he State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."[273]

Unfortunately, this provision has never been used to rebuke private anti-competitive behavior. In *Tatad*, however, the Supreme Court stated that this Section of the Constitution "is anti-trust in history and in spirit[,]"[274] and that it was intended to promote competition.[275] In the same case, the Supreme Court further stated that "combinations in restraint of trade and unfair competitions are absolutely proscribed and the proscription is directed both against the State as well as the private sector."[276]

2. Civil Code

The Civil Code provides basis for a private action for the recovery of damages arising from unfair competition. Article 28 of the Civil Code states that "[u]nfair competition in agricultural, commercial[,] or industrial enterprises or in labor through the use of force, intimidation, deceit, machination[,] or any other unjust, oppressive[,] or highhanded method shall give rise to a right of action by the person who thereby suffers damage."[277]

This provision is both too narrow and too broad. On the one hand, it is too narrow because although it provides a right of action, it does not specify the requisites necessary for its enforcement. It neither defines unfair competition, nor oppressive or high-handed methods. On the other hand, it is too broad, as it includes the use of force, intimidation, deceit, and

272. Gulapa, *supra* note 268, at 283. *See* Roxas-del Castillo & Ngochua, *supra* note 61, at 248 & Abad, *supra* note 14, at 342-45.

273. PHIL. CONST. art. XII, § 19.

274. *Tatad*, 281 SCRA at 358.

275. *Id.*

276. *Id.* at 357.

277. CIVIL CODE, art. 28.

machinations, acts not usually included in anti-trust law. Curiously, a private action arising from Article 28 of the Civil Code has never been instituted.[278]

3. Revised Penal Code

Article 186 of the Revised Penal Code punishes three acts. First, entering into an agreement to create a "combination to prevent free competition in the market."[279] Second, the creation of a "monopoly to restrain free competition in the market."[280] Third, "combining, conspiring[,] or agreeing with any person to make transactions prejudicial to lawful commerce or to increase the market price of merchandise."[281]

Only one case has been decided under this provision — *United States v. Fulgueras*.[282] In *Fulgueras*, the respondent used his purported "supernatural power" to induce others to lower the price of certain commodities.[283] Evidently, this case was not concerned with competition law, but rather unfair trade.[284]

Unfortunately, Article 186 of the Revised Penal Code has failed to effectively deter anti-competitive behavior.[285] This is probably due to lack of enforcement, as only one case has directly addressed the matter.[286] Moreover, it may be difficult to secure a conviction under the Revised Penal Code, as proof beyond reasonable doubt is required.[287]

4. Other Laws on Anti-competitive Agreements:

The Corporation Code,[288] the Price Act,[289] the Consumer Act,[290] the Universally Accessible Cheaper and Quality Medicines Act of 2008,[291] and

278. Gulapa, *supra* note 268, at 286.

279. II LUIS B. REYES, THE REVISED PENAL CODE 286 (17th ed. 2008). *See* REVISED PENAL CODE, art. 186.

280. *Id.*

281. *Id.* at 287.

282. United States v. Fulgueras, 4 Phil. 432 (1905).

283. *Id.* at 433.

284. *Id.*

285. Makati Business Club, *supra* note 15, at 7.

286. Abad, *supra* note 14, at 360.

287. *Id.*

288. Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa No. 68, § 59 (1980).

the Intellectual Property Code,[292] likewise, guard against some anti-competitive behavior.[293]

Additionally, agencies have been established to monitor and/or enforce competition law in the following industries: (1) banking and financial institutions; (2) insurance; (3) tourism, land use, and real estate development; (4) rice, corn, wheat, and other grains; (5) sugar, coconut, garment manufacturers and exporters, and telecommunications; (6) common carriers on land; (7) port operators and arrastre services; and (8) power generation and oil companies.[294]

Unfortunately, these laws have likewise failed to prevent market concentration and anti-competitive behavior.[295] Many of these laws merely express competition policy. Competition policies, on one hand, foster competition in the market by facilitating trade, reducing barriers to entry, and minimizing government intervention.[296] Competition law, on the other hand, is "specifically aimed at preventing anti-competitive business practices, abuse of market power[,] and anti-competitive mergers."[297]

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289. 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. 7581, § 5 (1992).

290. The Consumer Act of the Philippines [Consumer Act], Republic Act No. 7394, § 52 (1992).

291. An Act Providing for Cheaper and Quality Medicines, Amending For The Purpose Republic Act No. 8293 or the Intellectual Property Code, Republic Act No. 6675 or the Generics Act Of 1988, and Republic Act No. 5921 or the Pharmacy Law, and for Other Purposes [Universally Accessible Cheaper And Quality Medicines Act], Republic Act No. 9502, § 24 (2008).

292. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for other Purposes [INTELLECTUAL PROPERTY CODE], Republic Act No. 8293, § 168 (1997).

293. Roxas-del Castillo & Ngochua, *supra* note 61, at 248.

294. Abad, *supra* note 14, at 346.

295. Gulapa, *supra* note 268, at 286.

296. ASEAN GUIDELINES, *supra* note 31, at 4.

297. *Id.*

B. Philippine Law, Jurisprudence, and Practice Relating to Abuse of Dominance

In this section, Philippine law and jurisprudence, as well as the recent Philippine Competition Act, concerning the elements of abuse of dominance will be evaluated in light of the standards set forth in Sections III and IV. After which, recommendations as to the most appropriate standards for the Philippines will be proposed.

1. Dominance

Defining dominance is essential to successfully proscribe acts constituting abuse of dominance. As stated earlier, Professor Elhauge refers to this requisite as both a shield and a sword.[298] As a shield, the element of dominance focuses government resources to investigate only firms with sufficient market power to affect the market, thereby rendering enforcement feasible.[299] As a sword, the position of dominance can substitute definitive proof of adverse effects on the market, as the same can be inferred from market power.[300]

a. Market Power

The Supreme Court has discussed the concept of market power on several different occasions. Unfortunately, these definitions may not be optimal for purposes of competition law. The standing definitions of market power in law and jurisprudence will first be analyzed. Recommendation will then be suggested to improve the standing definitions.

i. Philippine Laws and Jurisprudence Prior to the Competition Act

In *Tatad*, the Supreme Court defined a monopoly as "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."[301]

Although monopoly is different from market power, the determination of the existence of a monopoly depends in part on a finding of market power. The determinants used by the Supreme Court in *Tatad* differ greatly from the previously discussed indicators of market power, or even monopoly. As mentioned in Section III, the main determinants of market

298. ELHAUGE, *supra* note 36, at 183.

299. *Id.*

300. *Id.* at 184.

301. *Tatad*, 281 SCRA at 355.

power or monopoly were market share,[302] and power to constrain output and raise prices.[303]

This definition is sorely lacking in terms of competition law. First, it only considers the number of firms in measuring market power. Second, instead of providing that power should be wielded over a market, it states that such power should apply to a "business or trade." Such scope is too wide, as a firm would have to dominate an entire business or trade, as opposed to a limited but relevant product and geographic market. Thus, if this method of determining monopoly power were to be applied in determining market power in general, it would prove inadequate and ill-suited.

The Supreme Court seemed to have expressed a better definition of monopoly in the earlier case of *Gokongwei, Jr. v. Securities and Exchange Commission*.[304] There, it defined a monopoly in the following manner —

> 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*.[305]

Through this rather lengthy definition of a monopoly, it seems that the Supreme Court espouses the view that it is not market share alone that is decisive of a firm's dominance. Instead, it is the potential to raise prices or exclude competition.[306] This definition conforms to the recommendation in the ASEAN Handbook that factors other than market share should be considered. It further demonstrates that actual injury need not result in order to trigger the prohibitions contained in the Constitution and the Revised Penal Code.[307] Thus, mere potential to raise prices and exclude competitors is sufficient. By not requiring a showing of anti-competitive effects, the Supreme Court seems to have adopted Professor Elhauge's view that the

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302. ASEAN GUIDELINES, *supra* note 31, at 10 & *Hoffmann-La Roche & Co. AG*, 1979 E.C.R. 461, ¶ 41.

303. *United Brands Company*, 1978 E.C.R 207, ¶ 65.

304. Gokongwei, Jr. v. Securities and Exchange Commission, 89 SCRA 336 (1979).

305. *Id.* at 376 (emphasis supplied).

306. Abad, *supra* note 14, at 348.

307. *Id.*

element of market power can obviate the need to demonstrate anti-competitive effects.

In the Competition Rules and Complaint Procedure (ERC Competition Rules)[308] promulgated by the Energy Regulation Commission (ERC), the ERC uses the term "substantial degree of power in a [m]arket[,]" rather than dominance.[309] The ERC Competition Rules provide that in determining whether a firm possesses a substantial degree of market power the following should be taken into consideration:

(a) competitors, or potential competitors, of that [p]erson or any of those [p]ersons in that [m]arket;[310] or

(b) [p]ersons to whom or from whom that [p]erson, any of those [p]ersons or any of their [a]ffiliates supply or acquire goods or services in that [m]arket.[311]

Therefore, it seems that in determining market power, evaluating market conditions is more favored than analyzing market share alone.

In another case, the Supreme Court seems to be insulating public utilities from competition. In *Batangas Transportation Co.*, the Supreme Court overturned the decision of the Public Service Commission issuing Cayetano Orlanes a certificate of public convenience, as Batangas Transportation Company had a "vested and preferential right over a person who seeks to acquire another and a later license over the same route."[312] The Supreme Court stated that it was necessary to deny the issuance of the certificate of public convenience in order to protect the first licensee's investment from "ruinous competition."[313]

Based on *Batangas Transportation Co.*, it seems that the Supreme Court does not favorably view competition in public utilities. The Supreme Court in this case seems to favor insulating the licensee from competition, since the burden rests on the applicant for a license to demonstrate that another licensee is necessary. This contravenes the underlying tenets of anti-trust law, under which competition is viewed as desirable.

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308. Energy Regulatory Commission, The 2006 Competition Rules and Complaint Procedures Implementing the Electric Power Industry Reform Act [2006 ERC Competition Rules] (Aug. 23, 2006).

309. *Id.* rule 5, § 1.

310. *Id.* rule 18, § 8 (a).

311. *Id.* rule 18, § 8 (b).

312. *Batangas Transportation Co.*, 52 Phil. at 466.

313. *Id.*

ii. Definition of Market Power in the Competition Act

Although the term "market power" is mentioned in the Competition Act, it is not explicitly defined.[314] Instead, the Competition Act uses the term "dominant position," which is "a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following: competitors, customers, suppliers, or consumers."[315]

In defining dominance, the Competition Act seems to place equal importance on market share and the ability to affect the market. Although the Competition Act provides for a presumption of dominance when a firm's market share is at least 50%,[316] it also provides that the following factors should be considered in evaluating the existence of dominance:

(a) The share of the entity in the relevant market and whether it is able to fix prices unilaterally or to restrict supply in the relevant market;

(b) The existence of barriers to entry and the elements which could foreseeably alter both said barriers and the supply from competitors;

(c) The existence and power of its competitors;

(d) The possibility of access by its competitors or other entities to its sources of inputs;

(e) The power of its customers to switch to other goods or services;

(f) Its recent conducts; and

(g) Other criteria established by the regulations of this Act.[317]

Considering both market share and ability to affect the market is ideal in the interpretation, enforcement, and application of the Competition Law. First, taking account of these factors is in accordance with the ASEAN Guidelines and the ASEAN Handbook, thereby demonstrating the Philippines' good faith compliance with its treaty obligations under the ASEAN Charter.

Second, establishing thresholds will greatly aid in the administration of competition law, since developing countries, like the Philippines, tend to have few resources at their disposal to monitor every single firm in a

314. *See* Philippine Competition Act, § 27.

315. *Id.* § 4 (g).

316. *Id.* § 27.

317. *Id.*

market.[318] It is sometimes difficult to prove capacity to affect the market; thus, the presumption serves to alleviate the burden on the Commission when a firm meets the 50% threshold. Further, the 50% threshold is in accordance with international practice. E.U. jurisprudence provides a similar threshold, as firms with market shares that surpass 50% may be presumed dominant.[319] Indonesia[320] and Thailand,[321] which have similarly situated economies, have likewise set the bar at 50%. All three countries are low-middle-income countries,[322] with histories of high market concentration.[323] Consequently, only a few corporations in those countries have the capacity to enter industries that require high capital.[324] Thus, establishing a lower threshold could serve as a disincentive for firms to expand. Instead, the 50% boundary is high enough that firms will still be encouraged to grow, allowing them to reach economies of scale and scope, and eventually enabling them to become more competitive both internationally and domestically.[325]

iii. Recommendation

In *Gokongwei Jr.* and the ERC Competition Rules, capacity to affect the market is determinative of market power.

318. Eleanor M. Fox, *Antitrust, Economic Development and Poverty: The Other Path*, *in* THE EFFECTS OF ANTI-COMPETITIVE BUSINESS PRACTICES ON DEVELOPING COUNTRIES AND THEIR DEVELOPMENT PROSPECTS 197 (Hassan Qaqaya & George Lipimile eds., 2008).

319. *AKZO Chemie BV*, 1991 E.C.R. I-03359, ¶ 60.

320. Hadiputranto, Hadinoto & Partners, Guide to Competition Law in Indonesia, (An Unpublished Guide Produced by Hadiputranto, Hadinoto & Partners in 2013) 7, *available at* http://www.hhp.co.id/files/Uploads/Documents/Type%202/HHP/bk_hhp_competitionlawindonesia_2013.pdf (last accessed Aug. 29, 2015).

321. ASEAN HANDBOOK 2010, *supra* note 90, at 94.

322. The World Bank, Country and Lending Groups, *available at* http://data.worldbank.org/about/country-classifications/country-and-lending-groups#Lower_middle_income (last accessed Aug. 29, 2015).

323. *See* Syamsul Maarif, Competition Law and Policy in Indonesia (An Unpublished Report Producted as Part of the ASEAN Competition Law Project) 13, *available at* http://www.jftc.go.jp/eacpf/02/indonesia_r.pdf (last accessed Aug. 29, 2015).

324. UNCTAD SECRETARIAT, *supra* note 16, at xvii.

325. Abad, *supra* note 14, at 368.

In interpreting the law, the courts, as well as the Commission, should be aware that the 50% threshold merely raises a presumption of dominance.[326] It should serve as "a useful first indication [of dominance], [the] meaningfulness [of which] will be interpreted in light of market dynamics and trends over time."[327] In determining dominance, in all cases — whether below or above the established threshold — the court should take into consideration the circumstances mentioned in Section 27 of the law. Thus, a firm may be considered non-dominant, although it possesses a market share above 50%, if, for instance, such firm cannot fix prices unilaterally.[328]

Since the Philippines has adopted the Competition Act, the Supreme Court's pronouncement in *Batangas Transportation Co.* will need to be reviewed. The classification of competition as "ruinous" in the decision is anathema to the spirit of competition law, even assuming that such categorization is limited to public utilities.[329] Like other ASEAN Member States, the Philippines has a history of government regulation of public utilities.[330] In fellow ASEAN Member States, such as Indonesia, state monopolies have hindered competition in its markets.[331] Hence, the ruling in *Batangas Transportation Co.* should be overturned.

b. Relevant Market

i. Philippine Laws and Jurisprudence Prior to the Competition Act

The relevant market consists of the geographic market and the product market.[332] A close scrutiny of the definition provided in the ERC

326. International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies (A Report Presented at the 6th Annual Conference of the International Competition Network) 98, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf (last accessed Aug. 29, 2015)

327. BERMANN ET AL., *supra* note 92, at 870 (citing E.U. Commission Notice, *supra* note 122, ¶¶ 11-13).

328. Philippine Competition Act, § 27 (a).

329. *Batangas Transportation Co.*, 52 Phil. at 466.

330. *See* Abad, *supra* note 14, at 358.

331. United Nations Committee on Trade and Development, *Voluntary Peer Review on Competition Policy: Indonesia*, 48, UNCTAD/DITC/CLP/2009/I (2009).

332. ASEAN GUIDELINES, *supra* note 31,at 8.

Competition Rules reveals that these two elements, likewise, form part of the definition of a market.[333] In the ERC Competition Rules, the term "market" includes "one in which goods or services, and other goods or services that are substitutable for, or in otherwise competitive with, the first-mentioned goods or services, are or may be supplied or acquired."[334]

On one hand, under the ERC Competition Rules, goods or services will be considered as belonging to the same product market if they are substitutable for, or competitive with each other.[335] On the other hand, the geographic market consists of the area where substitutable goods and services "may be supplied or acquired."[336] While these definitions more or less comply with those provided in the ASEAN Guidelines,[337] nevertheless these definitions are inadequate for actually determining a given market. Neither do the definitions in the ERC Competition Rules suggest any test to determine the relevant market.

ii. Definition of Relevant Market in the Competition Act

Similarly, under the Competition Act the market encompasses both the product and the geographic market.[338] The Competition Act defines the product and geographic market in the following manner:

> (a) A relevant product market comprises all those goods and/or services which are regarded as *interchangeable or substitutable* by the consumer or the customer, by reason of the goods and/or services' characteristics, their prices and their intended use; and
>
> (b) The relevant geographic market comprises the area in which the entity concerned is involved *in the supply and demand of go*ods and services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are different in those areas.[339]

As in the ASEAN Guidelines, the main criterion in ascertaining the product market is the substitutability of the goods. The Competition Act, however, does not establish an appropriate test for determining the relevant product or geographic market. This is especially unfortunate, since majority of the Senate and House Bills filed prior to the passage of the Competition

333. 2006 ERC Competition Rules, rule 18, § 2.

334. *Id.*

335. *Id.*

336. *Id.*

337. *See* ASEAN GUIDELINES, *supra* note 31, at 8-9.

338. Philippine Competition Act, § 4 (i) & (k).

339. *Id.* § 4 (k) (emphasis supplied).

Act seemed to espouse a test seminal to the SSNIP test to determine the relevant market. The Bills defined the product market as "the line of commerce in which competition has been restrained [and] the geographic area involved, including all reasonably substitutable goods, and all competitors, to which consumers could turn if the restraint or abuse results *in the significant increase in prices*."[340]

iii. Recommendation

Although the Competition Act does not specifically mention the SSNIP test, the same may nevertheless be applied by the enforcement agency, the Philippine Competition Commission (PCC). Notably, the PCC is charged with the obligation to create the Implementing Rules and Regulations (IRR) for the implementation of the Competition Act.[341] Further, the

340. An Act Penalizing Anti-competitive Conduct, Abuse of Dominant Position, and Anti-Competitive Mergers, establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor and For Other Purposes, H.B. No. 4446, § 4 (i), 16th Cong., 1st Reg. Sess. (2014); An Act Penalizing Anti-competitive Conduct, Abuse of Dominant Position, and Anti-Competitive Mergers, establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor and For Other Purposes, H.B. No. 4346, § 4 (i), 16th Cong., 1st Reg. Sess. (2014); An Act Penalizing Anti-competitive Conduct, Abuse of Dominant Position, and Anti-Competitive Mergers, establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor and For Other Purposes, H.B. No. 4320, § 4 (i), 16th Cong., 1st Reg. Sess. (2014); An Act Penalizing Anti-competitive Conduct, Abuse of Dominant Position, and Anti-Competitive Mergers, establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor and For Other Purposes, H.B. No. 3366, § 4 (i), 16th Cong., 1st Reg. Sess. (2013); An Act Penalizing Anti-competitive Conduct, Abuse of Dominant Position, and Anti-Competitive Mergers, establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor and For Other Purposes, H.B. No. 2672, § 4 (i), 16th Cong., 1st Reg. Sess. (2013); An Act Penalizing Anti-competitive Conduct, Abuse of Dominant Position, and Anti-Competitive Mergers, establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor and For Other Purposes, H.B. No. 453, § 4 (i), 16th Cong., 1st Reg. Sess. (2013); & An Act Penalizing Anti-competitive Conduct, Abuse of Dominant Position, and Anti-competitive Mergers, establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor and For Other Purposes, H.B. No. 388, § 4 (i), 16th Cong., 1st Reg. Sess. (2013) (emphasis supplied).

341. Philippine Competition Act, § 50.

Competition Act specifically provides that the PCC is not hamstrung by the law's provisions; instead, it is not prevented "from pursuing measures that would promote fair competition or more competition."[342] The Competition Act defines the relevant product market as "all those goods and/or services which are regarded as interchangeable or substitutable by the consumer or the customer."[343] Since the essence of the SSNIP test is the determination of the substitutability of the good in question for others, it meets the criterion set forth in Section 4 (k) (1) of the Competition Act. The PCC could, therefore, adopt the SSNIP test, as it satisfies the definition of the market in the Competition Act.

Although the SSNIP test contains many economically derived parameters, it nevertheless maintains flexibility.[344] The number of countries that have adopted the SSNIP test is a testament to its value.[345] Additionally, with the use of the SSNIP test, it is possible to analyze the product market and the geographic market simultaneously. In fact, the SSNIP test is used to determine both the product and the geographic market in other jurisdictions.[346]

The PCC should, however, exercise caution in applying the SSNIP test. As previously mentioned, the SSNIP test may pose problems in abuse of dominance cases, since prices will most likely be at monopoly levels for some offenses.[347] Commonly referred to as the cellophane fallacy, this situation will result in an erroneously broad definition of a given market.[348] The definition in the Competition Act could potentially fall right into the trap. The Competition Act does not give a time frame within which the substitutability of a good will be tested. If the determination is made when prices are already at monopoly levels, then the test will erroneously indicate a larger market, which could result in an unfounded finding of non-dominance. Notably, several of the Senate and House Bills, filed prior to the Competition Act, stated that the significant increase in price is caused by restraint or abuse.[349] This necessarily means that prices are already at

342. *Id.* § 15.

343. *Id.* § 4 (k) (1).

344. NATIONAL ECONOMIC RESEARCH ASSOCIATION, *supra* note 202, at 10.

345. Sharma, *supra* note 153, at 189.

346. E.U. Commission Notice, *supra* note 122, ¶ 16.

347. Sharma, *supra* note 153, at 190.

348. ELHAUGE, *supra* note 36, at 201-02.

349. H.B. No. 4446, § 4 (i); H.B. No. 4346, § 4 (i); H.B. No. 4320, § 4 (i); H.B. No. 3366, § 4 (i); H.B. No. 2672, § 4 (i); H.B. No. 453, § 4 (i); & H.B. No. 388, § 4 (i).

monopoly levels. In order to avoid falling prey to the cellophane fallacy, the IRR should provide that the price increase is a purely hypothetical exercise, wherein prices will be raised from competitive levels.

2. Acts Constituting Abuse of Dominance

Having already established the most appropriate definition of dominance, abuse of such dominance in general and exclusionary behavior towards competitors will now be analyzed vis-à-vis the provisions of the Competition Act itself. Taking these into account, the Author will then propose suggestions for the interpretation and implementation of the provisions of the Competition Act.

a. Definition of Acts Constituting Abuse of Dominance in the Competition Act

Prior to the enactment of the Competition Act, there was neither law nor case defining abuse of dominance. The Competition Act defines Abuse of Dominance as prohibition for "one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict[,] or lessen competition."[350]

Similar to the provisions of U.S.[351] and E.U. law,[352] this definition is drawn in broad strokes, thereby enabling it to encompass a wide range of anti-competitive behavior.

Notably, the Competition Act departs from the classification set forth in the ASEAN Guidelines.

b. Recommendation

Although the all-encompassing definition provided in the Competition Act could capture a wide range of anti-competitive behavior, it would be beneficial for purposes of enforcement, if the four general classes of abusive conduct in the ASEAN Guidelines were adopted. A broad definition of abusive conduct, while necessary to punish multifarious means of abusing dominance, may be difficult to enforce due to lack of specificity. As previously mentioned, this lack of specificity in the anti-trust provisions in the Constitution, Civil Code, and the Revised Penal Code is probably responsible for their inadequacy. Therefore, establishing more specific

350. Philippine Competition Act, § 15.

351. *See* Sherman Antitrust Act, 15 U.S.C. § 1 (2009).

352. *See* Treaty Establishing the European Economic Community, *supra* note 113.

definitions — perhaps in the IRR — for the four main kinds of abusive behavior given in the ASEAN Guidelines could aid in the enforcement of competition law. Further, the addition of such definitions would ensure conformity of the Competition Act to the ASEAN Guidelines, thereby demonstrating good faith in the performance of the Philippines' treaty obligations.

3. Exclusionary Behavior Towards Competitors

As previously mentioned, defining the four main types of abuse of dominance will aid in enforcement, since each definition can serve as a catch-all for innovative anti-competitive behavior. Unfortunately, exclusionary behavior towards competitors has never been defined. Nevertheless, the definition established by the E.U. Commission could be adopted in the IRR. The E.U. Commission has defined exclusionary conduct as a "situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking[,] whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers."[353]

a. Predatory Pricing

i. Definition in Philippine Laws and Jurisprudence Prior to the Competition Act

Although R.A. No. 8180, or the Downstream Oil Industry Deregulation Act of 1996,[354] was struck down by the Supreme Court for being unconstitutional, nevertheless, it is worthwhile to analyze the provisions contained therein relating to competition law. Section 9 (b) of R.A. No. 8180 states that "[p]redatory pricing [ ] means selling or offering to sell any product at a price unreasonably below the industry average cost so as to attract customers to the detriment of competitors."[355]

There are three major flaws in this short provision.

First, using the industry's average cost as the threshold could hamper competition, rather than encourage it. If a dominant firm is the most

353. BERMANN ET AL., *supra* note 92, at 880 (citing the European Union Commission Guidance Document).

354. An Act Deregulating the Downstream Oil Industry, and for Other Purposes [Downstream Oil Industry Deregulation Act of 1996], Republic Act No. 8180 (1996).

355. *Id.* § 9.

efficient in its market, then it will have a cost structure that is below that of its competitors. In such case, it would be justified in setting prices below that of its competitors. In order to avoid the chilling effect that this definition may have on competition, the standard should be a price below some measure of a firm's *own* costs.

Second, the Supreme Court, in its resolution for the motion for reconsideration of *Tatad*,[356] stated that this provision is "too loose to be [a] real deterrent."[357] Recognizing that the definition of predation needs "to be tightened up particularly with respect to the definitive benchmark price and the specific anti-competitive intent[,]"[358] Congressman Dante O. Tinga, one of the principal authors of the House Bill, suggested that the Areeda-Turner Model should be adopted.[359] The Areeda-Turner Model provides that a price below a firm's own average variable cost should be the decisive point.[360] Not only would this serve to clarify the ambiguous provision, but it would also ameliorate the problems associated with setting the threshold at industry average cost.[361]

Finally, probability of recouping losses is not an element of predation under R.A. No. 8180. The absence of this element increases the probability that a firm could wrongfully be deemed to be engaging in predation. Thus, probability of recouping losses sustained while implementing the pricing scheme should have been included in the definition of predatory pricing.

Congress seems to have taken Congressman Tinga's recommendation, since in the Downstream Oil Industry Deregulation Act of 1998 or R.A. No. 8479,[362] predatory pricing is defined as "selling or offering to sell any oil product at a price below the seller's or offeror's average variable cost for the purpose of destroying competition, eliminating a competitor or discouraging a potential competitor from entering the market[.]"[363]

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356. Tatad v. Secretary of the Department of Energy, 282 SCRA 337 (1997).

357. *Id.* at 345.

358. *Id.*

359. *Id.*

360. *Id.* at 346.

361. Downstream Oil Industry Deregulation Act of 1996, § 9.

362. An Act Deregulating the Downstream Oil Industry and for Other Purposes [Downstream Oil Industry Deregulation Act of 1998], Republic Act No. 8479 (1998).

363. *Id.* § 11 (b).

While this definition has improved, as Congress seems to have adopted the Areeda-Turner test, it still does not require the possibility of recoupment. Moreover, R.A. No. 8479 carves out an exception from liability for predation when done "to match the lower price of the competitor."[364] This exception has no basis in economic theory. The mere fact that a firm is merely matching the prices of a rival does not serve to preclude anti-competitive behavior. Instead, it may encourage it.

ii. Definition in the Competition Act

Predation is prohibited under Section 15 (a) of the Competition Act, which proscribes the following —

> Selling goods or services below cost with the object of driving competition out of the relevant market: Provided, That in the Commission's evaluation of this fact, it shall consider whether the entity or entities have no such object and the price established was in good faith to meet or compete with the lower price of a competitor in the same market selling the same or comparable product or service of like quality.[365]

Notably, this definition fails to specify which measure of cost should be used in analyzing whether a pricing scheme is predatory. It also fails to specify *whose* cost structure is taken into consideration — that of the firm alleged to be engaging in predation or the average of the market. Moreover, this definition does not do any better than R.A. No. 8479 in requiring probability of recoupment. Most importantly, it contains the same exception as R.A. No. 8479 regarding prices "established in good faith to meet or compete with the lower price of a competitor."[366]

iii. Recommendation

To avoid confusion, the measure of relevant cost should be specified in the IRR. The measure of cost that should be adopted is that found in Section 11 of R.A. No. 8479 — *average variable cost*.[367] Since setting prices below average variable cost are always less profitable than ceasing operations, anti-competitive intent can be gleaned from the fact of pricing below average variable cost.[368] Thus, the IRR should provide that setting prices below average variable cost raises a conclusive presumption of predatory behavior. This view is espoused by the E.C.J, which unlike the U.S. Supreme Court,

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364. *Id.*

365. Philippine Competition Act, § 15 (a).

366. *Id.*

367. Downstream Oil Industry Deregulation Act of 1998, § 11 (b).

368. SAMUELSON & NORDHAUS, *supra* note 33, at 151.

does not require recoupment as an element of predation when prices are below average variable cost.[369]

Interpreting the law in this way is actually in accordance with the provisions of the Competition Act. Significantly, the law requires a showing of intent or "object of driving competition out of the relevant market."[370] When prices are below average variable cost, such intent can be gleaned from the mere fact that when prices fall below this level, it would be more profitable for the firm to shut down. The fact that a firm chooses to price goods below average variable cost reveals an ulterior motive to eject its competitors from the market.

Nevertheless, a showing that prices are above average variable cost should not preclude a finding of anti-competitive behavior. Instead, when prices are above average variable cost, but below average total cost, inquiry should be made into the possibility of recouping losses, as required in the U.S.[371] Probability of recoupment should be required when costs are within this range, because without recoupment, a botched predatory scheme will benefit consumers. If, for instance, a firm attempts to engage in predation, but for whatever reason cannot sustain its prices above competitive levels, consumers ultimately benefit from lower prices.

This interpretation is likewise in keeping with the provisions of the Competition Act. Pertinently, the Competition Act provides that acts constituting abuse of dominance are proscribed only when such acts "*substantially* prevent, restrict or lessen competition."[372] If there is no possibility of recouping losses, then competition will not be prevented, restricted or lessened at all. If, for instance, the predator firm has no possibility of raising prices in order to recoup losses due to the constant influx of new entrants into the market, then consumer welfare is enhanced by lower prices.

Finally, the exception provided in the law for firms that lower prices in "good faith to meet or compete with the lower price of a competitor" will not serve the purpose of the law to proscribe anti-competitive behavior. As previously mentioned, it is not a valid exception according to economic theory, as it could actually encourage predation. Average variable cost is

369. *P, Tetra Pak International*, 1996 E.C.R. I-5951, ¶ 56.

370. Philippine Competition Act, §15 (a).

371. *P, Tetra Pak International*, 1996 E.C.R. I-5951, ¶ 94.

372. Philippine Competition Act, § 15 (emphasis supplied).

regarded by economists as the shutdown point; when prices are below average variable costs, it would be more profitable for a firm to shut down.[373] Hence, if a firm lowers its price below its average variable cost, albeit in response to a rival, eventually one firm will be induced to shut down. The firm with more resources at its disposal will probably have the wherewithal to withstand temporary losses.[374] In this event, such firm will merely wait for its rival to exit the market. In order for such retaliatory scheme to be logical, the surviving firm will necessarily raise its prices above competitive levels. In this situation, the Competition Act exempts the surviving firm from predation, as long as it did so in response to a competitor. The fact, however, that the surviving firm engaged in predation in pure retaliation will not prevent it from subsequently raising prices once the firm that initiated the predation leaves the market.

In order to harmonize the exception in Section 15 (a) with the purpose of the Competition Act, the term "good faith" should punctuate the intention of *both* firms. Thus, the firm that first lowers its prices should likewise do so in good faith, and without the "object of driving competition out of the relevant market."[375] If both firms compete on the basis of price in good faith, then competition on the market will be enhanced, ultimately redounding to the benefit of the consuming public.

VI. CONCLUSION

The Competition Act has been received with approbation, both domestically and internationally. Its passage has inspired many positive forecasts for the Philippine economy. It must be emphasized, however, that in order for the law to produce any meaningful effects, its implementation and enforcement must be animated by the spirit of the law. Thus, care should be exercised in interpreting the law in a manner consistent with its purpose.

Early on in the Note, the Author seemed to point an accusatory finger at the Piso-fare scheme of Cebu Pacific. Analyzing the essential elements of abuse of dominance in great detail reveals that the Author's speculative inferences were largely unfounded. More likely than not, Cebu Pacific is not engaged in predation. Piso-fare tickets are also offered for international flights, a market wherein Cebu Pacific has a negligible market share. Moreover, it is highly unlikely that the Piso-fare scheme falls below Cebu

373. SAMUELSON & NORDHAUS, *supra* note 33, at 151.

374. Lee U, *supra* note 96, at 117.

375. Philippine Competition Act, § 15 (a).

Pacific's average variable cost, since Piso-fare prices are exclusive of taxes and surcharges.[376]

The possibility of wrongly inferring abuse illustrates the danger of implementing a competition law that does not properly define abuse of dominance. If the PCC were to wrongly accuse Cebu Pacific of predation, and consequently enjoin it from implementing the scheme, the market would be deprived of cheap airfare. Worse, other airlines would be hesitant to lower their own prices in fear of being found guilty of predation. Ultimately, the consuming public and the market will suffer from a misinformed finding of abusive conduct. It is, therefore, imperative that the interpretation and implementation of the Competition Act clearly and definitively demystifies dominance.

376. *See* Cebu Pacific, Cebu Pacific offers P1 fare to China destinations, *available at* https://www.cebupacificair.com/about-us/pages/news.aspx?id=714 (last accessed Aug. 29, 2015).