

Transparency for Credibility: American Procedural Fairness as a Benchmark in Enhancing Philippine Competition Enforcement

Gonzalo D.V. Go, III*

I. INTRODUCTION.....	191
II. AMERICAN PROCEDURAL FAIRNESS IN ANTITRUST PROCEEDINGS.....	193
A. <i>Procedural Fairness as Due Process Element</i>	
B. <i>Transparency as Procedural Fairness Element in Competition Proceedings</i>	
C. <i>Transparency in Enforcing Competition in the United States</i>	
D. <i>Proposed Framework for Transparency Benchmarking</i>	
III. ENHANCING PHILIPPINE COMPETITION ACT ENFORCEMENT....	208
A. <i>American Antitrust Experience as the Most Logical Benchmark</i>	
B. <i>Philippine Competition Enforcement Enhancements via the Proposed Framework</i>	
IV. CONCLUSION.....	222

I. INTRODUCTION

[O]pen and frequent dialogue between competition law enforcers and those under investigation not only helps ensure fairness to the parties but also facilitates more effective enforcement.

— Christine A. Varney¹

* '17 LL.M., with honors, Columbia Law School; '06 J.D., with honors, Ateneo de Manila University School of Law. The Author's previously published works include *Curbing Domain Name Registration Abuse: A Legal Framework in the Implementation of the Anti-Cybersquatting Provision of the Cybercrime Prevention Act of 2012*, 57 ATENEO L.J. 949 (2013) with Ferdinand M. Negre; and *Advancing the Lore: A Proposed Legal Framework for Filipino Traditional Knowledge Protection and Commercialization*, 60 ATENEO L.J. 993 (2016) with Paolo Miguel S. Consignado. The Author is a member of the faculty of the Ateneo de Manila University School of Law, and was the Legal Director of Jollibee Foods Corporation. The Author expresses his sincere gratitude to Professors Christine Varney and David Marriott of the Columbia Law

The Philippine Competition Act of 2015² (PCA) addresses the highly concentrated political and socio-economic power of the oligarchic elite in the Philippine society. The law was fully implemented last 7 August 2017,³ wherein anti-competitive structures, conducts, and practices that continue to violate the provisions of this comprehensive antitrust legislation, will be punished with the applicable administrative, civil, and criminal penalties. The PCA centralized into one agency the exclusive and original jurisdiction to implement its provisions;⁴ and on that account, several constitutional and administrative guidelines must be observed to ensure its effective enforcement for the promotion of consumer welfare, economic development, innovation, and efficient allocation of wealth.

Competition law enforcement, to effectively protect market competition, entails fair procedures where parties are heard; false positives and negatives are avoided; and decisions are predictable, well-informed, and dispassionate.⁵ Transparency plays a critical role in achieving these objectives. It lends credibility and predictability in antitrust enforcement.

School, for their guidance in the preparation and enhancement of the original draft of this paper.

Cite as 62 ATENEO L.J. 191 (2017).

1. Christine A. Varney, Assistant Attorney General, Antitrust Division, United States Department of Justice, *Procedural Fairness*, Address at the 13th Annual Competition Conference of the International Bar Association 2-3 (Sep. 12, 2009) (transcript available at <https://www.justice.gov/atr/file/519876/download> (last accessed Aug. 10, 2017)).

Professor Christine A. Varney is the only person to have served as both the United States Department of Justice's Assistant Attorney General for Antitrust (2009-2011) and as a Commissioner of the Federal Trade Commission (1994-1997). Cravath, Swaine & Moore LLP, Christine A. Varney, available at <https://www.cravath.com/cvarney> (last accessed Aug. 10, 2017).

2. 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 Therefor [Philippine Competition Act], Republic Act No. 10667 (2015).
3. *Id.* § 53.
4. *Id.* § 5.
5. See A Douglas Melamed, *Good Competition Law Enforcement Requires Good Process*, 11 COMPETITION L. INT'L 51, 51 (2015).

This Article aims to provide a legal framework in benchmarking transparency as an element of procedural fairness. It takes into account the antitrust enforcement practices, experiences, and commitments of the United States' (US) Federal Trade Commission (FTC) and Department of Justice's (DOJ) Antitrust Division (each hereinafter referred to as "Agency;" and both, as "Agencies") and adopts their best practices as guide in suggesting some transparency measures in enhancing antitrust enforcement in the Philippines. The scope of this Article is limited to federal antitrust enforcement, and will not discuss the contributions of State enforcement agencies in the American antitrust landscape.

Part I briefly introduces the goals and objectives of this Article. Part II starts the discussion with the concept of procedural fairness in American antitrust proceedings, and then focuses on how transparency as a fundamental element of procedural fairness is regarded by the international community and guaranteed by the Agencies in all stages of antitrust enforcement in the US. A proposed framework for transparency benchmarking is thereafter proposed based on these premises. Part III explains why the American antitrust experience is the most logical benchmark to Philippine competition enforcement, and uses the proposed framework to recommend transparency measures in enhancing the present antitrust enforcement in the Philippines. Part IV concludes the discussion and advances some topics for future discussion.

II. AMERICAN PROCEDURAL FAIRNESS IN ANTITRUST PROCEEDINGS

A. Procedural Fairness as Due Process Element

The US Constitution guarantees that no person shall be deprived of life, liberty, or property, without due process of law.⁶ Due process of law safeguards every person against any arbitrary deprivation of rights by the government.⁷ It was intentionally left undefined,⁸ and without fixed

6. U.S. CONST. amend. V & U.S. CONST. amend. XIV, § 1.

7. *Dent v. West Virginia*, 129 U.S. 114, 123 (1889). Due process as an English concept is "designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law." *Id.* at 123-24.

8. *See Ballard v. Hunter*, 204 U.S. 241, 255 (1907) & *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856). The Constitution did not describe the allowed and forbidden processes, or prescribe what principles to apply to comply with due process.

[I]t was not left to the legislative power to enact any process which might be devised. The [due process clause] is a restraint on the

procedure⁹ aside from the fundamentally required opportunity to be heard and to defend oneself.¹⁰ Due process applies to regulatory enforcement,¹¹ such as in antitrust cases. In assessing if procedural fairness is consistent with due process, enforcement procedures are measured by the extent a respondent may be “condemned to suffer grievous loss.”¹²

If found to have violated the federal antitrust laws, a respondent may be fined¹³ and imprisoned¹⁴ to deter anti-competitive behavior. The violator not only suffers business or personal reputational damage, but is also ordered to disgorge his or her pertinent profits and is even slapped with treble damages¹⁵ to compensate the victims. A proposed merger may be halted through preliminary injunction;¹⁶ and a segment of a merged entity’s business may be ordered divested.¹⁷ Considering that the damaging and prohibitive nature of these penalties are tantamount to grievous loss, procedural fairness necessitates proper procedures to be fair and in place

legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process ‘due process of law,’ by its mere will.

Id.

9. Due process is composed of substantive due process and procedural due process. The term “due process,” as used in this Article, will generally pertain to procedural due process as the constitutional basis for procedural fairness. See generally Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003).
10. *Hagar v. Reclamation District*, 111 U.S. 701, 711 (1884). Where life, liberty, or property is involved, due process requires a “regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard[.]” In tax enforcement, “the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable.” *Id.* at 708.
11. See *McMillen v. Anderson*, 95 U.S. 37, 41 (1877). This case applied due process in tax collection.
12. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).
13. See *Monopolies and Combinations in Restraint of Trade* [The Sherman Antitrust Act], 15 U.S.C. §§ 1-7, §§ 1-2 (1890).
14. *Id.*
15. The Clayton Antitrust Act, 15 U.S.C. §§ 12-27, §§ 15 (1914). Private action may recover threefold the damages sustained, cost of suit, and attorney’s fees. *Id.*
16. *Id.* §§ 25-26.
17. *Id.* §§ 16 & 26.

before an antitrust violator is condemned to incur any of these penalties. The US Supreme Court identified some rights pointing to transparency as an essential attribute of due process. These include the parties' right to a timely hearing¹⁸ (transparency in duration of litigation); right to an impartial tribunal¹⁹ (transparency in conflict of interests); right to be informed of the charges against them²⁰ (transparency on what makes the cause of action criminal); right to confront evidence²¹ (transparency on incriminating evidence); right to cross-examine witnesses²² (transparency in establishing facts); right to be informed of the reasons for the decision maker's determination²³ (transparency in litigation outcome); and right to have access to review by an independent tribunal²⁴ (transparency in vetting a judgment). Transparency is the common attribute that unifies these rights. It shapes up the procedures to become fair.

-
18. Global Forum on Competition, Paris, France, Dec. 1-2, 2016, *Promoting Competition, Protecting Human Rights: Contribution from BIAC*, 4, DAF/COMP/GF/WD(2016)74 (Nov. 17, 2016) [hereinafter BIAC] (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977)). Due process is an instrument of forbidding "oppressive delay." *Id.*
19. BIAC, *supra* note 18, at 4 (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). There is no due process where a judge "has a direct, personal, substantial pecuniary interest in reaching a conclusion against [the accused] in his [or her] case." *Id.*
20. BIAC, *supra* note 18, at 4 (citing *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 227 U.S. 88, 93 (1913)). "All parties must be fully apprised of the evidence submitted or to be considered, and must be given [an] opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal." *Id.*
21. *Id.*
22. *Id.*
23. BIAC, *supra* note 18, at 4 (citing *Goldberg v. Kelley*, 397 U.S. 254, 271 (1970)). Decision "must rest solely on the legal rules and evidence adduced at the hearing. ... To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his [or her] determination and indicate the evidence he [or she] relied on." *Id.*
24. BIAC, *supra* note 18, at 4 (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)). The claimant has the "right to an evidentiary hearing, as well as to a subsequent judicial review before the denial of his [or her] claim becomes final." *Id.*

B. Transparency as Procedural Fairness Element in Competition Proceedings

Normative theories suggest that where laws and their enforcement have fair procedures in place, they are perceived as legitimate and will likely be obeyed by the people.²⁵ Procedural fairness is evaluated by looking into the process as to how litigants are treated within the litigation process,²⁶ and the quality of outcome in regulatory enforcement.²⁷

Regulatory outcomes are dependent on administrative procedural rules.²⁸ Transparency in these procedures lends legitimacy to agency action.²⁹ It improves agency processes and results by creating “an incentive for refinement and diligence in the agency’s fact-gathering and deliberating process before a decision is reached.”³⁰ According to FTC Commissioner Terrell McSweeney, the foundation of procedural fairness in antitrust enforcement are (1) commitments to institutional checks and balances; (2) transparency to parties; and (3) engagement on the merits.³¹ Professor Christine A. Varney, former FTC Commissioner, explained how transparency, as an element of procedural fairness, advances fairness and public confidence in antitrust enforcement.

-
25. See Caron Beaton-Wells, Substance and Process in Competition Law and Enforcement: Why We Should Care If It’s Not Fair (A Draft Paper for the 9th ASCOLA Conference Warsaw 2014 on PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS) at 5, available at http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/Beaton-Wells.pdf (last accessed Aug. 10, 2017).
26. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988). “Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome.” *Id.*
27. *Id.* at 667. Outcome- or instrumental-based theories “ensure[] that a challenged action accurately reflects the substantive rules applicable to such action; [the] point is less to assure *participation* than to *use* participation to assure *accuracy*.” *Id.*
28. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 167 (1998).
29. See BIAC, *supra* note 18, at 6.
30. Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937, 942 (2003).
31. Terrell McSweeney, Commissioner, Federal Trade Commission, *Procedural Fairness in Competition Law Enforcement and the FTC Experience*, Remarks at King’s College, Centre of European Law, London, United Kingdom at 3 (Oct. 23, 2015), (transcript available at https://www.ftc.gov/system/files/documents/public_statements/836913/mcsweeney_-_kings_college_remarks_10-23-15.pdf (last accessed Aug. 10, 2017)).

In the context of competition law enforcement, procedural fairness concerns not only dealings among parties, third parties, and enforcers, but also the internal dealings of the enforcement agency. The interactions among parties, third parties, and enforcers are obviously important, but so too is an understanding of how the enforcement agency makes decisions. Knowing who within an enforcement agency makes decisions and [having] a grasp of the timetable of likely milestones in an investigation are important steps in assuaging process concerns. Moreover, the symbolism of events, like the ability to meet with final decision makers, should not be underestimated. The ability to present one's case and have a fair hearing before the decision to bring an action ensures that the government decision maker knows all the arguments against an action, while simultaneously providing the party with the confidence that all relevant arguments have been considered.³²

The need for transparency in antitrust enforcement is recognized internationally. The Organisation for Economic Co-operation and Development (OECD) acknowledged that there is “a broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement, notwithstanding differences between prosecutorial and administrative systems, and other legal, cultural, historical, and economic differences among members.”³³ The Association of Southeast Asian Nations (ASEAN) noted that “[s]ound institutional framework and due process are fundamental in ensuring the effective application of competition law. ... [P]rocedures should be transparent, certain, accountable[,] and not unduly burdensome or prohibitive. Transparency is also fundamental in order to support the credibility of the competition regulatory body (or other law enforcement authority).”³⁴ The International Chamber of Commerce characterized transparency, which is considered as best practice in antitrust enforcement investigation, to be that which affords the respondents to “understand the procedures that govern such proceedings, the statutory or other legal authority under which they are taking place, and the allegations actually being made in such proceedings in sufficient detail to ensure that

32. Varney, *supra* note 1, at 1.

33. Organisation for Economic Co-operation and Development, Procedural Fairness and Transparency: Key Points 2012 at 5 (2012), available at <http://www.oecd.org/daf/competition/mergers/50235955.pdf> (last accessed Aug. 10, 2017).

34. ASSOCIATION OF SOUTHEAST ASIAN NATIONS, ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY 34, § 7.1.1 (2010) [hereinafter ASEAN Guidelines].

such companies can defend themselves.”³⁵ These initiatives laid the groundwork for the International Competition Network (ICN) in coming up with its Competition Agency Transparency Practices³⁶ general transparency enhancement measures, where case-specific measures are grouped according to intended stakeholders: the parties under investigation, third parties, and the public.³⁷

Transparency in antitrust enforcement is categorized as institutional or structural, *ex ante*, and *ex post*.³⁸ Institutional transparency pertains to the antitrust enforcement agency’s structure, composition, and organization. *Ex ante* transparency “refers to the process by which Agencies develop and explain policy.”³⁹ *Ex post* transparency “refers to transparency of actual enforcement decisions made by the Agencies in specific cases, including decisions to challenge, not to challenge, or settle;”⁴⁰ which is essential to educate on case-specific matters after the investigation. Transparency serves as a useful tool for predictability, but in order to avoid the damaging effects of leakage of privileged and proprietary business information, such has to be balanced⁴¹ with the competition agencies’ duty not to disclose certain information.⁴²

-
35. International Chamber of Commerce, Commission on Competition, Recommended framework for international best practices in competition law enforcement proceedings (A Policy Statement) at 1, § 2.1.1, available at http://www.icc-portugal.com/images/documentos/comissao_concorrencia/2010_Recommended-framework-for-international-best-practices-in-competition-law-enforcement-proceedings.pdf (last accessed Aug. 10, 2017).
36. International Competition Network, ICN AGENCY EFFECTIVENESS PROJECT ON INVESTIGATIVE PROCESS: Competition Agency Transparency Practices (April 2013) at 1, available at <http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf> (last accessed Aug. 10, 2017) [hereinafter ICN, Agency Effective Project on Transparency Practices].
37. *Id.* at 28-29.
38. See Harry First, et al., Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System (A New York University Law and Economics Working Paper) at 46, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1307&context=nyu_lewp (last accessed Aug. 10, 2017).
39. *Id.*
40. *Id.*
41. See Grimes, *supra* note 30, at 948. Transparency should not be “excessive, misplaced, or poorly implemented.” *Id.* Procedural and perceptual arguments

C. Transparency in Enforcing Competition in the United States

I. Institutional Transparency

The DOJ and the FTC are the antitrust enforcement agencies in the U.S. The DOJ is the only federal agency which may enforce the criminal and civil provisions of the first Section of the Sherman Act, prohibiting agreements that unreasonably restrain trade,⁴³ and its second Section, which deals with single firm monopolization or attempts to monopolize.⁴⁴ On the other hand, the FTC has the exclusive authority to enforce the FTC Act, particularly Section 5, prohibiting unfair methods of competition, which was interpreted to encompass all trade practices “which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.”⁴⁵ Both Agencies have concurrent authority to enforce the Clayton Act’s provision against mergers and acquisitions that

against transparency do not materially dilute its importance in antitrust enforcement procedures:

- (1) the burden of preparing for a public disclosure;
- (2) the risk that confidential business information would be disclosed or that the mere threat of disclosure would make it more difficult for the agency to obtain voluntary submissions of information;
- (3) the risk that disclosure of past agency decisions may unreasonably constrain the agency in making future enforcement decisions; and[,]
- (4) the risk that more disclosure will politicize enforcement decisions and increase burdens on staff.

Id.

42. See Sean Heather, James Rill, & Charles Webb, SUMMARY RESPONSES: The Treatment of Confidential Information in Competition/Antitrust Administrative Proceedings, A Practitioner’s Survey at 3, available at https://www.uschamber.com/sites/default/files/A%20Practitioner’s%20Survey%20on%20the%20Use%20of%20Confidential%20Information%20in%20Competition%20Proceedings%20-%20April%202014_I.pdf (last accessed Aug. 10, 2017). More than half of survey respondents confirmed that antitrust agencies have published policies and procedures in treating confidential information, and have followed these procedures; but there is no consensus on whether these agencies are able to strike the right balance between confidentiality and disclosure. *Id.* at 3, ¶ 4.

43. The Sherman Antitrust Act, § 1.

44. *Id.* § 2.

45. Federal Trade Commission v. Brown Shoe Co., Inc., 384 U.S. 316, 321 (1966).

may tend to substantially lessen competition, or create a monopoly.⁴⁶ Treble damages and injunctive relief may be claimed by private parties in court under the Sherman and Clayton Acts, but not through the FTC Act.⁴⁷

The Assistant Attorney General (AAG)⁴⁸ for the DOJ leads the department's antitrust enforcement function. The DOJ accepts complaints on anti-competitive practices, investigates on them, and internally decides on whether or not to charge antitrust violations against the person or entity complained of. On one hand, it is the AAG who has the power to authorize the filing of an antitrust suit in a federal court.⁴⁹ On the other hand, the FTC has five Commissioners who each serve for seven years.⁵⁰ The Agencies' leadership and their academic and professional experiences are posted in their official websites, something that is useful in lending credibility to their ability and proficiency to lead.⁵¹

The Agencies' bureaus of civil enforcement and economics — and criminal enforcement for the DOJ — play a vital role in building and prosecuting their cases in court. These bureaus have a good mix of competition expertise from its staff attorneys and economists. The Agencies' enforcement agenda and priorities are reflected in their policies,⁵²

46. The Clayton Antitrust Act, § 18.

47. Donald L. Flexner & Mark A. Racanelli, *I. Merger Control and State Aids Panel: State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 CONN. J. INT'L L. 501, 505 (1994).

48. See United States Department of Justice, History of the Antitrust Division, available at <https://www.justice.gov/atr/history-antitrust-division> (last accessed Aug. 10, 2017). Sherman Act enforcement was led by the Attorney General from the law's enactment in 1890 to 1903; then, by the Assistant to the Attorney General, 1903 to 1933; and ultimately by the Assistant Attorney General, 1933 to present. *Id.*

49. The Sherman Antitrust Act, § 4 & The Clayton Antitrust Act, § 4C.

50. See Federal Trade Commission, Commissioners, available at <https://www.ftc.gov/about-ftc/commissioners> (last accessed Aug. 10, 2017).

51. *Id.* See also United States Department of Justice, Meet the Acting Assistant Attorney General, available at <https://www.justice.gov/atr/staff-profile/meet-acting-assistant-attorney-general> (last accessed Aug. 10, 2017).

52. See, e.g., United States Department of Justice, Department of Justice and Federal Trade Commission: Antitrust Policy Statement on Sharing of Cybersecurity Information, available at <https://www.justice.gov/sites/default/files/atr/legacy/2014/04/10/305027.pdf> (last accessed Aug. 10, 2017) & United States Department of Justice, Statements of Antitrust Enforcement Policy in Health Care, available at <https://www.justice.gov/atr/statements-antitrust-enforcement-policy-health-care> (last accessed Aug. 10, 2017).

guidelines,⁵³ and social and other media accounts.⁵⁴

U.S. federal antitrust laws are enforced in three ways: (1) criminal and civil enforcement actions brought by DOJ; (2) civil enforcement actions brought by the FTC; and (3) lawsuits brought by private parties asserting damage claims.⁵⁵ Each mode of antitrust or competition enforcement may be divided into six stages: initiation, investigation, prosecution, decision on the merits, decision on sanctions,⁵⁶ and review.⁵⁷ Transparency in initiation

53. See, e.g., United States Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, *available at* https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf (last accessed Aug. 10, 2017); United States Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaboration Among Competitors, *available at* https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ficdojguidelines-2.pdf (last accessed Aug. 10, 2017); & United States Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines, *available at* <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> (last accessed Aug. 10, 2017).

54. The following are the United States Department of Justice and the Federal Trade Commission's social media accounts, respectively:

(1) Twitter: @JusticeATR, <https://twitter.com/JusticeATR> & @FTC, <https://twitter.com/FTC>;

(2) Facebook: <https://www.facebook.com/DOJ> & <https://www.facebook.com/federaltradecommission>;

(3) YouTube: <https://www.youtube.com/user/TheJusticeDepartment> & <https://www.youtube.com/user/FTCvideos>;

(4) Instagram: <https://www.instagram.com/thejusticedept/>; and,

(5) Newsfeeds, <https://www.justice.gov/atr/news-feeds> & <https://www.ftc.gov/stay-connected#RSS>.

55. United States Department of Justice, Antitrust Enforcement and the Consumer at 3, *available at* <https://www.justice.gov/atr/file/800691/download> (last accessed Aug. 10, 2017).

56. Stanley Wong, Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach at 4, *available at* <https://www.competitionpolicyinternational.com/assets/Uploads/ICNApril142.pdf> (last accessed Aug. 10, 2017). Dividing “for analytical purposes an enforcement process into [five] stages: initiation, investigation, prosecution, decision on the merits, and decision on sanctions (if any).” *Id.*

and investigation are considered *ex ante*; and in prosecution, decision on the merits, decision on sanction, and review, as *ex post*.

2. *Ex Ante* Transparency

Agencies use various means and platforms in exhibiting transparency in their general or non-specific antitrust enforcement procedures. Their respective websites provide comprehensive information on the antitrust statutes they enforce;⁵⁸ reports on their separate and joint enforcement activities;⁵⁹ and guidelines and policy statements in applying the antitrust laws⁶⁰ which cover investigative process, procedures, practices, and timetables. Some notable issuances are the Agencies' joint antitrust guidelines for collaborations among competitors;⁶¹ guidelines in the licensing of intellectual property;⁶² and their statements of antitrust enforcement policy in health care.⁶³

-
57. American Bar Association, Best Practices for Antitrust Procedure: Report of the ABA Section of Antitrust Law International Task Force, at 4, *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/_comments_bestprac_20150522.authcheckdam.pdf (last accessed Aug. 10, 2017). Stages of antitrust proceeding are investigation, asserting contentions of infringement, assessing contentions of infringement, first-instance decision, and review. *Id.*
58. See ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION MANUAL II-1-II-23 (5th ed. 2015) & United States Federal Trade Commission, Statutes Enforced or Administered by the Commission, *available at* <https://www.ftc.gov/enforcement/statutes> (last accessed Aug. 10, 2017).
59. United States Department of Justice, Reports, *available at* <https://www.justice.gov/atr/reports> (last accessed Aug. 10, 2017). These include takeaways from antitrust workshops, Agencies' joint reports on competition in the real estate brokerage industry, promoting innovation and competition through intellectual property rights, and improving health care. *Id.*
60. United States Department of Justice, Guidelines and Policy Statements, *available at* <https://www.justice.gov/atr/guidelines-and-policy-statements-0> (last accessed Aug. 10, 2017). These include Department of Justice's Antitrust Division Manual, memorandum of understanding with the Department of Agriculture, and policy statements on cybersecurity, patents, and health care; United States Federal Trade Commission, Anti-competitive practices, *available at* <https://www.ftc.gov/enforcement/anticompetitive-practices> (last accessed Aug. 10, 2017). This contains the United States Federal Trade Commission's guidelines about anti-competitive practices. *Id.*
61. United States Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors, *available at* https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture

The Agencies guide the industries through advisory opinions⁶⁴ and business review on the legality under the antitrust laws of proposed business conduct.⁶⁵ The Agencies' officials host and participate in numerous conferences and events where they share their personal views on enforcement procedures, and on how potent transparency is in enhancing these procedures.⁶⁶ Albeit publicly available, these enforcement guidelines do not have the force of law, are not binding to the courts, and may no longer be accurate in present practice for merely reflecting the Agencies' priorities and perspectives as of issuance.⁶⁷ Transparency forces the Agencies to update these guidelines, and even harmonize the Agencies' overlapping authorities, for the enhancement of procedural fairness and the ultimate benefit of antitrust stakeholders. One example is the Agencies'

'clearance' procedure by which they give each other notice of their intention to investigate a particular matter, and decide between themselves who will handle a particular case at issue. In this way, the federal government will investigate and challenge a potential violation only once,

-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguide
lines-2.pdf (last accessed Aug. 10, 2017).

62. United States Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, *available at* https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf (last accessed Aug. 10, 2017).
63. United States Department of Justice & Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care, *available at* https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf (last accessed Aug. 10, 2017).
64. United States Federal Trade Commission, Advisory Opinions, *available at* <https://www.ftc.gov/policy/advisory-opinions> (last accessed Aug. 10, 2017).
65. United States Department of Justice, What is a Business Review?, *available at* <https://www.justice.gov/atr/what-business-review> (last accessed Aug. 10, 2017) (citing 28 C.F.R. § 50.6 (2014)).
66. United States Department of Justice, Articles and Papers, *available at* <https://www.justice.gov/atr/articles-and-papers> (last accessed Aug. 10, 2017). This site has a list of DOJ enforcers' writings on their personal thoughts on enforcement procedures and priorities. *Id.* See also United States Department of Justice, Speeches, *available at* <https://www.ftc.gov/news-events/speeches> (last accessed Aug. 10, 2017). This site has transcripts of FTC officials' speeches. *Id.*
67. First, et al., *supra* note 38, at 48.

by one set of designated enforcers — a process that enhances the efficient use of limited federal resources and advances the goal of fairness.⁶⁸

The handling Agency will then conduct an investigation based on its publicly available enforcement procedures, and may lead to case-specific complaints or proceedings if warranted by its findings. In DOJ investigations, the Agency uses regular, informal, and oral discussions to share to the parties the DOJ's thinking — which includes the subject of investigation, its basis, factual basis for the allegations, relevant economic theory of harm, and the applicable legal doctrines — in order for the parties to present evidence and legal arguments directly targeted to the DOJ's concerns.⁶⁹

3. *Ex Post* Transparency

Each Agency's investigation of anti-competitive conduct will conclude in three ways:

- (1) the investigation may be dropped unconditionally, usually before any litigation is initiated. In premerger investigations, the investigation may be dropped even if the Agency finds the proposed merger to be unlawful when, in anticipation of agency enforcement, the parties abandon the proposed merger;
- (2) the investigation may result in a settlement, reached either before or after litigation is commenced, in which the target firm agrees to the imposition of a remedy; or
- (3) the investigation may result in litigation and a tribunal-imposed resolution of that litigation.⁷⁰

If an investigation is dropped unconditionally, the pertinent Agency sometimes issues a public statement to explain the rationale of its action. The DOJ, while not required, will issue a closing statement if the investigation was publicly confirmed and has received substantial publicity, taking into consideration public trust in its enforcement, and the value of the analysis for other enforcers, businesses, and consumers.⁷¹ The DOJ's closing statement does not include confidential or privileged information, internal

68. Flexner & Racanelli, *supra* note 47, at 505.

69. Varney, *supra* note 1, at 3.

70. Grimes, *supra* note 30, at 959.

71. Antitrust Division of the United States Department of Justice, Issuance of Public Statements Upon Closing of Investigations, *available at* <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/201888.pdf> (last accessed Aug. 10, 2017).

deliberations or confidential investigative techniques, and disparaging characterizations of individuals or organizations.⁷² Prior to releasing the closing statement, the parties to the investigation will be informed that one will be issued, with a disclaimer that the enforcement decision was made on a case by case basis and that its analysis and conclusions will not be binding on the DOJ in future matters.⁷³ The FTC has no equivalent policy with regard to closing statements, although in very seldom occasions, the FTC, its individual Commissioners, or dissenting Commissioners will issue statements with the intention of airing their differences publicly.⁷⁴

If the investigation results in a settlement, an Agency will issue a consent decree after soliciting public comments via publication of the proposed complaint, consent agreement, any related documents, and information about the merits of the proposed consent decree.⁷⁵ The DOJ consent decree in civil antitrust actions has to be filed with a Federal District Court together with a Competitive Impact Statement explaining the nature of the proceeding and justifying the appropriateness of the consent decree; thereafter, such shall be published in the Federal Register.⁷⁶ No court intervention is needed in effecting FTC's consent decree. It is sufficient for FTC to publish the proposed complaint, the consent agreement, and its Analysis to Aid Public Comment on the FTC website and in the Federal Register for 30 days to solicit public comments that may be considered by the FTC in deciding whether to withdraw from the proposed consent agreement, modify it, or make the order final.⁷⁷

If the investigation proceeds to judicial or administrative litigation — covering prosecution, decision on the merits, decision on sanctions, and review — transparency is expected because the court or deciding agency has to render a decision summarizing the relevant facts and explaining the bases of its decision. A correct decision will likely be used as precedent, and a wrong decision will likely be challenged in court or criticized in academic

72. *Id.*

73. *Id.*

74. First, *supra* note 38, at 53.

75. *Id.* at 50.

76. *Id.* at 50–51 (citing Antitrust Procedures and Penalties Act [Tunney Act], 15 U.S.C. § 16 (1974)).

77. *Id.* at 52 (citing Federal Trade Commission's Consent Order Procedure, 16 C.F.R. §§ 2.31–2.34 (2016)).

commentary.⁷⁸ In either case, transparency contributes to the evolution of the law and provides certainty and predictability to the litigating parties and the public.⁷⁹

D. Proposed Framework for Transparency Benchmarking

The Author's proposed transparency framework (Proposed Framework) is the product of synthesizing the preceding explanation on transparency as an element of procedural fairness, its significance to international competition, and how transparency has been applied by the Agencies in antitrust enforcement.

Figure 1. Proposed Transparency Framework in Competition Enforcement



78. Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 15-16 (1998). Quoting Chief Justice Harlan Fiske Stone, "the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it." Criticism can be leveled in dissents and in academic commentary." *Id.*

79. *Id.* at 39.

EX-POST TRANSPARENCY	3	Parties to the case	<ul style="list-style-type: none"> • opportunity to submit materials in support of views • disclosure of the legal basis and applicable legal standards • disclosure of the allegations against a party • opportunity to meet with the investigative staff • opportunity to respond to the agency's concerns • disclosure of the factual basis and nature of evidence • opportunity to consult with the agency on requests for information • disclosure of the economic theories of harm under consideration • access to the evidence obtained in the investigation • opportunity to meet with agency leadership • disclosure of staff recommendations to agency decision makers • disclosure of expected timing of the investigation
	Prosecution	Third parties (complainants, competitors, customers, or vendors)	<ul style="list-style-type: none"> • opportunity to submit materials in support of views • disclosure of the legal basis and applicable legal standards • disclosure of the allegations against a party • opportunity to meet with the investigative staff • opportunity to respond to the agency's concerns • disclosure of the factual basis and nature of evidence • opportunity to consult with the agency on requests for information • disclosure of the economic theories of harm under consideration • access to the evidence obtained in the investigation • opportunity to meet with agency leadership • disclosure of staff recommendations to agency decision makers • disclosure of expected timing of the investigation
		Public	<ul style="list-style-type: none"> • opportunity to submit information or materials in support of views • disclosure of the existence of an investigation • opportunity to provide views on proposed remedies • general public provided with access to the evidence • opportunity to meet with the investigative staff • disclosure of the expected timing of specific investigations • disclosure of the factual basis and nature of evidence
EX-POST TRANSPARENCY	4	Parties to the case	<ul style="list-style-type: none"> • timeliness of decision and review • impartial tribunal • opportunity to confront new evidence • opportunity to cross-examine new witnesses • disclosure of the reasons for the decision maker's determination
	5	Third parties	<ul style="list-style-type: none"> • opportunity to submit information or materials in support of views • disclosure of the existence of an investigation • opportunity to provide views on proposed remedies • general public provided with access to the evidence • opportunity to meet with the investigative staff • disclosure of the expected timing of specific investigations • disclosure of the factual basis and nature of evidence
	6	Public	<ul style="list-style-type: none"> • opportunity to submit information or materials in support of views • disclosure of the existence of an investigation • opportunity to provide views on proposed remedies • general public provided with access to the evidence • opportunity to meet with the investigative staff • disclosure of the expected timing of specific investigations • disclosure of the factual basis and nature of evidence
	Review		

The transparency measures mentioned in the Proposed Framework came from those enumerated by the ICN⁸⁰ and those inferred from the Agencies' antitrust enforcement experiences. These transparency measures were then classified as pertaining to institutional structure, or to the competition enforcement stages⁸¹ *ex ante* and *ex post*;⁸² and further classified based on intended stakeholders, i.e., the parties under investigation, third parties, and the public. The Proposed Framework will be used in this Article as a guide in benchmarking transparency measures to enhance competition enforcement in the Philippines.

III. ENHANCING PHILIPPINE COMPETITION ACT ENFORCEMENT

A. American Antitrust Experience as the Most Logical Benchmark

The Philippines' competition law "can be traced back to the Old Penal Code enforced by the Spanish regime" before the 1900s.⁸³ In 1925, during the American colonial regime, the Philippines enacted *An Act to Prohibit Monopolies and Combinations in Restraint of Trade*.⁸⁴ This law was patterned after the US' Sherman Act,⁸⁵ but was amended by the restraint of trade provisions in the Philippine Revised Penal Code of 1932.

The Philippines is the first Asian country to have a competition law,⁸⁶ but its competition policy remained underdeveloped until the enactment in 2015 of the PCA, its comprehensive competition law. The PCA has two very important purposes: (1) as compliance to the ASEAN Guidelines obliging its Member States to introduce their competition policies by 2015,⁸⁷ and (2) as an appropriate replacement to the country's scattered competition laws, comprised of "more than 30 industry-specific and consumer-related competition laws, including provisions in its criminal, civil[,] and

80. ICN, Agency Effective Project on Transparency Practices, *supra* note 36.

81. *See* Wong, *supra* note 56. *See also* American Bar Association, *supra* note 57.

82. First, *supra* note 38.

83. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD INVESTMENT POLICY REVIEWS: PHILIPPINES 2016 201 (2016) [hereinafter OECD Review].

84. An Act to Prohibit Monopolies and Combinations in Restraint of Trade, Act No. 3247 (1925).

85. OECD Review, *supra* note 83, at 201.

86. Geronimo Sy, *Philippines: Department of Justice*, THE ASIA-PAC. ANTITRUST REV. 161 (2015).

87. ASEAN Guidelines, *supra* note 34, at 1, § 1.1.3.

corporation codes.”⁸⁸ Unlike the broad statements of the Sherman Act and the Philippines’ 1925 competition law, the PCA enumerates the prohibited

88. Sy, *supra* note 86, at 161. See OECD Review, *supra* note 83, at 203. There were a number of competition-related laws and provisions prior to the Philippine Competition Act. See, e.g., PHIL. CONST.; An Act to Prohibit Monopolies and Combinations in Restraint of Trade (1925); An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815 (1932); The Public Service Law [Public Service Act], Commonwealth Act No. 146 (1952) (as amended); An Act Prescribing the Duties, Qualifications and Fixing the Number and Salaries, of the Members of the Legal Staff in the Office of the Secretary of Justice, Republic Act No. 2705 (1960) (as amended); Ordaining and Instituting an Insurance Code of the Philippines [INS. CODE], Presidential Decree No. 612 (1974); The Corporation Code of the Philippines [CORP. CODE], Batas Pambansa Blg. 68 (1980); Reconstituting the National Grains Authority to the National Food Authority, Broadening Its Functions and Powers and for Other Purposes [National Food Authority Act], Presidential Decree No. 1770 (1981); The Revised Securities Act [Revised Securities Act], Batas Pambansa Blg. 178 (1982); The Consumer Act of the Philippines [Consumer Act of the Philippines], Republic Act No. 7394 (1992); The New Central Bank Act, Republic Act No. 7653 (1993); An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunications Services [Public Telecommunications Policy Act of the Philippines], Republic Act No. 7925 (1995); An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes [INTELL. PROP. CODE], Republic Act No. 8293 (1997); An Act Deregulating the Downstream Oil Industry and for Other Purposes [Downstream Oil Industry Deregulation Act of 1998], REPUBLIC ACT NO. 8479 (1998); An Act Rationalizing and Strengthening the Provision on Anti-Dumping, Amending for the Purpose Section 301, Part 2, Title II, Book I of the Tariff and Customs Code of the Philippines, as Amended [Anti-Dumping Act of 1994], Republic Act No. 7845 (1994); An Act Liberalizing the Retail Trade Business, Repealing for the Purpose Republic Act No. 1180, as Amended, and for Other Purposes [Retail Trade Liberalization Act of 2000], Republic Act No. 8762 (2000); The Securities Regulation Code [The Securities Regulation Code], Republic Act No. 8799 (2000); An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes [Electric Power Industry Reform Act of 2001], Republic Act No. 9136 (2001); An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes [Government Procurement Reform Act], Republic Act No. 9184 (2003); An Act Promoting the Development of Philippine Domestic Shipping, Shipbuilding, Ship Repair and Ship Breaking, Ordaining Reforms in Government Policies Towards Shipping in the Philippines and for Other Purposes [Domestic Shipping Development Act of 2004], Republic Act No.

acts that constitute anti-competitive agreements⁸⁹ and abuse of dominant position,⁹⁰ and lays down the guidelines in determining anti-competitive

9295 (2004); 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 of 2008], Republic Act No. 9502 (2008); An Act Amending the Cooperative Code of the Philippines to be Known as the “Philippine Cooperative Code of 2008” [Philippine Cooperative Code of 2008], Republic Act No. 9520 (2008); An Act Regulating the Practice of Real Estate Service in the Philippines, Creating for the Purpose a Professional Regulatory Board of Real Estate Service, Appropriating Funds Therefor and for Other Purposes [Real Estate Service Act of the Philippines], Republic Act No. 9646 (2009); An Act Establishing Reforms in the Regulation of Rent of Certain Residential Units, Providing Mechanisms Therefor and for Other Purposes [Rent Control Act of 2009], Republic Act No. 9653 (2009); An Act Strengthening and Rationalizing the Regulatory Capacity of the Bureau of Food and Drugs (BFAD) by Establishing Adequate Testing Laboratories and Field Offices, Upgrading Its Equipment, Augmenting Its Human Resource Complement, Giving Authority to Retain Its Income, Renaming it the Food and Drug Administration (FDA), Amending Certain Sections of Republic Act No. 3720, as Amended, and Appropriating Funds Therefor [Food and Drug Administration Act of 2009], Republic Act No. 9711 (2009); & An Act Establishing the Pre-Need Code of the Philippines [PRE-NEED CODE], Republic Act No. 9829 (2009).

89. Philippine Competition Act, § 14.

SECTION 14. Anti-Competitive Agreements. —

- (a) The following agreements, between or among competitors, are *per se* prohibited:
- (1) Restricting competition as to price, or components thereof, or other terms of trade;
 - (2) Fixing price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation[,] and other analogous practices of bid manipulation;
- (b) The following agreements, between or among competitors which have the object or effect of substantially preventing, restricting[,] or lessening competition shall be prohibited:
- (1) Setting, limiting, or controlling production, markets, technical development, or investment;
 - (2) Dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers[,] or any other means;

(c) Agreements other than those specified in (a) and (b) of this [Section] which have the object or effect of substantially preventing, restricting[,] or lessening competition shall also be prohibited: *Provided*[,] Those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this Act.

An entity that controls, is controlled by, or is under common control with another entity or entities, have common economic interests, and are not otherwise able to decide or act independently of each other, shall not be considered competitors for purposes of this [Section].

Id.

90. *Id.* § 15.

SECTION 15. *Abuse of Dominant Position.* — It shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict[,] or lessen competition:

(a) 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;

(b) Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner[,] except those that develop in the market as a result of or arising from a superior product or process, business acumen, or legal rights or laws;

(c) Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;

(d) Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially: *Provided*[,] That the following shall be considered permissible price differentials:

- (1) Socialized pricing for the less fortunate sector of the economy;
- (2) Price differential which reasonably or approximately reflect differences in the cost of manufacture, sale, or delivery resulting

mergers.⁹¹ Notwithstanding these nuances, American antitrust enforcement remains the best benchmark for antitrust enforcement in the Philippines. No

from differing methods, technical conditions, or quantities in which the goods or services are sold or delivered to the buyers or sellers;

- (3) Price differential or terms of sale offered in response to the competitive price of payments, services[,] or changes in the facilities furnished by a competitor; and[,]
- (4) Price changes in response to changing market conditions, marketability of goods or services, or volume;
- (e) Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict[,] or lessen competition substantially: *Provided*[,] That nothing contained in this Act shall prohibit or render unlawful:
 - (1) Permissible franchising, licensing, exclusive merchandising[,] or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; or
 - (2) Agreements protecting intellectual property rights, confidential information, or trade secrets;
 - (f) Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or services to be supplied;
 - (g) Directly or indirectly imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisherfolk, micro-, small-, medium-scale enterprises, and other marginalized service providers and producers;
 - (h) Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers[,] or consumers, provided that prices that develop in the market as a result of or due to a superior product or process, business acumen[,] or legal rights or laws shall not be considered unfair prices; and[,]
 - (i) Limiting production, markets[,] or technical development to the prejudice of consumers, provided that limitations that develop in the market as a result of or due to a superior product or process, business acumen[,] or legal rights or laws shall not be a violation of this Act.

Id.

91. *Id.* Section 20, on prohibited mergers and acquisitions, and Section 21 on exemptions from prohibited mergers and acquisitions. *Id.* §§ 20-21.

less than the Philippine Supreme Court *en banc*, in deciding *Filipinas Cia. de Seguros, et al. v. Mandanas*,⁹² categorically cited the American landmark case *Board of Trade of Chicago v. United States*⁹³ and adopted the Sherman Act's true test of legality, which was laid down in the latter case. This case law remains good law for not having been overturned to date.⁹⁴ Therefore, the Sherman Act, its interpretations, and their concomitant enforcement mechanisms in the US remain applicable — or persuasive, at the very least — in shaping PCA's legal landscape.

B. Philippine Competition Enforcement Enhancements via the Proposed Framework

The PCA was signed into law on 21 July 2015, and took effect on 8 August 2015.⁹⁵ To implement the Philippines' national competition policy and enforce the PCA provisions, the Philippine Competition Commission (PCC) was decreed to be organized 60 days after the PCA's effectivity.⁹⁶ The PCC, a quasi-judicial body tasked to issue the PCA's implementing rules and regulations (IRR),⁹⁷ was only organized on 1 February 2016.⁹⁸ The delay in constituting the PCC consequently led to the delay in issuing the IRR, which was supposed to be issued within 180 days from PCA's effectivity,⁹⁹ but was only issued on 3 June 2016, almost 300 days after the PCA's effectivity. These delays had an effect on public perception as to the country's seriousness, capacity, and readiness in its competition enforcement efforts.

92. *Filipinas Cia. de Seguros, et al. v. Mandanas*, 17 SCRA 391, 396 (1966).

93. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918).

94. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 8 (1950). Judicial decisions applying or interpreting the laws form part of the legal system of the Philippines. *Id.*

95. Press Release by the Philippine Competition Commission, *PCC marks one year anniversary of Philippine Competition Act* at 1 (Aug. 10, 2016) (copy available at <http://phcc.gov.ph/pcc-marks-one-year-anniversary-philippine-competition-act> (last accessed Aug. 10, 2017)).

96. Philippine Competition Act, § 5.

97. Rules and Regulations Implementing the Philippine Competition Act, Republic Act No. 10667 (2016).

98. Philippine Competition Commission, PH's newly created antitrust authority taps Australian expertise in combating bad market practices, *available at* <http://phcc.gov.ph/phs-newly-created-antitrust-authority-taps-australian-expertise-combatting-bad-market-practices-balisacan-ph-competition-officials-meet-counterparts-sydney-canberra> (last accessed Aug. 10, 2017).

99. Philippine Competition Act, § 50.

The PCA provided a two-year curing period after its effectivity (from 8 August 2015 to 7 August 2017), to afford affected parties time to renegotiate agreements or restructure their businesses to comply with the PCA provisions.¹⁰⁰ Applicable administrative, civil, and, criminal penalties will be imposed for any business structure, conduct, practice, or any act that may continue to violate the PCA after the two-year curing period.¹⁰¹ Publishing the PCA's clear substantive guidelines on all prohibited acts and the PCC's manual of enforcement procedures would have been ideal in a perfect world. But given the time, resources, and other constraints, the PCC has to start with a workable enforcement framework to exercise with credibility and legitimacy its legal mandate to fully implement the PCA provisions. Transparency is an essential key in achieving this objective.

1. Institutional Transparency

Stage 0: Institutional Transparency

The PCC has the original and primary jurisdiction in enforcing antitrust laws in the Philippines.¹⁰² Its powers and functions are clearly expressed in the PCA.¹⁰³ The Philippine Department of Justice's Office for Competition (OFC) may only conduct preliminary investigation and prosecute criminal antitrust offenses upon the PCC's endorsement.¹⁰⁴ Similar to the FTC, the PCC has five Commissioners with seven-year terms.¹⁰⁵ The PCA requires PCC Commissioners to have distinguished credentials in economics, law, finance, commerce, or engineering.¹⁰⁶ The biographies and credentials of the present PCC Commissioners are posted in the PCC website.¹⁰⁷ Considering the infancy stage of centralized antitrust enforcement in the Philippines, the qualifications of present PCC commissioners are impeccable and on point. Their collective professional experiences and academic achievements in the fields of law, economics, and public service supply credibility and dynamism to the institution and its leadership. In order to

100. *Id.* § 53.

101. *Id.*

102. *Id.* § 12.

103. *Id.*

104. *Id.* § 13.

105. Philippine Competition Act, § 6.

106. *Id.*

107. Philippine Constitution Commission, List of Current Officials, *available at* <http://phcc.gov.ph/list-of-officials/> (last accessed Aug. 10, 2017).

enhance transparency on able leadership — and considering that antitrust remains relatively novel in the Philippine legal practice — the website may also list down each Commissioner’s civil service qualifications, law- and economics-related publications, and relevant seminars or conferences hosted, attended, and facilitated. These seminars and conferences, whether within the Philippines or not, need not categorically pertain to competition or antitrust, but will be sufficient if reflective of proficiency or expertise in public service, law enforcement, and/or industry relations.

Institutional transparency may also be improved by showcasing in relevant publications and press releases the PCC’s good mix and expertise of qualified antitrust investigators comprising of staff attorneys and economists. An organizational chart identifying the PCC’s Mergers and Acquisitions Office, Competition Enforcement Office, and Economics Office underscores the agency’s efforts and ability to provide analytical heft to its enforcement and decision.

Making transparent to the public the PCC’s enforcement agenda and priorities will also be ideal.¹⁰⁸ At present, merger policy statements¹⁰⁹ and review guidelines¹¹⁰ have already been released for the public’s guidance. The nearing deadline of the two-year curing period behooves the PCC to also release guidelines and policies on the other prohibited acts it will seek to curtail, specifically that for anti-competitive agreements and abuse of dominant position. These may be in the form of formal issuances, or some brief messages through speeches or press releases. The PCC may also take advantage in creating and linking social media accounts — such as the agencies’ Twitter, Facebook, Instagram, and YouTube accounts — to its official website to keep the concerned public abreast of the latest

108. See Philippine Competition Commission, Video Post, *PCC National Competition Day 2016*, Dec. 5, 2016, FACEBOOK, available at <https://www.facebook.com/competitionph/videos/1290217011042815/> (last accessed Aug. 10, 2017). This video showcases the Philippine public’s perception of free market competition and the need for protection against anti-competitive behaviors. *Id.*

109. Philippine Constitution Commission, PCC Policy Statement No. 17-001: On the ₱1 Billion Threshold for Compulsory Notification of Mergers and Acquisitions, available at <http://phcc.gov.ph/pcc-policy-statement-17-001-₱1-billion-threshold-compulsory-notification-mergers-acquisitions> (last accessed Aug. 10, 2017).

110. Philippine Constitution Commission, PCC Merger Review Guidelines, available at <http://phcc.gov.ph/merger-review-guidelines> (last accessed Aug. 10, 2017).

developments with the competition landscape in and affecting the Philippines.

2. *Ex Ante* Transparency

Stage 1: Initiation

A fact-finding or preliminary inquiry on anti-competitive conducts, agreements, or combinations may be initiated by the PCC by acting on its own initiative, upon the filing of a verified complaint by an interested party, or upon referral by a regulatory agency.¹¹¹ The PCC has begun educating the public as to what competitive actions it seeks to regulate. It even uploaded some self-study modules¹¹² in its website. In order to amplify the consumer's vigilance on antitrust, the PCC may specify which office in its agency to file a verified complaint with, underscore its commitment to confidentiality on received information,¹¹³ and remind the public as to when and how its "leniency program" will extend "immunity from any suit or charge of affected parties and third parties, exemption, waiver, or gradation of fines and/or penalties."¹¹⁴ The PCC will be able to reach more consumers in all strata of society if, similar to the DOJ's website, these guides will have translations in Filipino and in the other major Philippine languages.

The PCC's officials have continuously been discussing the topic of antitrust in varying lengths and depths in almost all fora they have had the chance to participate in.¹¹⁵ The PCC website has some photos of said events;¹¹⁶ adding descriptions of their agenda and key takeaways in the photo will add substance to these documentations.

111. Philippine Competition Act, § 31.

112. Philippine Competition Commission, Collaterals, *available at* <http://phcc.gov.ph/category/resources/publications/collaterals> (last accessed Aug. 10, 2017). Several self-study modules are available: Self-study Module No. 1: An Introduction to Competition Law; Self-study Module No. 2: On Anti-competitive Agreements; Self-study Module No. 3: On Mergers & Acquisitions; & Self-study Module No. 4: On Abuse of Dominant Position. *Id.*

113. Philippine Competition Act, § 34.

114. *Id.* § 35.

115. Philippine Competition Commission, Speeches, *available at* <http://phcc.gov.ph/category/phcc-news/speeches> (last accessed Aug. 10, 2017).

116. Philippine Competition Commission, Photo Gallery, *available at* <http://phcc.gov.ph/category/photo-gallery-2> (last accessed Aug. 10, 2017).

The PCC's public databases of its decisions¹¹⁷ and clarificatory notes¹¹⁸ are useful transparency tools for predictability. Interested entities would be able to ascertain, through actual cases and matters, what conduct the PCC identifies as anti-competitive, and how these would be punished by the PCC and/or addressed by the relevant party or parties. The PCC may also include databases, akin to the Agencies', for business reviews and request letters on possible hypothetical scenarios before doing any conduct, which may have anti-competitive effects; economic analysis and group papers whether or not related to a decided case; appellate and amicus briefs; and closing letters where reasons behind its decision to terminate the initiation or investigation proceedings may be read and used as guide by the market players.

Stage 2: Investigation

The IRR lays down the fundamental parameters for the PCC in conducting its investigation, such as compulsory notification threshold for mergers and acquisitions,¹¹⁹ and its determination of the relevant market;¹²⁰ control;¹²¹ anti-competitive agreement or conduct;¹²² and dominance.¹²³ An effective system of checks and balances in the investigation stage is warranted to ensure that the PCC's practices and procedures remain credible and transparent.

It will be helpful in this enforcement stage to have a PCC manual of procedures and practices, and to adopt some contents from the Agencies' manuals, including how to plan the investigation; determine whether to proceed with civil or criminal investigation; issue civil investigative demands, e.g., subpoena and other coercive writs, business review

117. Philippine Competition Commission, Commission Decisions, *available at* <http://phcc.gov.ph/category/resources/phcc-decisions> (last accessed Aug. 10, 2017).

118. Philippine Competition Commission, Clarificatory Notes, *available at* <http://phcc.gov.ph/category/resources/clarificatory-notes> (last accessed Aug. 10, 2017).

119. Rules and Regulations Implementing the Philippine Competition Act, rule 4, § 3.

120. *Id.* rule 5.

121. *Id.* rule 6.

122. *Id.* rule 7.

123. *Id.* rule 8.

procedures, engaging consultants and expert witnesses, judgment monitoring, and judgment enforcement.

It is also ideal to attach to its manual some sample forms or templates, e.g., access letters, questionnaires, resolutions, orders, notices of default, and closing letters, which may be used in this stage by PCC investigators and the concerned respondents. However, unlike that of the Agencies', all of the PCC's closing letters issued will be extremely educational to interested parties if these shall contain the legal and economic reasoning why the investigation yielded such results, and how PCC weighed exculpatory and inculpatory evidence to come up with such determination.

The PCC is legally mandated to complete its preliminary inquiry within 90 days from date of initiation,¹²⁴ and to decide whether or not to proceed to file a civil case in court, or endorse the matter to OFC for criminal preliminary investigation.

3. *Ex Post* Transparency

Possessing quasi-judicial or administrative adjudicatory function, the PCC is guided by Philippine jurisprudence in exercising its authority to adjudicate the rights of parties based on the PCA's legislative policy. In carrying out this function, the PCC officials are

required to investigate facts or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them as bases for their official action and exercise of discretion in a judicial nature. Since rights of specific persons are affected, it is elementary that in the proper exercise of quasi-judicial power due process must be observed in the conduct of the proceedings.¹²⁵

Stage 3: Prosecution

Not yet having its manual of practice and procedures, the PCC's procedures in its prosecution stage are guided solely by the general precepts of administrative due process, which affords to the parties opportunities to know the complaint against them and explain their side, without requiring a trial-type proceeding.

Due process, as a constitutional precept, does not always and in all situations require a trial-type proceeding. Due process is satisfied when a

124. Philippine Competition Act, § 31.

125. *Dole Philippines, Inc. v. Esteva*, 509 SCRA 332, 370 (2006) (citing *Commissioner of Internal Revenue v. Court of Appeals*, 329 Phil. 987, 1018-19 (1996)).

person is notified of the charge against him and given an opportunity to explain or defend himself. In administrative proceedings, the filing of charges and giving reasonable opportunity for the person so charged to answer the accusations against him constitute the minimum requirements of due process. The essence of due process is simply to be heard, or as applied to administrative proceedings, an opportunity to explain one's side, or an opportunity to seek a reconsideration of the action or ruling complained of.¹²⁶

In the Philippine landmark case of *Ang Tibay v. Court of Industrial Relations*,¹²⁷ the Supreme Court explained that

the right to a hearing[] ... includes the right of the party interested or affected to present his [or her] own case and submit evidence in support thereof. Not only must the party be given an opportunity to present his [or her] case and to adduce evidence tending to establish the rights which he [or she] asserts[,] but the tribunal *must consider* the evidence presented.¹²⁸

Transparency to the parties in the prosecution stage is crucial to reflect legitimacy of the PCC as an enforcement agency and on its actions and decisions. In consonance with transparency best practices, the PCC may consider including in its manual how it will afford the parties their opportunity to know the causes of action against them, such as access to evidence of competitive harm, legal basis and standards leading to this case, factual and analytical basis in law and economics, timing of investigation, and opportunity to meet and discuss with the PCC leadership and staff in connection with the case. The IRR allows the parties to a proposed merger or acquisition to meet with PCC staff prior to notifying the PCC of their intended merger.¹²⁹ The PCC manual may provide a counterpart provision to cases involving the other prohibited acts, but making sure that transparency measures are in place to avoid public perception of collusion or corruption. These discussions with PCC officials are transparency measures which may increase efficiencies by allowing the PCC and the parties to focus resources on key issues, and will be helpful in exploring possible *nolo*

126. *Ledesma v. Court of Appeals*, 541 SCRA 444, 451-52 (2007).

127. *Ang Tibay v. Court of Industrial Relations etc.*, 69 Phil. 635 (1940).

128. *Id.* at 636.

129. Rules and Regulations Implementing the Philippine Competition Act, rule 4, § 4 (a).

contendere pleas¹³⁰ and non-adversarial remedies, such as binding rulings, show-cause orders, and consent orders.¹³¹

The necessary PCC manual, however, should strike a balancing of interests between providing the needed transparency, on one hand, and with the parties' right to confidentiality, on the other. The PCA appropriately mandates that "confidential business information submitted by entities, relevant to any inquiry or investigation being conducted pursuant to [the PCA] as well as any deliberation in relation thereto, shall not, in any manner, be directly or indirectly disclosed, published, transferred, copied, or disseminated."¹³² Under the same rationale behind the Agencies' confidentiality provisions, leaks on these information must be avoided to promote orderly prosecutorial procedures, and more importantly, to protect individuals or business entities which are being investigated from premature public publicity and condemnation. It is critical to implement internal control measures, including non-disclosure undertaking of the PCC employees and agents, physical security of submitted and gathered information, and online and virtual security of these information.

Stages 4 to 6: Decision on Merits, Decision on Sanctions, and Review

Due to the present lack of the PCC procedures in deciding a competition case, the *Ang Tibay*¹³³ doctrine prescribing the cardinal primary rights and principles in Philippine administrative proceedings governs.

The PCC's duty to deliberate on the facts and evidence of the case implies a necessity to decide and explain the basis of its decision. Its decision must result from its "own independent consideration of the law and facts of the controversy, and not simply [from accepting] the views of a subordinate in arriving at a decision."¹³⁴ Evidence supporting the PCC's findings or conclusions must be substantial and "more than a mere scintilla," that type of relevant evidence a reasonable mind might accept as adequate to support a conclusion.¹³⁵

The PCC's decision "must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties

130. Philippine Competition Act, § 36.

131. *Id.* § 37.

132. *Id.* § 34.

133. *Ang Tibay*, 69 Phil. at 642-44.

134. *Id.* at 644.

135. *Id.* at 642.

affected;” and fashioned where “the parties to the proceeding can know the various issues involved, and the reasons for the decisions rendered.”¹³⁶ This is in consonance with the Philippine constitutional requirement that a decision of a court must distinctly state the facts and the law upon which it is based.¹³⁷ This extends in explaining in each of its decision the basis for the sanctions and the factors for imposing the amount of penalties.

Similar to its American counterpart, a PCC decision is expected to concentrate exclusively on preventing or remedying anti-competitive practices, consumer welfare, economic development, innovation, and efficient allocation of resources.¹³⁸ It should veer away from the temptation of also considering equity concerns and non-competition factors, such as employment or the environment, which should be left to other administrative agencies to implement the relevant laws and regulations.¹³⁹

Transparency measures based on the jurisprudential guidelines have to be in place, under pain of causing unnecessary harm to the parties. For the business entities and individuals affected by an enforcement agency decision, the right to appeal the PCC decision is “not a practical substitute for fairness at the agency stage given the additional time, cost, and commercial and reputational damages incurred while an appeal is pursued.”¹⁴⁰

Decisions of PCC are appealable to the Philippine Court of Appeals in accordance with the Philippine Rules of Court.¹⁴¹ Judicial processes and guidelines will be observed from this stage onwards. Except for jury trials when applicable, this review stage of antitrust enforcement is almost similar for the Philippines with that of the Agencies’ where the U.S.’ Federal Rules of Evidence, Federal Rules of Civil Procedures, and Federal Rules of Criminal Procedures will come into play. The suggested transparency

136. *Id.* at 636.

137. *Magcamit v. Internal Affairs Service-Philippine Drug Enforcement Agency*, 781 SCRA 573, 584 (2016).

138. *See* Koren W. Wong-Ervin, *Procedural Fairness and the Importance of Focusing Solely on Competition Factors in Competition Analysis at 2*, available at https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-erwin_-_procedural_fairness_-_aug_2014.pdf (last accessed Aug. 10, 2017).

139. *Id.* at 2-3.

140. Paul Lugard, *Procedural Fairness and Transparency in Antitrust Cases: Work in Progress*, available at <https://www.competitionpolicyinternational.com/assets/Uploads/LugardJUN-141.pdf> (last accessed Aug. 10, 2017).

141. Philippine Competition Act, § 39.

enhancement at this stage is to make sure that these procedures are strictly applied, and not remain as pure rhetoric.

IV. CONCLUSION

After languishing in the Philippine Congress for more than two decades, the Philippines' comprehensive antitrust law has finally been enacted and was fully implemented last 7 August 2017. The Philippines is arguably behind in terms of antitrust enforcement in comparison with its peers in the region. Nevertheless, the PCC may accelerate the designing of a *sui generis* antitrust enforcement framework for the Philippines, through the doctrine laid down in *Filipinas Cia. de Seguros*. The PCC may take full advantage of its implied authority to adopt the best practices in the American competition enforcement, a product of more than one century of antitrust learnings on the evolution of the Sherman Act and related laws. Further, the PCC is at liberty to even improve or tailor-fit to the Philippine setting those practices it regards as needing recalibration.

The PCC may also consider heightening transparency measures by adopting the Article's suggested enhancements in all stages of antitrust enforcement. These enhancements will ensure credibility to the PCC as an institution, predictability to its forthcoming rulings, and legitimacy to its enforcement actions.

Inasmuch as transparency is discussed in length in this Article, it is encouraged to conduct further scholarly researches on the other two elements of procedural fairness: commitments to institutional checks and balances, and engagement on the merits.¹⁴² Philippine antitrust enforcement will also benefit in installing effective checks and balances between the PCC investigators and decision makers, and in learning how parties and respondents will be able to frame intelligent and adequate responses on the anti-competitive allegations against them to the satisfaction of the PCC. It is also encouraged to analyze how the Philippine courts — taking into consideration the country's ASEAN commitments and those emanating from treaties with other nations — will examine the anti-competitive conducts, appreciate the economic analyses, and ultimately reason out on antitrust cases elevated to them for decision.

142. See McSweeney, *supra* note 31, at 3.