

# 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?

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## I. INTRODUCTION

Established in 1967, the Association of Southeast Asian Nations (ASEAN) is a regional group in Asia comprising ten countries, namely: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam (ASEAN Member States).<sup>1</sup> The ASEAN is now aiming for economic integration.<sup>2</sup> This economic integration is in the context of “open regionalism.”<sup>3</sup> This means that ASEAN integration schemes are not about forming a “closed or discriminatory trading bloc,” but rather, a way for ASEAN countries to cooperate to increase their international competitiveness and integration with the world.<sup>4</sup>

As part of the desire for economic integration, ASEAN Member States have committed to introduce competition policy (which term is being used by the ASEAN to refer to both laws and regulations, on the one hand, and public policies and general government directions aimed at introducing, increasing and/or maintaining competition, on the other) by 2015.<sup>5</sup> To

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1. Association of Southeast Asian Nations, Member Countries, *available at* <http://www.asean.org/74.htm> (last accessed Aug. 31, 2011).
  2. Association of Southeast Asian Nations, ASEAN Economic Blueprint 4, *available at* <http://www.aseansec.org/21083.pdf> (last accessed Aug. 31, 2011) [hereinafter ASEAN Economic Blueprint].
  3. Dr. Lawan Thanadsillapaku, Open Regionalism and Deeper Integration: The Implementation of ASEAN Investment Area (AIA) and ASEAN Free Trade Area (AFTA), *available at* <http://www.thailawforum.com/articles/lawanasean.html> (last accessed Aug. 31, 2011).
  4. *Id.*
  5. Association of South East Asian Nations [ASEAN], ASEAN Regional Guidelines on Competition Policy *Foreword* (Aug. 2007).

facilitate such goal, the ASEAN has adopted the Regional Guidelines on Competition Policy (Guidelines).<sup>6</sup>

While some of the ASEAN Member States have competition law in place, the Philippines does not have a single comprehensive statute dealing with “competition” as it is known in the European Union (or antitrust in the U.S.). Through the years, the Philippines has promulgated fragmented legal provisions which were made part of general statutes, and executive orders prohibiting certain anticompetitive acts.<sup>7</sup> However, the legal provisions do not cover the entire gamut of anticompetitive acts; on the other hand, the executive orders are sector-specific (the Author will refer collectively to these fragmented legal provisions and executive orders as the “Existing Philippine Legal Framework”).<sup>8</sup> At present, many anticompetitive acts in other sectors not covered by the Existing Philippine Legal Framework persist in Philippine markets. In particular, there is no comprehensive antitrust law on anticompetitive mergers although there exist administrative regulations that are sector-specific.<sup>9</sup>

To comply with the Guidelines and to further address the problems affecting competition in Philippine markets, the President of the Philippines has prioritized the enactment and consolidation of two pending comprehensive antitrust/competition bills, a Senate Bill,<sup>10</sup> and a House Bill<sup>11</sup> (Bills).<sup>12</sup> With the President’s prioritization of the Bills, it is likely that a consolidated version of the Bills will be passed this or early next year. The objective of this Article is to propose the appropriate legal framework for regulating anticompetitive mergers in the Philippines in light of emerging norms under International Competition Law. Whether there exists such

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6. Association of South East Asian Nations [ASEAN], ASEAN Regional Guidelines on Competition Policy (Aug. 2007). [hereinafter ASEAN Guidelines].
  7. Anthony Abad, Recommendations for Philippine Antitrust Policy and Regulation (A Paper presented during the Asia-Europe Meeting Trust Fund Conference) 1, available at <http://pascn.pids.gov.ph/DiscList/d00/s00-09.pdf> (last accessed Aug. 31, 2011) [hereinafter Recommendations for Philippine Antitrust Policy].
  8. *Id.*
  9. *Id.*
  10. S.B. No. 3197, 14th Cong., 2d Regular Sess. (Apr. 28, 2009). See also S.B. 1, 15th Cong., 1st Regular Sess. (July 1, 2010).
  11. H.B. No. 4835, 15th Cong., 1st Regular Sess. (June 8, 2011).
  12. President Benigno Aquino III, President of the Republic of the Philippines, State of the Nation Address, Address at the Joint Session of the 15th Congress of the Philippines (July 26, 2010). A transcript is available at <http://news.info.inquirer.net/breakingnews/nation/view/20100726-283277/Aquinos-first-State-of-the-Nation-Address> (last accessed Aug. 31, 2011).

branch of International Law is currently the subject of debate, but that issue is left for another day to be resolved. However, for purposes of this Paper, International Competition Law is taken to mean existing international rules and prevailing best country practices in relation to competition or antitrust law enforcement.<sup>13</sup>

Of course, the Author believes that a competition law framework should be indigenous to a particular country. Transporting a framework lock, stock and barrel may not work given the political, economic, cultural, and social circumstances of each country.<sup>14</sup> Accordingly, the Author's proposal will be in line with the existing economic development of and market structures in the Philippines.

This Article is divided into five parts. Chapter I is the Introduction. Chapter II provides a brief overview of the existing market structures and the Existing Philippine Legal Framework, including the current regulatory regime on mergers. Chapter III highlights the need for a merger regulatory regime in the Philippines that promotes public interest, particularly in promoting the performance of small and medium enterprises (SMEs). Finally, Chapter IV contains the Author's conclusion and recommendations.

## II. PHILIPPINE ECONOMY AND MARKET STRUCTURES

### *A. Economic Growth and Sectors*

A newly industrialized emerging market economy,<sup>15</sup> the Philippines is the 14th largest economy in Asia and 34th in the world.<sup>16</sup> The economy posted a real Gross Domestic Product (GDP) growth rate of 5.3% in 2006 and 7.1%

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13. This Article will not analyze all the provisions of the Bills and the institutional design of the proposed agency, given the enormity of the analytical task. However, these issues have been discussed in the full paper of the Author, available upon request.

14. See Dani Rodrik, *Institutions for High-Quality Growth: What They Are and How to Acquire Them* (A Draft Paper prepared for the International Monetary Fund Conference on Second-Generation Reforms) 3, available at <http://www.hks.harvard.edu/fs/drodrik/Research%20papers/institutions.PDF> (last accessed Aug. 31, 2011).

15. British Council, *The Philippines Market Introduction*, available at <http://www.britishcouncil.org/eumd-information-background-philippines.htm> (last accessed Aug. 31, 2011).

16. Central Intelligence Agency, *CIA World Factbook Country Comparison: GDP*, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last accessed Aug. 31, 2011) [hereinafter *CIA World Factbook Country Comparison*].

in 2007.<sup>17</sup> Growth slowed down to 3.7% in 2008 because of the financial crisis,<sup>18</sup> and 1.1% in 2009.<sup>19</sup> It grew 7.3% in 2010,<sup>20</sup> the highest in 34 years.<sup>21</sup> Despite this, poverty worsened because of a high population growth rate and inequitable distribution of income.<sup>22</sup>

The service sector contributes to more than half of the overall Philippine economic output, followed by industry (about a third), and agriculture (less than 20%).<sup>23</sup> The service sector comprises 52% of total employment in the Philippines, with agriculture at 33%, and 15% in industry.<sup>24</sup>

### *B. Ownership Concentration*

Although a market economy is encouraged, the Philippines has historically been the exclusive arena of the privileged.<sup>25</sup> The culture of wealth accumulation by the elite few traces its roots to the Spanish period and the American colonial rule.<sup>26</sup> While market competition rules are in place, there remains a very high concentration of ownership in the country; over the past 25 years, only 160 families have controlled political and socioeconomic power.<sup>27</sup>

Those commissioned by the Asian Development Bank (ADB) in 2001<sup>28</sup> put together a list of prominent business groups, identified the companies

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17. Central Intelligence Agency, CIA World Factbook East and Southeast Asia: Philippines, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html> (last accessed Aug. 31, 2011).
  18. *Id.*
  19. *Id.*
  20. *Id.*
  21. International Monetary Fund, Confidence High as Philippines Emerges from Downturn, *available at* <http://www.imf.org/external/pubs/ft/survey/so/2011/car030111a.htm> (last accessed Aug. 31, 2011).
  22. CIA World Factbook Country Comparison, *supra* note 16.
  23. *Id.*
  24. *Id.*
  25. Recommendations for Philippine Antitrust Policy, *supra* note 7, at 14.
  26. Anthony Abad, Updates on the Proposed Philippine Antitrust/Competition Legislation (A presentation during the 2009 Annual Asian Competition Law Conference), *available at* [http://www.asiancompetitionforum.org/download/091207\\_ACF\\_ppt/SB3-2\\_Antitrust-Competition%20Legislation%20updates%20revised.pdf](http://www.asiancompetitionforum.org/download/091207_ACF_ppt/SB3-2_Antitrust-Competition%20Legislation%20updates%20revised.pdf) (last accessed Aug. 31, 2011).
  27. Bertelsmann Stiftung, BTI 2010: Philippines Country Report 13, *available at* [http://www.bertelsmann-transformationindex.de/fileadmin/pdf/Gutachten\\_BTI2010/ASO/Philippines.pdf](http://www.bertelsmann-transformationindex.de/fileadmin/pdf/Gutachten_BTI2010/ASO/Philippines.pdf) (last accessed Aug. 31, 2011).
  28. Cesar G. Saldana, The Philippines (Corporate Governance in East Asia), *available at* [http://www.adb.org/Documents/Books/Corporate\\_Governance/](http://www.adb.org/Documents/Books/Corporate_Governance/)

belonging to each of these groups, and tracked the financial performance of each company from 1992 to 1997.<sup>29</sup> This study contains the latest most comprehensive information regarding ownership of businesses in the Philippines. The importance of family-based business is evident in the 50 largest corporate entities in terms of sales.<sup>30</sup> These entities accounted for 53.6% of the total sales of the top 1,000 corporations in 1997.<sup>31</sup> It was found that from the 25 of the 50 top corporate entities were family-based groups, noting that “[fa]mily-based groups are most dominant in sectors such as manufacturing, real estate, construction, and banking, while foreign-owned companies mainly serve the export markets.”<sup>32</sup>

*C. Lack of Valuable Participation by Small and Medium-Sized Enterprises (SMEs)*

*1. Weak SME Productivity*

In terms of number of establishments, SMEs appear to dominate the economy comprising almost 99.6% of the total number of establishments in 2003 while large enterprises comprised only 0.4%.<sup>33</sup> However, this number may be deceiving. According to leading antitrust practitioner William Kolasky, economics does not see competition in terms of rivalry *per se* but in terms of performance.<sup>34</sup> In terms of performance, SMEs suffer from low

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Vol2/chapter3.pdf (last accessed Aug. 31, 2011).

29. *Id.* Saldana says:

The total sales of these groups in 1997 were estimated at ₱806 billion. Family-based groups have larger companies since their total sales were about 33.4% of the top 1,000 corporations' sales, but they comprised only 23.8% of total companies in number. All major industries were represented, suggesting that business groups are common in all major markets. Some 20 financial institutions were affiliated with these groups, including 16 commercial banks. This is significant considering that there were only 31 local commercial banks in the country in 1997.

*Id.* at 178.

30. *Id.* at 156.

31. *Id.* at 179.

32. *Id.*

33. Rafaelita M. Aldaba, *Assessing Competition in Philippine Markets* (A Discussion Paper in the Philippine Institute for Development Studies Paper Series in 2008) 16, available at <http://www3.pids.gov.ph/ris/dps/pids/dps0823.pdf> (last accessed Aug. 31, 2011).

34. William J. Kolasky, Deputy Assistant Attorney General of the Antitrust Division of the United States Department of Justice, *What Is Competition?*, Address at the Seminar on Convergence Sponsored by The Netherlands Ministry of Economic Affairs at the Hague, Netherlands (October 28, 2002). A transcript of

productivity, which has remained only about half the labor productivity of large enterprises.<sup>35</sup> For instance, in manufacturing, the most important industrial subsector,<sup>36</sup> the share of SMEs increased from 23% of the total manufacturing value added in 1994 to 28% in 1998. However, this fell to 21% in 2003. Large firms contributed 79% of the total, an increase from its level of 72% contribution in 1998.<sup>37</sup>

## 2. Lack of linkages between SMEs and Large Enterprises

The tying link between SMEs and large corporations, both domestic and multinational, have been “weak” due to the number of subcontractors and those who “subcontracted work as percentage of the total value of output.”<sup>38</sup> Again, for instance in manufacturing, “[t]he number of SME subcontractors declined from 1,551 in 1994 to only 278 firms in 2003, while their subcontracted work dropped from 3.7% in 1994 to 0.7% in 2003.<sup>39</sup> This tends to imply that the creation of backward linkages within the manufacturing industry has remained weak.”<sup>40</sup>

## 3. Lack of access to credit

Due to the lack of access to credit, many SMEs are unable to realize their potential growth.<sup>41</sup> Moreover, “over 70% of the small, and 47% of the medium firms reported that they had to produce collateral to borrow from banks.”<sup>42</sup> More important, smaller firms face higher costs of financing because interest rates offered to them were from 10% to 12% while interest rates to large firms about 7%.<sup>43</sup>

The weak participation of SMEs would indicate that large firms actually dominate Philippine markets. Generally, large firms do not behave competitively with their rivals, except in some industries such as banking, department stores, and manufacturing of agricultural machinery.<sup>44</sup> In almost

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the said Speech is *available* at <http://www.justice.gov/atr/public/speeches/200440.pdf> (last accessed Aug. 31, 2011).

35. Aldaba, *supra* note 33, at 21.

36. *Id.* at 15.

37. *Id.*

38. *Id.* at 63.

39. *Id.*

40. *Id.*

41. ASIAN DEVELOPMENT BANK, PHILIPPINES: CRITICAL DEVELOPMENT CONSTRAINTS 22 (2007).

42. *Id.*

43. *Id.*

44. Aldaba, *supra* note 33, at 54 Table 13.

all sectors, these large firms are monopolies or oligopolies, and in many sectors, the oligopolies engage in cartelization and abuse of dominance.<sup>45</sup> These circumstances result in high prices of goods and services to consumers.<sup>46</sup>

#### *D. Entry Barriers*

With respect to *domestic* competition, the paid-in capital required to set up an enterprise is considered generally low.<sup>47</sup> This low amount makes it easy to set up a domestic corporation, and this could explain why SMEs flourish. However, existing players have heavily invested in their respective sectors that large capital requirements and economies of scale have made it difficult to compete.<sup>48</sup>

With respect to *foreign* competition, it has been said that the Philippine economy is substantially open.<sup>49</sup> Except for certain sectors,<sup>50</sup> most sectors are

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45. *Id.*

46. *Id.*

47. See The Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa Bilang 68, § 13 (emphasis supplied). This Section provides:

At least twenty-five percent (25%) of the authorized capital stock as stated in the articles of incorporation must be subscribed at the time of incorporation, and at least twenty-five (25%) per cent of the total subscription must be paid upon subscription, the balance to be payable on a date or dates fixed in the contract of subscription without need of call, or in the absence of a fixed date or dates, upon call for payment by the board of directors: Provided, however, That in no case shall the paid-up capital be less than five Thousand (5,000.00) pesos.

*Id.*

48. Aldaba, *supra* note 33.

49. *Id.* Abstract (emphasis supplied).

50. No Foreign Equity is allowed in the following sectors:

- (1) Mass Media except recording;
- (2) Practice of all professions;
- (3) Retail trade enterprises with paid-up capital of less than US\$2,500,000;  
— Full foreign participation is allowed for retail trade enterprises: (a) with paid-up capital of US\$2,500,000 or more provided that investments for establishing a store is not less than US\$830,000; or (b) specializing in high end or luxury products, provided that the paid-up capital per store is not less than US\$250,000.
- (4) Cooperatives;
- (5) Private Security Agencies;



open to foreign ownership albeit in varying levels. Under the negative list, capital requirements have likewise been set for such sectors as retail.

In both domestic and foreign competition, licensing proves to be a big entry barrier in certain sectors.<sup>51</sup> To obtain a license, an investor will have to deal with corruption and bureaucracy.<sup>52</sup> Corruption and bureaucracy are considerable structural constraints impeding economic progress.<sup>53</sup> According to the World Economic Forum (WEF), the Philippines ranked 71st out of 134 countries in global competitiveness.<sup>54</sup> The report cited corruption as the top problem, followed by an inefficient government bureaucracy.<sup>55</sup>

#### *E. Foreign Participation*

In 2009, foreign direct investment in the Philippines was estimated at \$1.94 billion.<sup>56</sup> In the ASEAN region, the Philippines has been ranked only sixth out of the 10 countries in terms of foreign direct investment since 2007.<sup>57</sup>

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- (6) Small-scale Mining;
  - (7) Utilization of Marine Resources in archipelagic waters, territorial sea, and exclusive economic zone as well as small scale utilization of natural resources in rivers, lakes, bays, and lagoons;
  - (8) Ownership, operation and management of cockpits;
  - (9) Manufacture, repair, stockpiling and/or distribution of nuclear weapons;
  - (10) Manufacture, repair, stockpiling and/or distribution of biological, chemical and radiological weapons and anti-personnel mines; and
  - (11) Manufacture of firecrackers and other pyrotechnic devices.

See Rafaelita M. Aldaba, FDI Investment Incentive System and FDI Inflows: The Philippine Experience (A Discussion Paper in the Philippine Institute for Development Studies Paper Series in 2006), *available at* <http://dirp4.pids.gov.ph/ris/dps/pidsdps0620.pdf> (last accessed Aug. 31, 2011).

- 51. Ky D. Johnson, In the Philippines: Fighting Corruption Most Cited Concern Among Business Leaders in Choosing Next President, *available at* <http://asiafoundation.org/in-asia/2010/03/10/in-the-philippines-fighting-corruption-most-cited-concern-among-business-leaders-in-choosing-next-president/> (last accessed Aug. 31, 2011).
- 52. *Id.*
- 53. See Stiftung, *supra* note 27.
- 54. MICHAEL PORTER & KLAUS SCHWAB, THE GLOBAL COMPETITIVENESS REPORT 10 (2008).
- 55. *Id.* at 276.
- 56. Saul de Vries, Mobilizing the Use of Remittances towards Poverty Reduction and Economic and Social Development through Government Initiatives: The

### III. EXISTING PHILIPPINE LEGAL FRAMEWORK

As mentioned, the Existing Philippine Legal Framework is fragmented. The main legal provisions on competition include Article XII, Section 19 of the Constitution, Articles 185 and 186 of the Revised Penal Code, and Article 28 of the Civil Code.<sup>58</sup> With respect to mergers, the Existing Philippine Legal Framework comprises one general provision in the Corporation Code and sectoral regulations intended to govern anticompetitive mergers.

#### A. Main Competition Provisions

The antitrust provisions of U.S. laws found their way into the Philippine Constitution,<sup>59</sup> the Revised Penal Code (RPC),<sup>60</sup> and the Civil Code.<sup>61</sup> Unfortunately, these provisions have not produced any meaningful judicial decisions.<sup>62</sup> It can be said that they have not been *directly* tested before courts and have only been raised as a side issue in litigation.<sup>63</sup> One reason for this is that Philippine lawyers are not very familiar with the meaning of these provisions, given that law schools do not teach antitrust laws. This lack of familiarity with antitrust law is also true with respect to judges. This lack of training in this field of law has led to a lack of antitrust litigation.

#### 1. The Constitution

The Constitution provides the basic policy of the Philippines on antitrust regulation. Article XII, Section 19 provides that the State shall regulate or prohibit monopolies *when the public interest so requires*.<sup>64</sup> No combinations in restraint of trade or unfair competition shall be allowed.<sup>65</sup> Under the said

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Philippine Experience 1 (2011), available at [http://www.unctad.org/sections/wcmu/docs/ciem4\\_Country\\_Paper\\_Philippines\\_De\\_Vries\\_en.pdf](http://www.unctad.org/sections/wcmu/docs/ciem4_Country_Paper_Philippines_De_Vries_en.pdf) (last accessed Aug. 31, 2011).

57. See generally Association of Southeast Asian Nations, ASEAN Investment Report 2009, available at <http://www.aseansec.org/documents/AIR2009.pdf> (last accessed Aug. 31, 2011).

58. Abad, *supra* note 26. This Article excludes provisions on unfair trade.

59. PHIL. CONST.

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

61. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1949).

62. See generally Recommendations for Philippine Antitrust Policy, *supra* note 7, at 6.

63. Abad, *supra* note 26.

64. PHIL. CONST. art. XII, § 19.

65. PHIL. CONST. art. XII, § 19.

provision, monopolies are not in themselves illegal unless prohibited because of public interest, as opposed to combinations in restraint of trade or unfair competition, which are not allowed. For monopolies, these are made illegal by some laws in certain sectors. As for combinations in restraint of trade or unfair competition, the Supreme Court has not expressly defined these terms, although the Supreme Court has elucidated on the contours of what constitutes fair competition in *Tatad v. Secretary of Energy*:<sup>66</sup>

[W]e underline in scarlet that the fundamental principle espoused by [S]ection 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market. *But the competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail. Monopolistic or oligopolistic markets deserve our careful scrutiny and laws which barricade the entry points of new players in the market should be viewed with suspicion.*<sup>67</sup>

Nonetheless, in *Association of Philippine Coconut Desiccators v. Philippine Coconut Authority*,<sup>68</sup> the Supreme Court has reiterated that “[a]lthough the present Constitution enshrines free enterprise as a policy, it nonetheless reserves to the government the power to intervene [*when*] *necessary to promote the general welfare.*”<sup>69</sup>

## 2. Revised Penal Code

While the Constitution provides for the basic policy on antitrust regulation, the main law addressing anticompetitive behavior is found in the RPC.<sup>70</sup>

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

The Supreme Court said the law’s provisions on tariff differential, inventory requirements, and ban on predatory pricing violated the Constitutional provision against combination in restraint of trade. The first two requirements benefitted the Big Three and erected high barriers to the entry of new players. As for the ban on predatory pricing, the inquiry should be whether entry barriers encourage predatory pricing by the Big Three. Given the significant barriers created by the first two requirements and the lack of comparable players, the temptation to engage in predatory pricing and succeed was a chilling reality.

67. *Tatad*, 281 SCRA at 358-59 (emphasis supplied).

68. *Association of Philippine Coconut Desiccators v. Philippine Coconut Authority*, 286 SCRA 109 (1998).

69. *Association of Philippine Coconut Desiccators*, 286 SCRA at 125 (emphasis supplied).

70. See The Official Website of the Philippine Tariff Commission, Competition law and Policy, available at <http://www.tariffcommission.gov.ph/competit.html> (last accessed Aug. 31, 2011). See also REVISED PENAL CODE.

The RPC, in fact, preceded the Constitutional provision on monopolies and combinations. Article 185 of the RPC prohibits and criminalizes bid rigging.<sup>71</sup> In addition, Article 186 prohibits and criminalizes the following acts:

- (1) conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition;
- (2) monopolizing any merchandise or object of trade or commerce, or combining with any other person or persons to monopolize any merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market; and
- (3) combination, conspiracy or agreement between a manufacturer, producer, processor or importer and any other persons for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price of any merchandise or object of commerce.<sup>72</sup>

Article 186 of the RPC was patterned after the Spanish Penal Code<sup>73</sup> (which was made applicable to the Philippines during the Spanish occupation) and Act No. 3247<sup>74</sup> against monopolies.<sup>75</sup> The Spanish Penal Code contained provisions dealing with monopolies and combinations in restraint of trade.<sup>76</sup> In 1925, the Philippine Legislature enacted Act No. 3247 entitled, “An Act to Prohibit Monopolies and Combinations in Restraint of Trade.”<sup>77</sup> This law, which was based on the Sherman Act,<sup>78</sup> supplemented

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The Tariff Commission says these members of Congress are threatened by the enactment of a comprehensive competition policy/law and therefore resist its passage.

71. REVISED PENAL CODE, art. 185.

72. *Id.* art. 186.

73. CÓDIGO PENAL [C.P.] (Spain).

74. An Act to Prohibit Monopolies and Combinations in Restraint of Trade [Anti-Monopoly Act], Act No. 3247 (1925).

75. See Tristan Catindig, The ASEAN Competition Law Project: The Philippines Report 2, available at [http://www.jftc.go.jp/eacpf/02/philippines\\_r.pdf](http://www.jftc.go.jp/eacpf/02/philippines_r.pdf) (last accessed Aug. 31, 2011).

76. *Id.* at 2.

77. See Anti-Monopoly Act.

78. See generally The Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890) (U.S.).

the provisions of the Spanish Penal Code. Act No. 3247 was repealed upon the enactment of the Revised Penal Code on 8 December 1930.<sup>79</sup>

Article 186 continues to be the law directly applicable to monopolies and combinations in restraint of trade.<sup>80</sup> However, Article 186 has not been an effective deterrent to monopolies and combinations in restraint of trade as no business enterprise has yet been indicted under the antitrust provisions of the RPC.<sup>81</sup> In fact, it was only in *Gokongwei v. Securities and Exchange Commission*<sup>82</sup> when the Supreme Court fleshed out the meaning of Article 186. In that case, a question regarding the validity of a director serving in two competing corporations was raised before the Supreme Court.<sup>83</sup> The Supreme Court stated that a person is prohibited from serving at the same time as a director in any two or more corporations, if such corporations are, by virtue of their business and location of operation, competitors so that the elimination of competition between them would constitute violation of the antitrust laws, namely: the Constitution and Article 186 of the Revised Penal Code.<sup>84</sup>

### 3. Civil Code

Article 28 of the Civil Code<sup>85</sup> gives a cause of action for damages to any person who suffers damages due to unfair competition.<sup>86</sup> This means an individual must file a complaint before the courts in order to recover damages for their injury. It cannot be filed by the State on the individual's behalf. To date, no private individual has filed a complaint based on Article 28 of the Civil Code. Perhaps, the reason for this is that a competition or antitrust culture has not been ingrained in the psyche of the Filipino public, given that the lawyers they consult are themselves unfamiliar with this area of law and due to the lack of information that is available to the public at large.

#### *B. Merger Regulation*

As regards mergers, the Corporation Code requires that a merger of corporations be approved by the Securities and Exchange Commission

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79. See generally REVISED PENAL CODE; Anti-Monopoly Act.

80. Catindig, *supra* note 75, at 2.

81. *Id.*

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

83. *Id.*

84. *Gokongwei, Jr.*, 89 SCRA at 375-77.

85. CIVIL CODE, art. 28.

86. *Id.*

(SEC).<sup>87</sup> In the case of merger or consolidation of banks or banking institutions, building and loan associations, trust companies, insurance companies, public utilities, educational institutions, and other special corporations governed by special laws, the favorable recommendation of the appropriate government agency shall first be obtained.<sup>88</sup>

From the Author's observation and based on his experience in merger clearance with the SEC, the SEC does not strictly look into the anticompetitive nature or effects of a merger. This is not because the anticompetitive aspect of a merger is not relevant, but because there is simply no express provision of law requiring the SEC to do so. The rules of the SEC merely require it to approve mergers on the basis of observance of general corporate procedures (*e.g.*, obtaining consent of stockholders and directors to the merger plan, and to the amended corporate charter).<sup>89</sup> However, some of the regulatory agencies in certain sectors that are required to give their favorable recommendation do look into the anticompetitive aspects of the merger because the law requires them to do so.<sup>90</sup> In these sectors, the SEC in effect relies on the power of these agencies to evaluate the anticompetitive nature or effect of the merger.

#### 1. Energy

The Electric Power Industry Reforms Act<sup>91</sup> (EPIRA) empowers the Energy Regulatory Commission (ERC) to promulgate rules and regulations to promote competition, encourage market development and customer choice, and discourage or penalize abuse of market power, cartelization and any anti-competitive or discriminatory behavior.<sup>92</sup> The ERC has issued competition rules applying to the energy sector.<sup>93</sup> The rules regulate anticompetitive agreements, misuse of power, and mergers.<sup>94</sup> If the agreement or act is not likely to lessen competition substantially, a clearance

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87. CORPORATION CODE, § 79.

88. *Id.*

89. *Id.* § 77.

90. *See* CORPORATION CODE].

91. An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes [Electric Power Industry Reform Act], Republic Act No. 9136 (2001).

92. *Id.* § 43.

93. Energy Regulatory Commission, Competition Rules and Complaint Procedures Implementing the Electric Power Industry Reform Act, § 45 (2001).

94. *See generally* Electric Power Industry Reform Act.

must be obtained. The application for clearance may be refused if the agreement or act is shown to substantially lessen competition.<sup>95</sup>

If the agreement or act is likely to lessen competition substantially, then an authorization (not a mere clearance) is required.<sup>96</sup> The ERC may grant or refuse to grant an authorization depending on whether or not the agreement or act will result, or will likely result, in a benefit to the public which would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, from it.<sup>97</sup> In determining what amounts to a benefit to the public, the ERC considers the following:

- (1) any efficiencies that the ERC considers will result, or will be likely to result, from the making of the agreement or arrangement, the arriving at the understanding or the giving effect to the provision of the agreement, arrangement or understanding to the extent that those efficiencies will benefit the public; and
- (2) where one or more of the parties to the agreement, arrangement or understanding is a distribution utility or an affiliate of a distribution utility — improved reliability of service by, reduction of costs of, and compliance with any performance standards prescribed in the IRR by, that distribution utility.<sup>98</sup>

In the past, therefore, the ERC has retained the power to refuse to issue such clearance or authorization. However, based on the Author's review of the decisions of the ERC since the promulgation of its rules on competition in 2004,<sup>99</sup> no party has applied for such clearance or authorization to date.<sup>100</sup>

## 2. Banking

After more than 30 years of interventionist financial policies, the Philippines initiated a financial liberalization program in the early 1980s.<sup>101</sup> In 2000, the General Banking Law<sup>102</sup> was enacted to replace the old law. The new law

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95. Energy Regulatory Commission, Competition Rules and Complaint Procedures Implementing the Electric Power Industry Reform Act, § 45, rule 8 (9).

96. *Id.* rule 8, § 2.

97. *Id.* rule 8, § 3.

98. *Id.* rule 8, § 4.

99. See Energy Regulatory Commission, ERC Decisions & Orders, available at <http://www.erc.gov.ph/> (last accessed Aug. 31, 2011).

100. *Id.*

101. Aldaba, *supra* note 33, at 7.

102. An Act Providing for the Regulation of the Organization and Operations of Banks, Quasi-Banks, Trust Entities and for Other Purposes [The General Banking Law of 2000], Republic Act No. 8791 (2000).

allowed foreign banks to own up to 100% of one locally-incorporated commercial or thrift bank, without the obligation of divesting later. Recent research suggests that banks have been behaving competitively.<sup>103</sup>

The Bangko Sentral ng Pilipinas (Central Bank) is the agency tasked to supervise the banking sector.<sup>104</sup> Under the Corporation Code, the Central Bank is required to give its recommendation for mergers of banks.<sup>105</sup> In terms of laws and regulations, the Central Bank is not bound by any express antitrust criteria, although under its own rules<sup>106</sup> the Central Bank is required to consider if the merger or consolidation will result in a more viable financial institution as a result of cost savings and improved *competitive* position. The Central Bank has a strong pro-merger policy because according to its analysis, the country's banking sector remains competitive based on the Herfindahl-Hirschman Index.<sup>107</sup>

### 3. Telecommunications

In the telecommunications sector, the National Telecommunication Commission (NTC) is empowered to regulate rates when ruinous competition results or when a monopoly or a cartel or combination in restraint of free competition exists, the rates or tariffs are distorted or unable to function freely, and the public is adversely affected.<sup>108</sup> Indirectly, the

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103. Aldaba, *supra* note 33, at 42.

104. The General Banking Law of 2000, § 4.

105. CORPORATION CODE, tit. IX, § 79.

106. Central Bank of the Philippines, Circular No. 237, Series of 2000 (April 19, 2000).

107. Banking sector maintains perfect competition-BSP, PHIL. DAILY INQ., June 26, 2010, available at <http://globalnation.inquirer.net/news/breakingnews/view/20100615-275770/Banking-sector-maintains-perfect-competitionBSP> (last accessed Aug. 31, 2011).

In its latest report on the banking industry, the Central Bank said the Herfindahl Hirschman Index (HHI) for the five biggest universal and commercial banks as of end-2009 stood at 613.2, well within the ceiling of 1,000 for perfect competition.

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While the Central Bank is pleased with the latest HHI, they said the country's banking sector could still afford to consolidate some more and stay within the ceiling for perfect competition.

*Id.*

108. An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunication Services [Public Telecommunications Policy Act of the Philippines], Republic Act No. 7925, § 17 (1995).



NTC could regulate mergers through this provision by making sure any anticompetitive combination (such as a merger) will not lead to the restraint of free competition. The NTC has the power to order interconnection between previously State-owned Philippine Long Distance Telecommunications and new entrants.<sup>109</sup> In 2000, a study revealed the inefficiency and lack of experience of the NTC to deal with competition.<sup>110</sup> Particularly, the NTC was attacked due to delays in interconnection.<sup>111</sup> However, it seriously considered these criticisms and revised its rules on interconnection.<sup>112</sup> This enabled it to decide 36 disputes from 2002 to 2006.<sup>113</sup> It has also amassed some experience in handling competition cases.<sup>114</sup>

With the Existing Philippine Legal Framework as background, what problems do the Bills seek to remedy?

### *C. Passing the Bills*

Prior to the Bills, several bills have been proposed in the past but were not enacted. The previous bills did not form part of the prioritized bills of past

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109. Office of the President, Prescribing the Policy Guidelines for Compulsory Interconnection of Authorized Public Telecommunications Carriers in Order to Create a Universally Accessible and Fully Integrated Nationwide Telecommunications Network and thereby Encourage Greater Private Sector Investment in Telecommunications, Executive Order No. 59, (Feb. 24, 1993). See *Philippine Long Distance Telecommunications v. National Telecommunications Commission (NTC)*, 190 SCRA 717, 734-35 (1990) where the Supreme Court stated that the regulation of the use and ownership of telecommunications systems is in the exercise of the plenary police power of the State for the promotion of the general welfare. Section 6 of Article XII, 1987 Constitution recognizes the existence of that power when it provides that the use of property bears a social function, and all economic agents shall contribute to the common good.

110. Rafael Aldaba, *Opening Up the Philippine Telecommunications to Competition (A Case Study)* 3, available at <http://economics.mipt.ru/articles/management/competition/philippines2> (last accessed Aug. 31, 2011).

111. *Id.* at 4.

112. See National Telecommunications Commission, *Implementing Rules and Regulations (IRR) for the Interconnection of Authorized Public Telecommunications Entities*, Memorandum Circular No. 14-07-2000 (July 21, 2000).

113. Edgardo V. Cabbarios, *Competition in the Philippine Telecommunications Sector (A Discussion Paper)*, available at [http://www.dlsu.edu.ph/research/centers/aki/\\_pdf/\\_conferences/manilaConference/competitioninthePhilippintTelecommunicationsSector.pdf](http://www.dlsu.edu.ph/research/centers/aki/_pdf/_conferences/manilaConference/competitioninthePhilippintTelecommunicationsSector.pdf) (last accessed Aug. 31, 2011).

114. *Id.*

Presidents and therefore languished as pending legislation.<sup>115</sup> Another cause of the non-passage of past bills is the unfamiliarity of many of these concepts to legislators. This lack of appreciation on the part of Congress resulted in the failure to take progressive steps in enacting an antitrust bill.<sup>116</sup> Prior to the present administration, the relevant committee of each house has conducted only one hearing on antitrust bills in the past.<sup>117</sup> Legal practitioners believe that big businesses and rich families oppose the enactment of an antitrust law in the Philippines.<sup>118</sup> There has been a strong lobby against the enactment of past bills into law, given the fear by big businesses of the possible consequences of the passed law to their current business arrangements, *e.g.*, vertical integration.<sup>119</sup>

Why the need for the Bills? What problems would it cure?

Specifically regarding anticompetitive mergers, the Existing Philippine Legal Framework does not cover anticompetitive mergers and acquisitions *outside* the telecommunications, banking, and energy industries.

Yet, anticompetitive mergers<sup>120</sup> exist in other sectors.

How do the Bills address the above problems?

The Senate Bill criminalizes cartels, monopolies, and abuse of market power in all sectors.<sup>121</sup> The House Bill covers the same criminal acts except that it adds “predatory behavior” among the abuses of dominant position and regulates mergers that substantially lessen competition, or tend to create a monopoly.<sup>122</sup> The House Bill introduces a new regime on merger regulation. The provisions on merger regulation are not exhaustive, perhaps because the specific details will be left to the implementing agency (the proposed Fair Competition Commission under the House Bill).<sup>123</sup> Prior

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115. Abad, *supra* note 26.

116. *Id.*

117. *Id.*

118. *See, e.g.*, Philippine Antitrust Law Enacted Soon, *available at* <http://www.unlawyer.net/?p=1200> (last accessed Aug. 31, 2011).

119. *See, e.g.*, Valeriano Avila, About that Proposed Antitrust Law, *available at* <http://www.philstar.com/Article.aspx?articleId=645112&publicationSubCategoryId=109> (last accessed Aug. 31, 2011).

120. *See Anti-trust Law Needed to Curb Emerging Monopolies*, THE DAILY TRIB., July 7, 2010, *available at* [http://www.tribuneonline.org/business/20101007\\_bus2.html](http://www.tribuneonline.org/business/20101007_bus2.html) (last accessed on Aug. 31, 2011).

121. S.B. No. 3197.

122. H.B. No. 4835.

123. *Id.* The Author notes that on June 9, 2011, the President designated the Department of Justice as the competition authority under Executive Order No. 45. However, this executive order is silent on merger regulation.

notification to the Fair Competition Commission is required for any stock or asset acquisition if as a result of the acquisition, the acquiring firm would own 20% or more of the shares of stock or assets of the acquired firm. This proposed merger regulation tracks the usual merger regulation in many developed countries. Should the Philippine merger regulatory regime be somehow different?

### III. PROPOSING MERGER REGULATION IN THE PHILIPPINES IN LIGHT OF EMERGING NORMS UNDER INTERNATIONAL COMPETITION LAW

#### *A. Merger Regulation under the ASEAN Guidelines*

In 1997, the ASEAN leaders decided to transform the ASEAN into a stable, prosperous, and highly competitive region with equitable economic development, and reduced poverty and socio-economic disparities.<sup>124</sup> In 2003, the ASEAN declared as its goal the regional economic integration, which it sought to accomplish by 2020.<sup>125</sup> In January 2007, they agreed to accelerate the establishment of the ASEAN Economic Community (AEC), which will transform ASEAN into a region of free movement of goods, services, investment and skilled labor, and capital.<sup>126</sup> The main idea of the AEC is to transform ASEAN into a single market and production base.<sup>127</sup> It is therefore similar to the European Union (E.U.) in the sense of being a common market; it is different from the E.U. in the sense that the ASEAN will not have a common external tariff.<sup>128</sup>

Originally, the intent was to establish the AEC by 2020, but this was moved to 2015 for Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand (ASEAN Six); Cambodia, Myanmar, Laos, and Vietnam (CMLV) were given until 2020 to complete their commitments.<sup>129</sup> The ASEAN is quickly moving towards its target in respect of freedom of movement of goods, but not with respect to the other three freedoms.<sup>130</sup>

With regard to the free movement of goods, ASEAN secured a major landmark when, on 1 January 2010, the ASEAN Six applied zero tariffs on 99% of goods; the CLMV were not far behind, trading 98.6% of goods at

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124. Association of Southeast Asian Nations, ASEAN Vision 2020, *available at* <http://www.aseansec.org/5228.htm> (last accessed Aug. 31, 2011).

125. Association of Southeast Asian Nations, Declaration of ASEAN Concord II, *available at* <http://www.aseansec.org/15159.htm> (last accessed Aug. 31, 2011).

126. ASEAN Economic Blueprint, *supra* note 2.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

0.5% of tariff rate.<sup>131</sup> Free movement of services is an important issue which has held back full integration.<sup>132</sup> For example, Thailand prohibits foreigners from practicing certain professions; on the other hand, the Philippines reserves the practice of professions only to Filipinos. Free movement of investment and skilled labor, and free movement of capital have also yet to see tangible results.<sup>133</sup>

### 1. Nature of the Guidelines

In November 2007, the ASEAN Member States adopted the AEC Blueprint, in which they agreed to introduce competition policy by 2015. The Blueprint tasked the ASEAN Expert Group on Competition (AEGC) to develop regional guidelines on competition.<sup>134</sup> In August 2010, the AEGC issued the Guidelines.<sup>135</sup> The Author notes that the Guidelines are not binding, but they do serve as a common reference to ASEAN Member States in introducing competition policy. The preface of the Guidelines even call them a *living* reference, as the AEGC will update them within the next five years to reflect changes and developments in the ASEAN and in international best practices.<sup>136</sup>

### 2. Public Interest and SMEs

Under the Guidelines, ASEAN Member States may establish thresholds, for which notification and approval will be required.<sup>137</sup> A simplified filing system may be created for mergers which do not raise serious competition concerns.<sup>138</sup> The provisions of the Guidelines on mergers do not expressly allow the ASEAN Member to consider public interest in approving or rejecting a merger.<sup>139</sup> However, the Guidelines do recognize public interest as an overarching goal of competition policy. Article 3.5.1 also allows ASEAN Member States to exempt specific industries or activities from competition law based on strategic and national interest, public, economic[,]

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131. See Sanchita Basu Das, ASEAN on path to achieving AEC goal, *available at* <http://www.iseas.edu.sg/aseanstudiescentre/asco47-10.pdf> (last accessed Aug. 31, 2011).

132. *Id.*

133. *Id.*

134. See ASEAN Economic Blueprint, *supra* note 2.

135. ASEAN Guidelines, *supra* note 6.

136. *Id.* at ii.

137. *Id.*

138. *Id.*

139. *Id.* at 6.6.1.

or social considerations.<sup>140</sup> This would seem to refer to the requirements of public interest.

Article 3.5.5 further provides that ASEAN Member States may consider exempting SMEs from the application of competition law.<sup>141</sup> Can this be stretched to mean that an ASEAN Member State may impose conditions that promote SMEs or prohibit a merger where there are several SMEs in the market? There is no hard and fast rule to this question. The solution will depend on the public interest existing in each ASEAN Member State.

### *C. Merger Regulation in the Philippines*

#### *1. Rationale*

One author has said that the implementation of competition law in the ASEAN countries is the best way to deal with the fear of economic conquest by foreign investors.<sup>142</sup> While this concern may be true to some extent, the Author does not adhere to the same view as this may lead to a protectionist competition law. Further, protecting against foreign conquest is not the most pressing issue for the Philippines in creating a real antitrust legal framework. This is because, as mentioned earlier, foreign investment is not the biggest driving force of the Philippine economy.

The Author believes that the evil preventing full competition in the Philippines is two-pronged: (a) the concentration of businesses in the hands of a few rich families (rather than foreign investors); and (b) the weak participation of SMEs in the economy due to their low productivity, lack of linkages to large enterprises, and lack of access to credit. This is one important failure of the Bills: it does not address the two-pronged evil described above.

#### *2. Public Interest: Promoting SME Performance*

One of the goals of Philippine competition law should be to promote public interest. The term “public interest” actually appears in the Constitutional provision on monopolies, which requires monopolies to be prohibited when public interest so requires.<sup>143</sup> Is the public interest element complied with by prohibiting monopolies *in order* to promote competition? Or for instance, should the Philippine Fair Competition Commission be given the power to prevent an anticompetitive act on the basis of specific public interests?

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140. ASEAN Guidelines, *supra* note 6, at 3.5.1.

141. *Id.*

142. Lawan Thanadsillapakul, The Harmonisation of ASEAN Competition Laws and Policy from an Economic Integration Perspective, *available at* <http://www.thailawforum.com/articles/theharmonisation2.html> (last accessed Aug. 31, 2011).

143. PHIL. CONST. art. XII, § 19.

The Constitutional debates do not seem to have anticipated this issue. Existing laws and the Bills are also silent on it. However, the ASEAN Guidelines recognize the inclusion of non-competition goals (such as the promotion or protection of small businesses).<sup>144</sup> More important, many newer antitrust jurisdictions, especially developing countries, allow public interest justifications for rejecting mergers.<sup>145</sup> These include, among many other States, South Africa, Zimbabwe, and Zambia.<sup>146</sup>

In South Africa, a merger may be stopped or allowed on purely public interest grounds, whether the merger is procompetitive or anticompetitive.<sup>147</sup> For instance, in the matter of *Harmony Gold Mining Company Limited-Gold Fields Limited and Pamodzi Gold Free State (Pty) Ltd*,<sup>148</sup> the Competition Tribunal found that the merger may have an adverse effect on employment, and hence on public interest.<sup>149</sup> To obviate such concern, the Tribunal imposed a condition that the retrenchment of employees be limited to 1,000 managerial and supervisory staff.<sup>150</sup>

In Zimbabwe, competition law was heavily influenced by the desire of the government to ensure that exports are effectively promoted and indigenous entrepreneurs encouraged.<sup>151</sup> Accordingly, the Competition Commission approves mergers subject to conditions that relate to the promotion of small or indigenous enterprises.<sup>152</sup> In the *Coca Cola/Cadbury-*

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144. ASEAN Guidelines, *supra* note 6, at 2.2.3.

145. See, e.g., Paulo Correa & Frederico Aguiar, Merger Control in Developing Countries: Lessons from the Brazilian Experience (A Paper presented at the United Nations Conference on Trade and Development), *available at* [http://www.unctad.org/en/docs/ditclpmisc24\\_en.pdf](http://www.unctad.org/en/docs/ditclpmisc24_en.pdf) (last accessed Aug. 31, 2011).

146. *Id.*

147. James Hodge, et al., Public Interest Provisions in the South African Competition Act — A Critical Review (A Paper presented at the Competition Commission of South Africa Competition Policy, Law and Economics Conference) 7-8, *available at* <http://www.compcom.co.za/presentations-third-annual-competition-conference/> (last accessed Aug. 31, 2011).

148. In the matter of Harmony Gold Mining Company Limited-Gold Fields Limited and Pamodzi Gold Free State (Pty) Ltd (71/LM/Oct 09) [2010] ZACT 11 (5 February 2010) [hereinafter Harmony Gold Mining Company Merger].

149. Harmony Gold Mining Company Merger at 4.

150. *Id.* at 5.

151. Alexander J. Kububa, *Anti-Competitive Practices and Their Adverse Effects on Consumer Welfare: The Zimbabwean Experience*, THE EFFECTS OF ANTI-COMPETITIVE BUSINESS PRACTICES ON DEVELOPING COUNTRIES AND THEIR DEVELOPMENT PROSPECTS 97 (2008).

152. *Id.* at 103-16.

*Schweppes* merger,<sup>153</sup> the Competition Commission approved the merger subject to the following conditions:

- (1) that in addition to the acquisition of the Cadbury-Schweppes beverage brands, The Coca Cola Company undertake to also acquire Schweppes Zimbabwe Limited as a going concern and to establish an appropriate local shareholding structure (to include indigenous shareholders) to oversee the operations of the new company to be formed;
- (2) that The Coca Cola Company undertake to maintain the local *Mazoe* and *Calypso* brands on the Zimbabwean market and to develop the brands into regional brands with wider circulation; and
- (3) that The Coca Cola Company undertake to promote and develop Zimbabwean suppliers with respect to the necessary raw materials required to produce the local beverages brands.<sup>154</sup>

This may provide a good framework for the Philippines in prohibiting or lessening the concentration of business ownership in the hands of a few rich families. For example, the Philippine Fair Competition Commission may be given powers to look at the structure of the market and impose conditions that promote public interest such as SME participation in Philippine markets.

More important, as mentioned, the linkages between SMEs and large companies are weak. The Philippine Fair Competition Commission may be given powers to require the merging parties to outsource some of their activities to SMEs or to designate SMEs as suppliers. A Zambian case may shed light on how to promote the linkage between SMEs and large companies. In 2004, Agriflora Limited (Agriflora) and Chalimbana Fresh Produce Limited (Chalimbana) submitted a joint notification to the Zambia Competition Commission for the transfer of controlling ownership of Agriflora to Chalimbana.<sup>155</sup> According to *The Acquisition of the Assets of Agriflora by Chalimbana Fresh Produce Limited*,<sup>156</sup> “the Zambian Competition

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153. See Alexander J. Kububa, Overview of Competition Policy and Law in Zimbabwe (A Paper presented at the Third Annual Competition Commission, Competition Tribunal And Mandela Institute Conference On Competition Law, Economics And Policy In South Africa), available at <http://www.google.co.za/cse?cx=partner-pub-2042229053686381%3A8227vx-6w19&ie=ISO-8859-1&q=Coca+Cola%2FCadbury-Schweppes+merger&sa=Search&siteurl=www.compcom.co.za%2F> (last accessed Aug. 31, 2011).

154. *Id.* at 106.

155. Thulasoni Kaira, *The Role of Competition Law and Policy in Alleviating Poverty – The Case of Zambia*, THE EFFECTS OF ANTI-COMPETITIVE BUSINESS PRACTICES ON DEVELOPING COUNTRIES AND THEIR DEVELOPMENT PROSPECTS 157 (2008).

156. *Id.* at 158 (citing Zambia Competition Commission, Staff Paper No. 211, February 2005).

Commission authorized the takeover of the assets of Agriflora by Chalimbana on the basis of assurances from Chalimbana that the takeover was envisaged to provide the continuity of the viable and lucrative business of Agriflora, with supply linkages to the small to medium scale farmers.”<sup>157</sup>

Interested in expanding production beyond its own farms, Agriflora saw the attractiveness of working with various smallholders in the vicinity of its pack house.<sup>158</sup> Under a new loan scheme, the Zambia Agribusiness Technical Assistance Centre (ZATAC) would supply irrigation equipment for production of baby corn, beans, and peas, and the produce would then be sold under contract to Agriflora.<sup>159</sup> ZATAC provided small horticulturists with drip irrigation equipment while Agriflora Ltd. installed refrigeration warehouse next to their house.<sup>160</sup> This led to strong linkages between small producers and Agriflora.

In regulating mergers, therefore, the Philippine Fair Commission should be given the power to strengthen linkages between dominant firms and small suppliers by requiring merger parties to provide tie-ups or assistance to SMEs.

### 3. Balancing Public Interest with Inefficiency

Due to the linkages that may be forced upon the merger parties, there arises a fear that these large enterprises may create buying power that squeezes the SMEs and transfers a larger part of the value chain to the larger enterprises.<sup>161</sup> This may be avoided. How? First, competition law enforcement could protect small producers from the purchasing power of large enterprises.<sup>162</sup> Abuse of market power provisions may be formulated to cover *abuse of power*, that is, the ability of a firm, or a group of firms acting jointly, to decrease and profitably maintain prices below the level that would prevail under

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157. *Id.* at 158.

158. *Id.* at 159 (citing USAID, USAID/Zambia – Success Stories, available at [http://www.usaid.gov/regions/afr/success\\_stories/zambia.html](http://www.usaid.gov/regions/afr/success_stories/zambia.html) (last accessed Aug. 31, 2011)).

159. *Id.*

160. *Id.*

161. Bruno Dorin, *From Ivorian Cocoa Bean to French Dark Chocolate Tablet*, in THE EFFECTS OF ANTI-COMPETITIVE BUSINESS PRACTICES ON DEVELOPING COUNTRIES AND THEIR DEVELOPMENT PROSPECTS 309–11 (2008).

162. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT SECRETARIAT, THE EFFECTS OF ANTI-COMPETITIVE BUSINESS PRACTICES ON DEVELOPING COUNTRIES AND THEIR DEVELOPMENT PROSPECTS xiii–xiv (2008).



competition.<sup>163</sup> Second, merger regulation may prioritize mergers or acquisitions that, for instance, result in excessive vertical concentration.<sup>164</sup>

In addition, the “purist” competition experts are worried that by protecting SMEs, competition law might protect inefficiencies. This is a genuine concern, and therefore competition authorities must strike a balance between efficiency and distribution of wealth. To illustrate, if competition authorities are given the power to require large enterprises to provide tie-ups or assistance to SME suppliers, these SMEs may refuse to grow and innovate and will simply rely on government protection.

The concern on protecting inefficiencies can be addressed. Respected scholar Ajit Singh, in defending Japan’s industrial policy in its early stages of development, says that even if the Japanese Government protected domestic industries, they nonetheless spurred rivalry among domestic enterprises<sup>165</sup> by imposing “performance standards” and “organized investment races.”<sup>166</sup> This can provide a model for the Philippines. The Philippine Fair Commission can have a competitive screening of SMEs that it will help based on some performance standards, specifically those which have the prospect of innovating and are most likely to be successful.

#### IV. CONCLUSION AND RECOMMENDATIONS

One key to a competitive business environment is proper merger regulation. However, developing countries like the Philippines should consider including public interest in the equation in analyzing anticompetitive mergers. In this regard, the Bills should be amended to include public interest as an objective of the Bills. The Bills may specify “the promotion of SMEs” and “the prevention of business concentration in the hands of the elite” as among the objectives. *Of course, the enforcement of public interest should not be at the expense of efficiency.* In particular, the Philippine Fair Competition Commission should be given the power to strengthen linkages between large enterprises and *prospectively successful* SMEs in regulating mergers. At the same time, the Bills should be amended to include abuse of buyer power.

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163. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT SECRETARIAT, COCOA STUDY: INDUSTRY STRUCTURES AND COMPETITION vii (2008) [hereinafter UNCTAD Cocoa Study].

164. See generally UNCTAD Cocoa Study.

165. Ajit Singh, Multilateral Competition Policy and Economic Development: A Developing Country Perspective on the European Community Proposals (A Revised Paper presented at the United Nations Conference on Trade and Development Series on Issues on Competition Law and Policy) 10, available at [http://www.unctad.org/en/docs/ditccplp200310\\_en.pdf](http://www.unctad.org/en/docs/ditccplp200310_en.pdf) (last accessed Aug. 31, 2011).

166. *Id.* at 11.

Since the Spanish period to the American colonial rule, economic participation has been the exclusive arena of the privileged. With these recommendations, the Author seeks to use competition law to strike the evil where it is most felt in the Philippines — that is, the concentration of business ownership in the hands of a few.