THE LEGAL FRAMEWORK FOR REFORM OF THE PHILIPPINE LAW ON UNFAIR METHODS OF BUSINESS COMPETITION*

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ABSTRACT

Amidst the prevailing Philippine trend towards free enterprise, marked by deregulation, liberalization and privatization, there a corresponding danger also exists: the unification and concentration of economic power and propagation of acts in restraint and obstruction of trade, adopted by commercial interests in their battle for business survival and pursuit of profit. These acts undermine competition, destroying the primordial economic objects of free enterprise.

To forestall this, the Constitution in Section 19, Article XII prohibits and regulates monopolies, combinations in restraint of trade, and unfair competition when the public interest so requires. In the Philippine legal system, the Supreme Court has singled out Article 186 of the Revised Penal Code and Article 28 of the New Civil Code as the statutory embodiment of the constitutional competition policy. These provisions are denominated 'antitrust' in history and spirit. This study has focused on these laws with the primary objective of determining and evaluating their status and performance during the decades of their existence, within the context of the American antitrust legal discipline. Their analysis found a necessity for reform when made within the context of the American anti-trust legal discipline and the work endeavored to formulate and extract accurate conclusions (about what?). The present statutes form the framework for legal reform on unfair methods of competition specially suited to Philippine jurisdiction as an autonomous and unified legal discipline for general application.

The conclusions and recommendations are within the parameters of four major areas: to clarify the underlying philosophy of the regulation of competition; to identify the characteristics of a general law serving as deterrence against unfair methods of business competition; to specify the acts that constitute a violation; and to strengthen the enforcement measures, including the prescription of appropriate penalties and remedies and other remedial considerations. A draft of the Philippine Business Competition Code, composed of seven titles is proposed, crystallizing the insights acquired and giving statutory form to the recommendations, discussed in the paper.

It is hoped that the study will in small measure provide to the interested reader knowledge of the fundamental principles and doctrines of antitrust laws and the commercial tort related thereto, a relatively obscure legal field in Philippines.

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I. INTRODUCTION

A. CONSTITUTIONAL PREMISES AND STATUTORY FOCUS

Over the past decade, Philippine trade policy has taken a shift towards privatization, deregulation and liberalization. Constitutional policies acknowledge the indispensable role of the private sector,[1] directing the State to allow its optimum development[2] by: broadening the base of its ownership,[3] providing incentives for needed investments,[4] and recognizing the right of private groups and individuals to own, establish and operate private enterprises[5] subject to the duty of the State to intervene when common good demands,[6] and protecting the Filipino enterprises against unfair competition and trade practices.[7] These policies give sufficient legal basis for such prevailing trend in economic politics.

The Philippine Supreme Court has recently pronounced that notwithstanding a "Filipino first" policy,[8] the Constitution does not intend that the State pursue an isolationist stance rather, it considers realities of the world beyond the territorial boundaries of the Philippines by requiring a trade policy based on equality and reciprocity and speaks of industries which are competitive in both domestic and foreign markets, thus clearly showing a bias against a sheltered domestic environment.[9] It also opined that the Constitution has beyond doubt committed the Philippines to the free enterprise system, albeit with its own distinctiveness.[10]

As held, these policies are denotive of a free enterprise system where the regime of law favors free market forces, freedom of contract and economic individualism. These policies are supported by one strong argument: to promote a mutually profitable division of labor which/that greatly enhances the potential or real national product and creates higher standards of living.[11] However, free enter-

1 PHIL. CONST. art. II, § 20.

2 PHIL. CONST. art. XII, § 1.

3 PHIL. CONST. art. XII, § 1.

4 PHIL. CONST. art. II, § 20.

5 PHIL. CONST. art. XII, § 6.

6 PHIL. CONST. art. XII, § 6.

7 PHIL. CONST. art. II, § 20; art. XII, § 1, 19.

8 PHIL. CONST. art XII, § 10, 12.

9 Tanada v. Angara, 272 SCRA 18 (1997), *citing* the PHIL. CONST. art XII, sec 1 & 13. Petitioners contend that the Agreement establishing the World Trade Organization signed by the Philippines, violated the constitutional directives for preference in favor of qualified Filipinos in the grant of rights, privileges and concessions covering national economy and patrimony and the preferential use of Filipino labor, domestic materials and locally produced goods. The Supreme Court upheld the validity of the Philippine membership in the WTO, reasoning as above stated. [hereinafter Tanada].

10 Tatad v. Secretary of the Department of Energy, 281 SCRA 330 (1997). Petitioners challenged the constitutionality of RA 8180, 'An Act Deregulating the Downstream Oil Industry and For Other Purposes', a statute passed which ended twenty six years of government regulation of the downstream oil industry. Among other reasons, the Supreme Court invoked Section 19, Article XII of the 1987 Constitution to invalidate RA 8180. [hereinafter Tatad].

prise, as may be discerned from the history of countries who have adhered upon private industry and commerce as the source of national wealth and progress, carries with it its own economic and political evils.

Where free enterprise is promoted by a greater reliance on private machinery and correspondingly, a decreased government presence, there is in equipoise an incipient danger of monopolization, price fixes and discrimination, cartels, conscious parallelism, intra-enterprise conspiracies, unification of interests and other restrictive anti-competitive strategies with respect to business conduct. These practices work to destroy the essence of free enterprise, injure honest competitors and deprive the consuming public of the opportunity to buy goods and services of the highest possible quality at the lowest possible price. To forestall this, a strong competition policy is prescribed as an effective countervailing measure. The government's role is to adopt and maintain a legal system focused on competition as the technique of social control, for public as well as private consequences.

Concededly, the Philippines has not totally embraced the western *laissez-faire* economic policy that depends primarily on competition to regulate business conduct. By adopting deregulation of certain industries, stimulating domestic and foreign private investment and enterprise, dismantling government-owned and-controlled corporations and industries, privatizating government-owned assets, the government has markedly reduced its presence in the market and, relies, to a greater degree, upon economic forces to police trade conduct.[12] As experienced by jurisdictions similarly situated, the likelihood of proliferation of anti-competitive trade practices is also increased and, if uncontrolled, these private restraints supplant government restriction, defying the primordial objects of free trade and private enterprise.

The State is mandated to prohibit and regulate vices of competition, not merely as a necessary incident of the 'free enterprise' policies, but in a distinct provision. Section 19, Article XII expressly requires the State to regulate or prohibit monopolies when public interest so requires, and to prohibit combinations in restraint of trade and unfair competition.[13] The Philippine Supreme Court has characterized such competition policy as *'anti-trust'* in history and spirit.[14]

11 JACKSON, DAVEY & SYKES, JR, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, CASES, MATERIALS AND TEXT, 14 (1995) *citing* Paul A. Samuelson, Economics 692, 1973 Edition [hereinafter JACKSON et al].

12 Anna Leah Castaneda, *From Merit To Disclosure Regulation: The Shifting Bases of Philippine Securities Law*, ATENEO L. J., Vol. XLII, No. 2 (1998) Mla., Phil. at 43, *citing* THE PHILIPPINES THE NEXT ASIAN TIGER 59 (1996), 'the stronger participation of the private sector in the overall economic expansion has been due largely to government's opening of new investment opportunities through privatization and the involvement of private capital in large scale infrastructure undertakings. The privatization program alone involves the disposal of a total of 103 government owned and controlled corporations, as well as the sale of nearly 400 non-performing assets that state financing agencies had been forced to acquire during the recession of the early 1980's. More recently, the opening up of domestic industries to foreign investments has further widened these opportunities to the global economy'.

13 PHIL. CONST. art. XII, § 19.

14 Tatad, *supra* note 10, at 355-359.

Antitrust, an American legal creation, comprehends a broad body of statutory and administrative rules and jurisprudential doctrines, the primary objective of which is the preservation and maintenance of competition in a capitalist economy.[15]

A survey will show provisions on competition scattered in Philippine statutes providing for the proscription and regulation of monopolies, monopolization, combinations in restraint of trade, unfair competition and other vices of competition, some of them dating back more than five decades. Specifically, the Philippine Supreme Court has singled out Article 186 of the Revised Penal Code and Article 28 of the New Civil Code as the statutory embodiment of the constitutional competition policy[16] and by jurisprudential edict the same constitute, primarily, Philippine antitrust law.

Article 186 of the Revised Penal Code[17] is a near duplicate of three provisions of the American federal antitrust law from which it was derived. It singularly embodies anti-trust law, penalizing any person who enters into contracts, agreements or conspiracies in restraint of trade; or who, by artificial means, acts of monopolization or combinations, prevents free competition in the market, or causes acts prejudicial to lawful commerce or acts that effect abnormal increases in the market price.[18] Article 28 of the New Civil Code[19] on the other hand is a commercial tort, deemed necessary in a system of free enterprise by the Civil Code Commission, as an aspect of democracy.[20]

Antitrust and unfair competition, while closely related, are different legal disciplines that lie within the general realm of unfair methods of competition. Antitrust governs the relationship of the competitor with his State, and its object is to keep competition free, primarily because of the public consequences of anti-competitive conduct, particularly upon consumers. On the other hand, the unfair competition referred to in Article 28 pertains to the relations between and among those who compete. It is directed towards private rather than public interests, and is tasked with regulating the conduct of trade participants as competitors. Presupposing the presence of competition, it places emphasis on fairness and provides for the remedy that a person injured, as a result of competitive or anti-competitive conduct, may look upon to his State for redress.

Where American federal anti-trust laws responding to technological advancement and complexities of the business milieu have, over a century, developed into a coherent and formidable force, resulting in a complex array of statutes, jurisprudential doctrines, and administrative rules, the Philippine counterpart since

[15] See Ch III of the work, *infra*.

[16] Tatad, *supra* note 10, at 358. See also: Gokongwei, Jr. v. Securities and Exchange Commission, 89 SCRA 336 (1979) at 376.

[17] Act 3815 (1930), The Revised Penal Code of the Philippines, art. 186, as amended.

[18] LUIS B. REYES, THE REVISED PENAL CODE, CRIMINAL LAW, II 253 – 254 (1993)

[19] R.A. 386 (1950), The Civil Code of the Philippines art. 28.

[20] MELENCIO SANTAMARIA JR., PERSONS AND FAMILY RELATIONS LAW 31 (1995).

its enactment in 1930, has not progressed beyond its embryonic stage. There has been little legislative or jurisprudential development elucidating or supplementing its general tenor. Special laws containing provisions pertaining to the matter have subsequently been enacted, but they are piecemeal and, with few exceptions, likewise general in language. There has been no legislative or judicial action to unify them into a single legal discipline.

It is doubtful whether these laws can adequately regulate restrictive business practices and whether such practices are appropriately the subject of control only by these laws. These provisions must be scrutinized in the context of antitrust law, to determine whether they can give effect to the Philippine competition policy, and are sufficient and capable of treating the various trade malpractice they seek to deter.

B. OBJECTIVES OF THE STUDY

The objective of this work has twin aspects: first, to determine the state and performance of the prevailing Philippine anti-trust laws as well as the tort component related thereto, and to evaluate whether they have provided effective deterrence against unfair methods of competition during the decades of their existence; and second, if shown to be necessary, to propose the blueprint of a legal system able to foster and preserve fair competition in a free enterprise. The resulting proposal is aimed at yielding two primary results: first, to harmonize the desire for economic upliftment through a free market and the conflicting interests that may arise therefrom; and second, to illustrate the role of competition in a free enterprise system and the laws that have for their object its preservation and maintenance.

Towards that end, this thesis will propose the fundamental framework which, will form the basis of a draft of the proposed *Philippine Business Competition Code*. The proposed Code will attempt to specify unlawful business conduct, in terms of what may or may not be allowed. It will also propose appropriate sanctions and remedies for violations, public and private; and recommend enforcement mechanisms and related procedural considerations, focusing on the creation of a regulatory agency, delineating its role in enforcing and administering the laws regarding the matter.

Lastly, it is hoped that the paper will provide to the interested reader a basic general knowledge and understanding of the various components of unfair methods of competition, particularly the concepts of anti-trust and the trade tort related thereto, a relatively obscure legal discipline in Philippine jurisdiction.

C. SCOPE OF THE STUDY

To attain its objectives, this paper will make a critical study of Article 186 of the Revised Penal Code and its tort counterpart, Article 28 of the New Civil Code. The study will take into consideration pertinent laws, legal doctrines and Senate Bill 996 of 1989, a proposed antitrust legislation. It shall also delve into affinitive economic principles of competition.

The proponent will place particular focus on the American federal antitrust law and its jurisprudential application and development. This is not merely because Article 186 of the Revised Penal Code is a near duplicate of the American provisions from where it was copied, but because of the recognition that the American antitrust system is the most comprehensive and vigorously enforced in the world. This study will also evaluate the private cause of action for damages arising from injurious business practices in contravention of antitrust laws, such that an integration of the substantive and adjectival rules may be made to constitute a unified legal system, providing for the deterrence of unfair methods of business competition.

Whenever possible, the analyses will delve into actual Philippine cases. However, insufficient data necessitates that American jurisprudence will be used when discussing the antitrust history and doctrines to the extent that they may be applicable to the study.

D. DELIMITATION

It must be emphasized that this study does not purport to be a comprehensive treatment of every aspect of the American federal system of antitrust laws. A more voluminous work would be more appropriate for such a task. On the contrary, the intention here is to provide the fundamentals for a general legal competition system suited to Philippine setting, the substantive and procedural rudiments of which shall be codified in a one law. Such system will serve as a legal landscape for competitive conduct amidst the policy trend towards free enterprise, after more than three decades of trade restriction and control by the State.

Also, while consumer welfare through a free and fair competition is one of the goals of a competition law, the proposal will not include unfair competitive conduct more properly in the realm of contract, consumer protection and intellectual property laws such as malicious interference, product liability, passing-off, false advertising, infringement of intellectual property, and other similar acts. This study will touch upon them only in reference. The delimitation is due to the fact that the regulation of competition emanates from principles distinct and different from the underlying bases of the three bodies of law.

E. THE CONTEXT OF THE STUDY

Regulation of trade and competition is as old as economic history. Three centuries preceding *laissez-faire*, regulation was the common practice in civilized nations. Trade regulations in medieval economy originating with the guilds arose out of the canonical belief that every article has its just and true value which can best be determined by government authority.[21] The philosophy underlying the regulation of competition is the freedom of every person to carry on the business of his choice as it is in the nature of personal liberty, as much as a property right. To preserve its free exercise is fundamental to a democratic society, not merely because of the private necessity, but for its public consequences as well.[22] Its objective is the impartial reconciliation of conflicting interests in the economic structure, more figuratively in the context of a competitive *'game'*, the establishment and supervision of the *'playground'* by maintaining and preserving conditions under which the *'game'* could be most fairly played.[23] The legal and economic bases of competitive capitalism which cover the institutions of contract and private property and are implements of competition must be secured, such as: the operation of interrelated forces of supply and demand in determining market prices; and the freedom of the individual and his access to the market and the opportunity for work.[24]

Unfair methods of competition disturb the competitive order and undermine the *'rules of the game'*. These include unfair competition and the obstruction of free competition which differ in nature. Unfair competition regulation is that field of law that regulates the conduct of those who participate in business competition or the *'players in the game'*. On the other hand, antitrust laws generally govern the market structure, which is the *'playground'*.[25]

Despite this distinction they, in principle, have been treated similarly by the law. Both legal disciplines are prohibitive, proscribing the use of a certain anticompetitive or competitive practice. From the standpoint of their respective goals, antitrust laws are designed to achieve and preserve the freedom of competition, while the law on unfair competition strives to promote and maintain fairness in competition. The former seeks to prevent any restraint of trade or lessening of competition while the latter seeks to prohibit any unfair conduct while competing.[26]

The primary function of the law of unfair competition is to safeguard the competitive community against methods of trade and business that are destructive of equal opportunity in honest competition, and to protect free enterprise from such practices. On the other hand, the primary function of anti-trust laws is to maintain competitive order and provide means of keeping competition free. Freedom to compete presupposes freedom to enter the market, to develop and grow in the market free from artificial combinations or aggregations or monopoly pressures. Restraints upon the freedom to act according to their own dictates run counter to antitrust policy, as does a contract that derogates from the freedom of purchasers to buy in open market.[27] Simply stated, the object of antitrust is to keep competition free, while unfair competition is tasked with keeping it fair. As Callman puts it:

> Just as the order of peace is violated by struggle, so is the order of struggle violated by peace. Every peaceful agreement between competitors is inconsistent with the nature of the

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[21] ALTMAN, CALLMAN UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES, 2 (1996).

[22] KINTNER, AN ANTITRUST PRIMER, (1964)*citing* former US Supreme Court Justice Tom C. Clark.

[23] ALTMAN, *supra* note 21, at 9.

[24] *Id.*

[25] *Id.* at 10.

[26] *Id.* at Ch 4, 13.

[27] *Id.* at 4.

relationship, so far as it affects their positions in a competitive state of commercial activity.[28]

II. THE ROLE OF COMPETITION

A. ECONOMIC EVOLUTION OF FREE ENTERPRISE

Capitalism is an economic system based upon private property ownership and free market exchange. Freedom of enterprise and choice are vital characteristics and self-interest is the motivating force, through which sellers compete for buyers' patronage. Its ideology is centered on economic pluralism, where the power to control the market is distributed among many and social goals are achieved by a decentralized decision-making. Undue concentrations of governmental or private power are thought to be inherently destructive to the objectives of a free market.[29] *Laissez-faire* was but a brief interlude in economic history which was short lived because excessive enthusiasm for freedom in all matters resulted in disastrous economic repercussions. Its philosophy of natural liberty led to an abundance of freedom of right and action, resulting in bondage and degradation of the weak. It also negatively eased the conscience of technical law breakers, assuring them that their actions promoted public welfare and constructively giving them the argument for demanding the repeal of hampering regulations.[30] Emphasis on individual liberty elevated the right in defensive justification of almost any practice and led to the survival not of the fittest, but of the most predatory and the toughest. The theory of free contract became an illusion and inconsistent with actual economic independence.[31] When the failure of *laissez-faire* became obvious, the fallacy of the basic assumptions upon which individualism rested – that the individual, rational and free will choose and obtain such wants consistent with the well-being of the community – also became manifest.[32] The attempt to substitute competitive economic pressure for legal enforcement as a regulator of industrial and commercial behavior was not very successful.[33] As a consequence, government coming to full circle again intervened to maintain and restore the economic order.[34]

The passage of time with the changing social perceptions and political relations changed the complexion of state activity. With a change of constitutional rule and methods, discretion and autonomy passed from government to business-

[28] *Id.* at 11, *quoting* Callman, *The Essence of Anti-Trust*, 49 Columbia Law Review 1100 (1949).

[29] MOORE, MAGALI & GAY, THE LEGAL ENVIRONMENT OF BUSINESS, A CONTEXTUAL APPROACH, 1987 Edition, Smith-Weston Publishing Co., Cinn.., Ohio, USA at 344-345 [hereinafter MOORE et al].

[30] ALTMAN, *supra* note 21, at 3, *citing* Mitchell, *Intelligence and the Guidance of Economic Evolution in Authority and the Individual*, Harvard Tercentenary Publication (1937) at 8.

[31] *Id.* at 4.

[32] *Id. citing* Rosen, *The Modern Corporation and Private Property* (1932) at 345.

[33] *Id. citing* Watkins, *Economic Implications of Unfair Competition*, 21 Iowa L Rev. (1936) at 265.

[34] *Id.* at 6.

men, and the interest of the businessmen superseded the 'crown'.[35] Commerce during the transition from medieval trading, featured government intervention for the benefit of the feudal lord to *laissez-faire* as distinguished by excessive freedom in competition, produced a new kind of lord characterized by impersonalization of economic life and interdependence of territorial conditions.[36]

Corporations and conglomerates became and still are the order of the day. Economies do not speak of countries, cities, or towns but of products, domestic and foreign. Problems have become international and rarely respect political boundaries. At the present stage, there is a tug of war between the state and business where specific legislation or the lack thereof becomes the coveted prize. The pervasive modern administrative regulation is the manifestation of this tension, which necessarily arises when the business organizations proved too powerful or were deemed 'affected with public interest' requiring interference by the State.[37]

B. THE ECONOMIC THEORY OF COMPETITION

A key requisite for free enterprise to succeed on the *production* side of the economy is the force of competition. Free markets rely primarily on competition to allocate the provision of goods and services and to control the conduct among the competitors.[38] The following values are attributed to competition: (a) full employment and price stability; (b) distribution of individual opportunity to carry on a business and to prosper on one's own merit, as determined by the market; (c) control of unchecked power because it addresses concerns of concentrations of power, in its social and political aspects and makes possible the dispersal of power throughout society; and (d) competition may promote fairness, in the sense of keeping prices close to cost and of alternatives for buyers and seller.[39]

In The Wealth of Nations, Adam Smith theorized competition as essentially an *'independent striving'* for patronage by various sellers:

> Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of society, which he has in view. But the study of his own advantage, naturally or rather necessarily, leads him to prefer that employment which is most advantageous to society . . . He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it . . . he intends only his own gain, and he is in this . . . led by an invisible hand to promote an end which was no part of his intention . . . Every man as long as he does not violate the laws of justice is left perfectly free to pursue his own interest. . . to

[35] *Id.* at 7, *citing* Veblen, *The Theory of Business Enterprise* (1904) at 285.

[36] *Id.*

[37] *Id.* at 8.

[38] MOORE et al, *supra* note 29, at 345.

[39] AREEDA, ANTITRUST ANALYSIS, PROBLEMS, TEXT & CASES 6-7 (1974).

will elevate because of the withdrawal of former competitors to produce the under-supplied goods.[65] The economy will eventually reach a new equilibrium. However, the production of the once undersupplied product will have increased and once oversupplied product's production will have decreased.[66]

The theory of equilibrium is neither actual nor realistic; it is used as a device to forecast the effect of a change in one variable upon the others. Market equilibrium is an economic paradigm, said to be present when all significant variables are in balance and when no pressures or forces for change are present, which will produce a corresponding change in such variables.[67] The functional relationship between the variables of supply and demand determine the value of a commodity or service, represented by its price. Theoretically, a change in one is associated in some regular and predictable way with a corresponding change in the other.[68]

A shift in consumer preference will cause a proportional ripple in producers profits. Producers impelled by the need to keep profits or position in the market or to partake of additional profits created by an increased consumer demand compete with each to cater to changing consumer taste. Competition between and among producers in the relevant market, absent any collusive agreement to warp the equilibrium, allows consumers to define their expression of wants and thing and compels the production and sale of goods and services under conditions most favorable to consumers. It requires producers to organize the production and sale of their products and services in accordance with the scale of values that consumers choose by their relative willingness to purchase.[69] It forces producers to respond to consumer choices, if it is to survive in the market environment.

Competition regulation is aimed at preserving the *'independent striving'* required in a free enterprise[70] and curbing business practices which contort market equilibrium, by the use of artificial means. Their underlying purpose is to insure that businesses respond to the needs and interests of consumers, free from fraudulent machinations and the protection of honest competitors from predators, shielding them from the temptation to adopt the tactics of tricksters in the battle for business survival.[71] Consumers must be protected against chicanery because fairness requires that they receive an honest product, honestly presented. Promotion of consumers is upon the theory that they ultimately determine the degree of control exercised by the State.[72]

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65 *Id.*

66 *Id.* at 8.

67 ACKLEY, MACROECONOMIC THEORY, 14-15 (1961).

68 *Id.* at 8.

69 BORK, *supra* note 57, at 91.

70 MOORE et al, *supra* note 29, at 349, *citing* Smith, *supra* note 42.

71 *Id.*

72 KINTNER, *supra* note 22, at 5.

III. THE ORIGIN, NATURE AND SCOPE OF AMERICAN LAW ON UNFAIR METHODS OF COMPETITION

A. ORIGIN OF STATE INTERVENTION

From the Magna Carta, English common law judges developed legal principles which proscribed monopolies and agreements not to compete as an unlawful restriction on the freedom of the individual. The common law principles and their statutory development were incorporated into the jurisprudence of England's American colonies and later, into the laws of the newly independent United States. They were designed to put an end to unjustified privilege and to insure a permissive, diversified, and decentralized way of life.[73]

Laissez-faire in America prevailed from revolutionary times to the late nineteenth century. Individuals were encouraged to seek rewards of technological progress through unrestrained competition and the survival of the economically fittest. However, with the industrial age, competition in the milieu of freedom of contract and *laissez-faire* became more fierce, as firms aggressively fought for capital, customers and raw materials. Cutthroat competition and accompanying predatory practices, often resulted in the destruction of the weakest members of the industry and resulted either in the formation of combinations among surviving competitors or the establishment of a monopoly of the sole survivor. The individual merchants were being steadily replaced by the trusts, cartels, corporations as the customary forms of business organization.[74]

As 'big businesses' came to the forefront, protests against their abusive power mounted. Common law 'restraint of trade' doctrines and remedies proved incapable of controlling this ferocious brand of competition practiced by the 'robber barons'. Small merchants complained of being driven out of business or denied access to enter business. Farmers agitated against the rebate system and price discrimination. Labor demanded that large businesses be controlled, as a method of obtaining better wages and working conditions and prevention of antiunionism practices. Consumers and the public in general rebelled against the rising prices, deteriorating quality, unfair and deceptive practices and politically dangerous concentrations of power.[75]

However, public sentiment was not for the abandonment of the free enterprise ideology. On the contrary, continuing faith in economic individualism largely created the climate in which monopolistic abuses became possible. The focus of the outcry were the most serious abuses rather than free market system itself.[76] There was a curious divergence of private from public morality. The industrialist who preyed upon his competitors and victimized customers could still be the object of veneration, provided that he was fastidious about alcohol, sex and blasphemy.[77]

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73 KINTNER & JOELSON, AN INTERNATIONAL ANTITRUST PRIMER, 2 (1974).

74 *Id.*

75 *Id.*

76 MOORE et al, *supra* note 29, at 342.

Recognizing the threat to the marketplace, American legislators focused their concern on large corporations and their increasing use of *'trust'* arrangements to increase their size and wealth. The trust device was used extensively by corporations to gain monopolistic control over various industries. It permitted majority of the stocks of several competing corporations to be transferred to selected trustees. Ostensibly, these companies remained separate entities in the technical sense however, the designated trustees in reality made joint pricing, production and operation decisions for all the competing firms in order to eliminate competition among them.[78] As these combinations in order to avoid 'ruinous' competition intensified, so did the demand for government supervision and regulation of business.[79]

As a result, anti-trust and trade regulation were enacted as a deterrence against flagrantly anti-competitive activities. The first statutes attempting to deal with monopolistic practices emerged at the time when the trust device was prevalent, hence the laws were known as *'antitrust'* laws. Today, the trust is no longer used for such purposes and antitrust laws include all statutes, designed to promote competition.[80]

The premise underlying this body of law was that public interest is best protected from the evils of monopoly and predatory behavior by the maintenance of a competitive economy free from limitations based upon corporate self-interest;[81] and that unrestrained interaction of competing market forces will yield the best allocation of resources, the lowest prices, highest quality and the greatest material progress while simultaneously providing an environment condusive to the preservation of democratic, political and social institutions.[82]

B. ANTITRUST, ITS ORIGIN AND DEVELOPMENT

1. Common Law Origins

Cases involving alleged restraints of trade date back to at least the fifteenth century in English common law. Adopting this, American common law frowned upon attempts to restrain competition rationalizing that collusive agreements restraining trade inhibit free and open exchange of goods and services fundamental to the efficient operation of capitalist markets and was considered the antitheses of independent competition.[83] It was realized that pressures of a competitive market readily provide incentives for collusion, particularly if firms become large enough to collectively dominate a market.[84]

[77] KINTNER, *supra* note 22, at 5.

[78] MOORE et al, *supra* note 29, at 343.

[79] KINTNER & JOELSON, *supra* note 73, at 5.

[80] MOORE et al, *supra* note 29, at 343-344.

[81] *Id.*

[82] FUGATE, FOREIGN COMMERCE & THE ANTITRUST LAWS, 11 (1982) *citing* Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958).

[83] MOORE et al, *supra* note 29, at 354.

The common law heritage was ineffective as a deterrent force. Restrictive agreements could only be challenged by a party to the agreement, who had little incentive to do so, or by the injured private person, who seldom had either the evidence or the finances necessary to prove their case. In addition, with the freedom of contract recognized as a fundamental right, the trust agreement was almost beyond the common law jurisdiction.[85]

2. American Federal Antitrust Law

a. The Sherman Act

In July 2, 1890, the United States became the first country to attempt a general statutory control of the power wielded by large business enterprises with the passage of the Sherman Act.[86] The cornerstone of antitrust laws, it is known as the 'charter of economic freedom';[87] a civil and criminal statute which declares illegal every contract, combination or conspiracy in restraint of trade[88] and outlaws monopolization, attempts and conspiracies to monopolize.[89]

i. RULE OF REASON

In 1711, English common law enunciated in *Mitchel v. Reynolds*,[90] that only unreasonable agreements restraining trade were to be invalidated. The United States Supreme Court however, refused to apply this common law rule on the proposition that the sweeping and seemingly explicit statutory language of the Sherman Act, precluded its application.[91] Realizing the difficulty of its incongruous position, the American courts began to withdraw from this literal and unjustifiable reading of Section 1.

In 1898, a circuit appellate court[92] condemned an agreement among producers of cast iron pipes to fix prices in areas where they competed and divide markets to avoid the rigors of competition. While recognizing that the case could be disposed by applying Section 1 literally, the *ponente* went on to test the legality

[84] *Id.*

[85] *Id.* at 346.

[86] JACKSON et al, *supra* note 11, at 1062.

[87] *Id.*, at 1065; See also: STICKELLS, FEDERAL CONTROL OF BUSINESS, ANTITRUST LAWS, 52 (1972) *citing Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955).

[88] GOULD, U.S. CODE UNANNOTATED, Vol 1 at Title 15, Ch 1, §1, 15-2. (1994).

[89] *Id.* at §2, 15-2-15-3 (Sherman Act, §2) Monopolizing trade a felony; penalty.

[90] 24 Eng. Rep. 347 (1711). Reynolds, a baker incident to the sale of his bakery to Mitchel (plaintiff) promised not to compete for five years in the immediate locality. The court enforced the agreement on the proposition that the trade restraint may be justified as reasonable, if ancillary to some principal transaction and if limited in time and space.

[91] United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897). Upon the defendants argument that their formation of an association to set joint freight rates would not be unlawful at common law, and therefore did not violate Section 1 of the Sherman Act, the U.S. Supreme Court held, however that the common law validity of the action was irrelevant, because Section 1 condemned *every* restraint of trade. [hereinafter Trans-Missouri]

[92] United States v. Addyston Pipe & Steel Company, 175 U.S. 211 (1899).

of the agreement by reference both to common law rules and to what subsequently developed into as the *'rule of reason'*.[93] In the landmark decision of *Standard Oil Company v. United States*,[94] the United States Supreme Court fully adopted the rule of reason:

> The propositions urged by the government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language . . . [However] the statute . . . evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is undue restraint . . . it follows that it was intended that the standard of reason which had been applied at the common law . . . [was] to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.[95]

Under the rule of reason, restraints were to be tested by a full factual inquiry as to whether they will have any significant adverse effect on competition, what the justification for them is, and whether that justification could be achieved in a less anticompetitive way.[96] Subsequently, in *United States v. Chicago Board of Trade*,[97] a simpler test was formulated, as whether the restraint imposed is such, as merely regulates and perhaps thereby promote competition or whether it is such as may suppress or even destroy competition.

ii. PER SE ILLEGALITY

Per se unreasonable restraints are those whose effects on competition are so harmful that they cannot be justified.[98] In *Trans-Missouri*, it was argued that the plain language of Section 1 meant that all contracts, combinations and conspiracies in restraint of trade were *per se* unreasonable and therefore illegal. While this proposition was clearly overturned in *Standard Oil, supra*, the principle of *per se* illegality today remains, as important a standard as the rule of reason.

When an activity is unlawful *per se*, the courts are not required to conduct a rigorous investigation of its economic consequences to determine reasonableness. It bypasses the extensive inquiry of reasonableness and needs only to determine that the restraint actually exists. The *per se* rule serves two important functions. First, by declaring certain restraints *per se* illegal, the rule sets a standard of unreasonableness against which other restraints may be measured. This relieves the courts of the necessity of performing complex economic analyses, for which they are generally ill-suited. Secondly, a standard of unreasonableness promotes the stability and predictability necessary for business planning.[99]

The more prevalent *per se* illegal agreements are: fixing prices of goods or services, allocating territories or customers to avoid competing with each other,[100] fixing the price of goods and services bought, to limit the supply of commodities sold, and to collectively refuse to sell to certain distributors. Any formalized conspiracy attempting to jointly determine prices or any other market variable is referred to as a *'cartel'*. Cartel arrangements are likewise *per se* illegal under Section 1 of the Sherman Act.[101]

It is tempting to classify all restraints, as requiring an analysis under either the rule of reason or the *per se* rule. But such dichotomy would be misleading because the *per se* rule is but a specific application of the rule of reason. Few restraints blatantly show an agreement to fix prices. Restraints which initially appear to be reasonable will prove to be, after a preliminary analysis, identical with *per se* violations. Consequently, it becomes necessary to determine whether seemingly innocuous restraint results in a price fix. If the parties to the restraint intended to set prices, the intent prevails despite its actual effect.[102] Such intent makes the restraint illegal *per se*, for which no legal defenses are available.[103]

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[93] *Id.*

[94] 211 U.S. 1 (1911). Standard Oil Company of New Jersey and 33 other corporations, J.D. Rockefeller, W. Rockefeller and five other individual defendants were charged with numerous violations of Section 1 and 2 of the Sherman Act. The charges included allegations that the defendants had restricted oil output, obtained preferential rail rates for shipping oil, fixed prices, conspired to monopolize oil refineries, and established an illegal trust which held the stock of over 40 competing oil companies. The court found that Standard Oil violated §1 & 2, however of great importance was the rejection by the Court of the Justice Department's argument that all contracts in restraint of trade violate §1. [hereinafter Standard Oil].

[95] *Id.* at 63.

[96] JACKSON et al, *supra* note 11, at 1065.

[97] 246 U.S. 231 (1918).

[98] BLACKBURN, HAYMAN & MALIN, THE LEGAL ENVIRONMENT OF BUSINESS, 567 (1991) [hereinafter BLACKBURN et al].

[99] *Id.*

[100] JACKSON et al, *supra* note 11, at 1063.

[101] MOORE et al, *supra* note 29, at 356-357.

[102] A complex price fix was illustrated in United States v. Socony-Vacuum Oil Company, 310 U.S. 150 (1940). More gasoline was refined than was demanded, the independents having no storage facilities had to sell their 'distress oil' in the spot market. The resulting glut depressed prices. The major oil companies responded with a buying program. Regardless of their needs, they agreed to buy oil from each independent. Although on the surface the majors were only seeking to purchase the gasoline in the spot market and were allowing the market to fix the price. The purpose of their buying program was to set a floor price and thereby stabilize them. This was compounded by the pricing formulae in the long-term contracts which were based on the spot market price. The buying program, in this case was held to be *per se* illegal.

[103] MOORE et al, *supra* note 29, at 357.

iii. ACTIVITIES IN RESTRAINT OF TRADE

A. Horizontal Restraints

The horizontal restraint first declared to be *per se* illegal was the price fix.[104] Horizontal price fixing involves an agreement, express or implied, among competitors at the same level of the distribution chain, to fix the prices of goods or services they offer to the public. It is viewed as eliminating the main form of competition in the market: that based on price.[105] The United States Supreme Court has declared it as *per se* unlawful, despite the reasonableness of the price.[106]

Price fixing arrangements are not limited to agreements which specify prices but also include conspiracies to stabilize prices, to set a floor under the prices, or to set a maximum level.[107] More recently, after many years of excluding agreements by persons performing services, including doctors and lawyers from the jurisdiction of Section 1, because these persons were not engaged in trade or commerce, the courts reviewed the question of price fixing in the service sector in the contemporary context.

In *Goldfarb v. Virginia State Bar, et al*,[108] the United States Supreme Court addressed the issue in a case involving legal fees. The court refused to accept the defense of the state and county bar that the practice of learned professions were not *'trade and commerce'* and thus totally excluded from antitrust regulation. It held that such sweeping exclusion finds no support in the intention of the law and that the nature of an occupation standing alone does not provide a sanctuary from the Sherman Act because the rendering of service in exchange for money is commerce, in the most common usage of the word.

It is to be noted however, that not all business arrangements that affect prices are condemned as *per se* price fixes. Many business arrangements are legitimate despite its incidental effects on price. By forming trade associations for example, a group of competing sellers may organize buying cooperatives to take advantage of bulk discounts[109] or engage in cooperative research, publication and statistical dissemination in an industry. When the effects on price are merely incidental to its legitimate purpose, such arrangements are perfectly valid.[110] If after an evaluation of their activities it is found that the *'dominant purpose'* of the existence of such an association is to restrain trade, the government may, in addition to other penalties for engaging in unreasonable restraints, dissolve such as association.[111]

Horizontal restraints are not limited to price fixes between competitors, they extend to agreements of horizontal division of markets or customers as well. This occurs when two or more competitors at the same level of business agree to divide the market or customers geographically or otherwise. The obvious effect of such agreements is to eliminate competition among the firms who reach the agreement.[112]

In *United States v. Topco Associates*,[113] horizontal territorial divisions that restrain intra-brand competition were declared *per se* illegal and was held unjustified, even if they promoted inter-brand competition. Moreover, they are equally illegal, not only between sellers of competing brands, but also among those of the same brand.[114]

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[104] United States v. Trenton Potteries, 273 U.S. 392 (1927). [hereinafter Trenton Potteries].

[105] MOORE et al, *supra* note 29, at 357.

[106] Trenton Potteries, *supra* note 104. Twenty-three corporations did not deny that they fixed prices. Their defense was that the fixed prices were reasonable and thus, permissible under the rule of reason. The Court held however, that while Standard Oil ruled that only restraints which are unreasonable are prohibited, it does not follow that agreements to fix and maintain prices are reasonable restraints, merely because of reasonableness of the price.

[107] BLACKBURN et al, *supra* note 98, at 569-570.

[108] 421 U.S. 773 (1975). Petitioners were in need of legal services to perform a title examination. This service could only be performed by lawyers. They sent 36 letters to several lawyers, 19 of whom responded indicating their fee at not less than the rate fixed by a minimum schedule published by the respondent bar association. Because petitioners did not find a lawyer willing to charge a fee lower than what the schedule dictated, they instituted an action against the State and Country Bar alleging that the minimum fee schedule constitutes price fixing in violation of Section 1 of the Sherman Act. [hereinafter Goldfarb].

[109] BLACKBURN et al, *supra* note 98, at 568.

[110] MOORE et al, *supra* note 29, at 363.

[111] In Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936). The United States Supreme Court while noting several legitimate activities of the association, however concluded that the dominant purpose of the Institute was to create and maintain a relatively high and uniform price structure among its members. This was found by the Court to be an unreasonable restraint of trade under Section 1 and upheld the District Court's decree to dissolve the Institute.

[112] MOORE et al, *supra* note 29, at 361.

[113] 405 U.S. 596 (1972). Twenty-five independent supermarket chains organized to form Topco Associates, to enable them to compete with the larger chains. They developed and marketed Topco products, giving themselves a private label line of merchandise. Each member of the association received an exclusive territory wherein to sell the Topco products. The Supreme Court held these agreements of exclusive territories to be *per se* illegal. Their elimination of intraband competition was held to be unjustified by their promotion of competition between the Topco members and national chains.[hereinafter Topco Associates].

[114] BLACKBURN et al, *supra* note 98, at 569.

B. Vertical Restraints[115]

The most common vertical restraints are territory, customer and market restraints, retail price maintenance, tying devices, exclusive dealing arrangements. The first two are violations of the Sherman Act while the last are also covered by another antitrust statute, the Clayton Act. Vertical price fixing are agreements that fix prices between the buyer and seller at different levels of the manufacturing and distribution process.[116] Typically, they are between manufacturer and distributor or retailer, or between franchisor and franchisee. Their purpose is to sacrifice some interbrand to further intraband competition.[117] Resale price maintenance, a specie of vertical price fixing occurs when a manufacturer tries to control the retail price of its products. A manufacturer may wish to set a maximum retail price on its products, as part of an aggressive campaign to take customers away from competitors or it may want to maintain a minimum price to create an aura of high quality of goods. If the manufacturer and retailer agree to minimum or maximum retail prices, the contract is a vertical fix and *per se* illegal.[118]

Manufacturers and franchisors frequently impose territorial restraints on retailers or franchisees. Vertical territorial or customer restraints differ from horizontal restraints in that they are designed for the benefit of the manufacturer or franchisor rather than for the benefit of the competing retailers, distributors or franchisees.[119] In *White Motor Company v. United States*, the U.S. Supreme Court,

[115] Author's Note: The vertical restraints under the Clayton Act will be discussed under the relevant section of the work. Both types of restraints, however are covered by vertical restraint guidelines issued by the US Justice Department for the first time in antitrust history, captioned from BLACKBURN et al, *supra* note 98, at 584, as follows: 1.) Per se violations require express or circumstantial evidence of an explicit agreement to fix resale prices. 2.) Restraints that are always lawful include selective distribution through a limited number of dealers, dealer location clauses, assigning areas of primary responsibility, and profit passover arrangements, whereby a dealer selling in another dealer's area of primary responsibility must compensate that dealer for promotional and servicing costs. 3.)Territorial and exclusive dealing restraints are analyzed under a two-step approach: Step 1. Requires calculating the *vertical restraint index* (VRI) by summing the squares of the market shares of each firm that is a party to an arrangement containing the restraint. Step 1 also requires calculating the coverage ratio, which is the percentage of each market involved in the restraint. Under Step 1, the Justice Department does not challenge a restraint if the market share of the party imposing the restraint is 10 % or less, or if each level of the market has a VRI of 1,200 or less; or a coverage ratio below 60 %. Step 2. If the restraint does not pass Step 1, the Department analyzes the restraint further focusing on market structure, ease of entry, the VRIs and coverage ratios, whether market conditions are conducive to collusion, the exclusionary effects of the restraint, the intent of the parties, and the size of the firms. 4.) The department does not challenge tie-ins where the firm's market share in the tying product is less than 30%.

[116] MOORE et al, *supra* note 29, at 361.

[117] Author's Note: The purpose of horizontal territorial division agreements is the promotion of interbrand competition by sacrificing intrabrand competition. These agreements have been declared illegal *per se* in Topco Associates, *supra*. Inversely, the purpose of vertical territorial divisions is the promotion of intrabrand competition at the expense of interbrand competition. These restraints are deemed not to be *per se* unreasonable, but are to be tested under the rule of reason. *See also* note 125, *infra*.

[118] BLACKBURN et al, *supra* note 98, at 573.

[119] *Id.* at 570.

refused to categorize vertical territorial restraints as *per se* illegal on the ground that the Court's experience on the matter was insufficient and the validity of these agreements were better tested under the rule of reason.[120] Four years later, in *United States v. Arnold Schwinn & Company*,[121] the Court reversed itself and concluded that it had gained enough experience and qualifiedly declared agreements of vertical territorial divisions as *per se* illegalities.[122]

Responding to the *Schwinn* doctrine, manufacturers made changes in their distribution methods. Many of them however, found it impossible to alter their system in manner that ensured retention of legal title to their products. These manufacturers resorted to assigning areas of primary responsibility and employing dealer location clauses.[123] The legality of these vertical non-price restraints was tested in *Continental TV, Inc. v. GTE Sylvania, Incorporated*.[124] In this case, the Court reverted to the standard articulated in *White Motor* and abandoned the *per se* rule in *Schwinn*, reasoning that when the anti-competitive effects are shown to result from particular vertical restrictions, they can be adequately policed under the rule of reason.[125]

iv. REQUIREMENT OF JOINT ACTION

While a joint or concerted action is a requirement for a violation of Section 1 of the Sherman Act, not all joint or concerted actions are considered violations thereof. There is a wide variety of these activities – some plainly uncompetitive, others enhancing competition. To clarify the requirement of joint action in relation to a violation of Section 1 of the Sherman Act, intra-enterprise conspiracy, conscious parallelism and group boycotts will be discussed.

A. Intraenterprise Conspiracy

An intra-enterprise conspiracy occurs when two or more parts of the same enterprise agree to restrain trade. A corporation may have many different divisions, each responsible for a different line of products. Since the divisions are all part of the same corporation, there is only one legal entity. As such, there could be

[120] 372 U.S. 253 (1963) [hereinafter White Motor].

[121] 88 U.S. 350 (1967) [hereinafter Schwinn].

[122] *Id.* The United States Supreme Court held that vertical territorial divisions were *per se* illegal, if the manufacturer parted with ownership and control of the product. Where the manufacturer retained title to the product however, exclusive territories are not *per se* unreasonable.

[123] BLACKBURN et al, *supra* note 98, at 570.

[124] 433 U.S. 36 (1977).

[125] *Id.* Continental TV was a licensed dealer of GTE Sylvania products. Its license contained a dealer location clause prohibiting Continental from selling Sylvania products outside the location specified in the license agreement. Continental violated the location clause, Sylvania canceled Continental's dealership and Continental sued, contending that the dealer location clause violated Section 1 of the Sherman Act. The validity of the location clause was upheld reasoning that vertical restrictions promote intra-brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.

no conspiracy nor agreement among them. Conversely, if a business organizes its different departments into (or classifies as) separate subsidiaries, each subsidiary would be a separate corporation and a separate legal entity.[126] For many years, Section 1 applied to conspiracies among a corporation and its subsidiaries. In *Copperweld Corporation v. Independence Tube Corporation,*[127] however, the court abandoned its prior stand and adopted the doctrine that a corporation cannot be found to have conspired with its wholly owned subsidiaries.

B. Conscious Parallelism

Conscious parallelism is present when a common or parallel behavior among competitors is evident but no explicit evidence of a conspiracy or trade-restraining contract exists. It is a joint action that occurs when many competitors copy the actions of a leader in a market and where a few large producers dominate a highly concentrated market. A market change by a dominant firm affects market conditions substantially, causing competitors to follow suit. As a general rule, conscious parallelism does not violate Section 1, as long as each competitor had made its decision independently.[128] However, certain circumstances may suggest that what appears to be a series of independent actions to copy a price leader may actually be the result of an agreement among the competitors.

In the celebrated anti-trust suit against Japanese television manufacturers,[129] the evidence required to prove conscious parallelism went beyond proof of meetings, communications among the competitors or even parallel predatory action which benefits the 'conspirators' if all others took the same action. The standard established is that the reviewing tribunal must be able to appreciate that the alleged predatory practices of the conspiracy make practical sense and additionally, to see the rational motive for such a conspiracy.

[126] BLACKBURN et al, *supra* note 98, at 562.

[127] 457 U.S. 752 (1984). The Court reversed its earlier ruling reasoning that the very notion of an 'agreement' in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning, because in reality a parent and a wholly-owned subsidiary always have a ' unity of purpose or a common design, sharing a common purpose'.

[128] MOORE et al, *supra* note 29, at 363. In the 1960's manufacturers of corrugated boxes agreed to exchange price information and data. Although these companies together accounted for 90% of the shipments of such boxes in the southeastern USA, their agreement appeared to fail short of *per se* price fixing under Section 1. Subsequently however, in United States v. Container Corporation of America, 393 U.S. 333 (1969), the Court took a different view and held that the 'parallel' and price-stabilizing results of this practice constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

[129] Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574 (1986). American TV manufacturers sued Japanese manufacturers for violating the Sherman Act. The Americans alleged that the Japanese fixed prices for TV sets at artificially high levels in Japan and at artificially low levels in USA, claiming that the Japanese used their excess domestic profits to offset their losses in the American market. The US Supreme Court held that in light of the absence of any rational motive to conspire, neither pricing practices, nor their conduct in the Japanese market, nor their agreement respecting prices and distribution in the American market, suffice to create a 'genuine issue for trial'.

C. Group Boycotts

Any individual producer may validly refuse to deal with anyone without violating the Sherman Act. However, concerted refusals to deal or "group boycotts," are *per se* violations of Section 1. Group boycotts occur when a group of firms at one level of the market induce or coerce a group of firms at another level to refrain from dealing with the competitors of the first group.[130] Group activities that have been held as *per se* illegalities generally involve joint efforts by a firm or by several firms to disadvantage competitors either by directly denying or by persuading or coercing suppliers or customers to refuse competitors.[131] For example, a group of retail lumber dealers circulated a black list to induce all retailers not to deal with wholesalers who also sold lumber at retail discount prices. The practice was held illegal.[132] In another case, it was illegal for a group of automobile dealers to induce General Motors not to deal with discount outlets.[133]

Viewed literally, many group activities amount to a concerted refusal to deal. For many years it was unclear how these actions should be evaluated when challenged under the Sherman Act. *Northwest Wholesale*, enumerated certain traits to merit the *per se* treatment that: (a) the boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete; (b) frequently, the boycotting firms possessed a dominant position in the market; and (c) the practices were not justified by plausible arguments that they intended to enhance overall efficiency and make the markets more competitive. The court held a finding of *per se* illegality (is justified) because the likelihood of anti-competitive effects is clear and the possibility of countervailing pro-competitive effects is remote. The standard however, does not require for the challenged joint refusal to possess all three traits. It is sufficient that a likelihood of predominantly anti-competitive consequences exists. Otherwise, where these cooperative arrangements would seem to be designed to increase economic efficiency and render the markets more rather than less competitive, these arrangements are valid.

v. MONOPOLY AND MONOPOLIZATION

Both economic theory and real-world observation clearly indicate that the attainment and exercise of monopoly power are antithetical with a free enterprise system. Economic forces and opportunity, productive and allocative efficiency and

[130] BLACKBURN et al, *supra* note 98, at 585.

[131] Northwest Wholesale Stationeries, Incorporated v. Pacific Stationery & Printing Company, 472 U.S. 284 (1985). Northwest was a wholesale buying cooperative of which, Pacific was a member. Northwest expelled Pacific from membership, on the ground that it had failed to notify the former of a change of ownership. Pacific otherwise claimed that the expulsion was for maintaining a competing wholesale operation. The Supreme Court validated the expulsion, holding that the arrangement permit the participating retailers cost-savings and order-filling guarantees, that enable them to maintain their stock so as to compete more effectively with the larger retailers. [hereinafter Northwest Wholesale].

[132] Eastern States Retail Lumber Dealers Association v. United States, 193 U.S. 38 (1904).

[133] United States v. General Motors Corporation, 384 U.S. 17 (1966).

limited economic and political power are all benefits of free competition which are threatened by monopoly power.[134] Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and combining or conspiring with others to monopolize.[135] While the violations under Section 1 concentrate on collusion among firms, Section 2 focuses primarily on monopoly power and the conduct of a single firm.[136] The American courts have consistently applied the rule of reason to Section 2 cases, recognizing that success achieved through legitimate means is not to be sanctioned. Monopolies are not outlawed; it is the anti-competitive exercise of economic power that is prohibited.[137]

A. Monopolization

Monopolization is defined as the exercise of monopoly power within a relevant market with the intent to monopolize. In determining whether or not a business enterprise has violated the proscription against monopolization, a three-step analysis is required:

1. Determining the relevant market, including the product and location;
2. Determining if the firm has monopoly power in the relevant market; and
3. Determining if the monopoly power was exercised with intent to monopolize.[138]

1. Relevant Market

The determination of the relevant market is critically important in monopolization cases because it forms the basis upon which the proportional market share of the firm is determined. The bigger the relevant market, the smaller the firm's market share. In a broadly-defined relevant market, an accused monopolist may be able to show that it has insufficient monopoly power necessary for a violation of Section 2.

There are two aspects to be looked into to determine the relevant market; or namely, product and geography.[139] It was only in 1956, in *United States v. Du Pont*,[140] where the United States Supreme Court specified that the test in determining the relevant product market is whether or not that market which is composed

[134] MOORE et al, *supra* note 29, at 364.

[135] Sherman Act, § 2, as amended, *supra* note 89.

[136] MOORE et al, *supra* note 29, at 364.

[137] BLACKBURN et al, *supra* note 98, at 591.

[138] *Id.* at 592.

[139] *Id.*

[140] 351 U.S. 377 (1956). The United States Supreme Court determined the relevant product market in this case to be 'all flexible wrapping materials', including wax paper, aluminum foil, polyetherene, and not only the cellophane market, because cellophane competed with the other types of flexible wrapping materials. Thus, Du Pont having only 20% of the 'all flexible wrapping materials' market (it had 75% of the cellophane market) was deemed to have insufficient monopoly power, necessary to prove monopolization.

of products that have a *'reasonable interchangeability'* for the purposes for which they were produced; price, use, and qualities considered. On the other hand, the relevant geographical market essentially is the place where sellers of the relevant product compete.[141] It determines the territorial scope upon which the relevant product market may be derived. It may be national, regional, or within cities where the business enterprise sells its products or offers its services. In considering the relevant geographical market, courts consider such factors as seller and buyer behavior, corporate organizational structures, distribution networks, and transportation costs.[142]

2. Monopoly Power

Monopoly power begins to appear as business enterprise moves away from pure competition, approaching pure monopoly, and increases as the departure becomes greater. It is a matter of degree and is not limited to situations of pure monopoly.[143] To be considered a monopolist however, a firm must possess a certain amount of monopoly power in the relevant market. With such monopoly power, it has the ability to control market price and/or to exclude competitors,[144] independent of the forces of supply and demand.[145]

In determining market power, the key is to initially decide the alleged monopolist's share, expressed as a proportion of production, in units sold or revenue as it relates to a relevant market. A firm possessing a market share between 85% to 100% is deemed conclusively to have monopoly power, whereas a firm whose share is less than 50% would be found to lack such power. When an enterprise controls between 50% to 85% of the market, factors beyond percentage market share are looked into.[146] These additional considerations include the structure of the market, barriers to entry into the market, the strength of the alleged monopolist's competitors and conduct inconsistent with competition.[147] *United States v. U.S. Steel Corporation*[148] exemplified the essentiality of monopoly power in monopolization cases. The United States Supreme Court held that whatever wrongful

[141] BLACKBURN et al, *supra* note 98, at 592.

[142] *Id.*

[143] Author's Note: Pure competition is discussed in Ch II, §C1 of this work. Pure monopoly is the converse of pure competition, in this economic model, the pure monopolist with 100% of the market exercises absolute economic power, within the relevant market.

[144] MOORE at al, *supra* note 29, at 365.

[145] BLACKBURN et al, *supra* note 98, at 592.

[146] *Id.*

[147] *Id.* at 593.

[148] 251 U.S. 417 (1920). The Justice Department charged US Steel Corporation of monopolization by gaining control of approximately 180 independent firms accounting for over 50% of the national iron and steel output. US Steel's defense was that it simply did not possess sufficient monopoly power to make it capable of violating Section 2, since its market share of the national steel industry fell from 50.1% in 1901 to 40.9% in 1911. US Steel contended that this single corporate entity was not formed for the purpose of monopolization, but rather it was an efficient response to the technological necessities of making and handling steel. [hereinafter US Steel].

intent of defendant corporation was immaterial, as it had insufficient monopoly power by itself, to control prices or exclude competition.

On the other hand, the landmark decision of *United States v. Aluminum Company of America*[149] vividly showed the crucial importance of defining the relevant product market to determine monopoly power. In this case, where the product market was defined broadly, Alcoa was found only to hold 33% of such market; whereas in a narrowly defined market, it had a 90% market share. It is considered an anti-trust landmark decision in monopolization cases because of its strong emphasis on the market structure criterion in determining the presence of monopolization. In effect, the entire case depended upon the analysis of the relevant market. The court found that Alcoa had 90% monopoly power and by that fact inferred that it was guilty of monopolization in the said market.

3. Intent to Monopolize

In 1920, the US Court pronounced that the law does not make mere size or the existence of unexerted power an offense.[150] The law as presently construed,[151] requires more than the mere existence of monopoly power to violate Section 2. The alleged monopolist must have deliberately acted with intent to monopolize,[152] often referred to as the *'purposeful act requirement'*.[153] For there to be monopolization, aside from proving the monopoly power of the alleged monopolist, its deliberate conduct with intent to monopolize must also be proved.

The standard required in monopolization is the general intent test. American courts examine the reasonably foreseeable consequences of the actions of an alleged monopolist, even when there is no specific intent behind the firm's actions. If monopoly power is a reasonably foreseeable result, US courts find that the firm intended to monopolize. All that is required is to engage in deliberate conduct, which foreseeably results in the acquisition or maintenance of monopoly power.[154]

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149 148 F. 2d 416, (2D Cir. 1945). Alcoa was charged with monopolizing eleven different product markets, including bauxite, aluminum cooking utensils, and virgin pig and ingot aluminum. The trial court dismissed the charges concluding that none of the markets had been monopolized. Delivering the majority opinion, Judge Learned Hand concluded as above stated. [hereinafter Alcoa].

150 US Steel, supra note 148.

151 MOORE et al, *supra* note 29, at 370. The court's position in US Steel was modified in the 1945 Alcoa decision, wherein Judge Hand placed more emphasis upon structural market power as the deciding factor. However, Judge Hand left a window open for exclusion, it clarified that a monopoly might avoid a violation of Section 2, if the monopoly power was innocently 'thrust upon' the firm. In 1966, Grinnell, *infra* note 157 opened the window for avoidance farther. The court was careful to distinguish between the 'wilful acquisition or maintenance' of monopoly power and 'the growth or development as a consequence of a superior product, business acumen, or historic accident'.

152 *Id.*

153 BLACKBURN et al, *supra* note 98, at 593.

154 *Id.* The acts which show the required intent are not limited to predatory, immoral or unfair practices, but includes actions which in the absence of monopoly power, would generally be regarded as good business practice.

When a firm achieves monopoly power without intending to, it is a passive or thrust-upon monopoly.[155] These legal monopolies exist when the government confers a monopoly on a firm, as in the grant of franchises to public utilities and the grant of exclusive patents. In certain cases, a market may be so small that only a single firm can efficiently and profitably serve it or changes in consumer tastes drive out all, but one producer or a producer may develop a new product and is the only firm in the market until other producers enter it.[156] The second kind of cases are also referred to as natural monopolies. Finally, a producer may achieve monopoly position as a result of a superior product or skill, business acumen, foresight and industry.[157]

Legal monopolies are however not immune from Sherman Act jurisdiction. If the foreseeable result of a passive monopolist's conduct is to exclude competition,[158] such business practices violate Section 2, as purposeful acts of monopolization. A legal monopoly power not otherwise unlawful may violate Section 2, where such power was unlawfully obtained,[159] improperly used or maintained.[160] Similarly, a natural monopolist may be guilty of a violation, if it uses predatory or other unfair methods to drive out competitors.[161]

B. Attempts to Monopolize

Attempts to monopolize are the employment of methods, means and practices, which, if successful, attain monopolization or nevertheless approach monopolization so close, as to create a dangerous probability of it.[162] In attempts to monopolize, the defendant firm has not yet attained monopoly power. There is thus no need to establish the same.[163] The more demanding standard of specific intent

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155 Alcoa, *supra* note 149.

156 BLACKBURN et al, *supra* note 98, at 593.

157 United States v. Grinnell Corporation, 384 U.S. 563 (1966).

158 United States v. Terminal Railroad Association, 284 U.S. 383 (1912). Several railroad companies combined to form Terminal Railroad Association, which owned and operated the sole terminal of St. Loius. The association required the unanimous consent of all members before allowing a non-member access to the terminal. The court held that the association violated Section 2 by refusing appropriate and equal use of the terminal to non-member companies.

159 For example, a patent or franchise was fraudulently obtained.

160 Aspen Skiing Company v. Aspen Highlands Skiing Corporation, 472 U.S. 585 (1985). Skiing demanded that Highlands reduce its share of proceeds from their combined skiing facilities. Highlands refused and Skiing terminated the arrangement. Thereafter, it denied Highlands access to its three areas even when the latter offered to pay full retail price. Highlands sued for treble damages, claiming that Skiing had monopolized the market for downhill skiing services in Aspen. It won.

161 United States v. Griffith, 334 U.S. 100 (1948). Griffith owned a chain of movie theaters, which in certain towns, he enjoyed a natural monopoly because the population was so small that they could only support one theater. Griffith used the legally attained monopoly position to obtain from distributors exclusive rights to motion pictures in towns where it faced competition. The court held that a natural monopoly violated Section 2, where it used its monopoly in one market to foreclose competition or gain a competitive advantage in another market.

162 American Tobacco Company v. United States, 328 U.S. 781 (1946). [hereinafter American Tobacco].

163 MOORE et al, *supra* note 29, at 376.

to monopolize must however, be met. Proof of general intent or a *'deliberateness'* to obtain or maintain monopoly power is insufficient and no inference of intent to monopolize may be made from the possession of monopoly power, precisely because the firm has yet to actually achieve such power.[164]

To prove specific intent, the courts have required evidence that the defendant firm has engaged in exclusionary or predatory acts with a specific intent of achieving a monopoly. *American Tobacco* interpreted the term *'predatory'* to refer to a disposition to exploit or injure others for one's own gain.[165] In addition to showing that such practices occurred and that they were specifically intended to monopolize, a *'dangerous probability'* of success must also be proved.[166] Because of these requirements, it has been observed that the difficulty of proof required in attempting to monopolize cases has resulted in few successfully prosecuted cases.[167]

C. Combining or Conspiring to Monopolize.

Combining or conspiring to monopolize requires the action of two or more persons. It is an exception to the generally unilateral character of Section 2 violations. Conspiracy to monopolize is a separate offense, requiring proof that two or more entities conspired with the specific intent of monopolizing, plus at least one overt act to accomplish it. The proof required under Section 2 is no different from that under Section 1. Evidence of specific intent is the same as in attempt to monopolize cases. When there is a conspiracy to commit predatory acts, it most likely constitutes a restraint of trade. Such conspiracy is usually challenged more easily under Section 1, rather than as a conspiracy to monopolize.[168]

vi. LIMITATIONS AND THE NEED FOR ADDITIONAL LEGISLATION

The Sherman Act was perceived by diverse sectors as insufficient, particularly after the pronouncement of the rule of reason in *Standard Oil*. The Act's inherent lack of specificity coupled with the rule of reason meant that most alleged violations had to be decided on a case to case basis. Some feared this would permit the courts to sanction various anti-competitive practices while others expressed concern that the sweeping judicial discretion embodied in the rule might result in the prohibition of many types of beneficial business conduct.[169]

164 Standard Oil, *supra* note 95. In addition to having been found guilty of restraining of trade, the Court concluded from Standard's ruthless market practices that it acted with 'specific intent' to monopolize the petroleum industry. The corporate officers were likewise found to have possessed the required 'specific intent' because their actions showed that they intended to commit the specific crime of monopolization.

165 MOORE et al, *supra* note 29, at 385. Examples of predatory practices include: sustained below-cost pricing, boycotting arrangements, foreclosing access to distributor channels, excessive advertising which cannot be matched by competitors.

166 American Tobacco, *supra* note 162.

167 MOORE et al, *supra* note 29, at 376.

168 *Id.* at 377. See also: BLACKBURN et al, *supra* note 98, at 604.

169 MOORE et al, *supra* note 29, at 388.

Certain questionable business practices were, moreover, simply beyond the Sherman Act, such as corporate directors serving on the boards of competing firms or business conduct likely have anti-competitive effects. These fall short of actual monopolization or an unreasonable restraint of trade.[170] Also, the Sherman Act was believed to be an ineffective safeguard against anti-competitive mergers, which were challenged under it with little success. In 1895, a merger which placed 98% of the US output of refined sugar under the control of one corporation was held lawful.[171] There are also the decisions, which were viewed contrary to legislative history, like the inclusion of labor unions within the its ambit.[172]

The perceived insufficiency and ineffectiveness of various aspects of the Sherman Act invariably led to the movement by widely divergent forces for additional legislation. Support came from factions openly hostile to big business and desirous of more specific and drastic legislation. These groups favored sharper definitions of unlawful practices, as well as the establishment of an independent commission empowered to investigate a wide variety of unfair trade practices more expeditiously than the courts.[173]

Surprisingly, the business community supported additional legislation, although for different reasons. More specific statutes would benefit them by providing advance guidance on which practices were acceptable and which were not, a desirable feature which was felt to be lacking in the Sherman Act. Businesses also favored the establishment of an independent commission. They envisioned some sort of friendly advisor which would, upon request, scrutinize the conduct of a business and either point out its violations or give it a clean bill of health. The commission would also have the authority to legalize many business practices that may be technical restraints of trade but considered necessary to a growing economy.[174]

Within this context the Clayton Act and the Federal Commission Act in 1914 were passed, providing for some of what each of the rallying groups wanted. Together with the Sherman Act, these three statutes supplement each other and express the fundamental American federal anti-trust policy.[175] Two guiding principles give them an underlying unity. The first is that the objective of anti-trust laws is to prohibit private restraints that may interfere with a competitive economy and this is achieved through sweeping provisions directed at their deterrence. The second is that the Justice Department, the Federal Trade Commission, and the courts are given broad discretion in interpreting and applying these laws because of the open-textured language of the statutes.[176]

170 *Id.*

171 United States v. E.C. Knight Company, 156 U.S. 1 (1895).

172 MOORE et al, *supra* note 29, at 388-389.

173 *Id.*

174 *Id.*

175 STICKELLS, *supra* note 87, at 51.

176 Jerrold Vancise, *The Federal Antitrust Laws*, American Enterprise Institute for Public Policy, Wash., USA (1975).

b. The Clayton Act

The Clayton Act provides for statutory precision in condemning certain business practices, absent under the generality of the Sherman Act. It is a civil statute which declaring several specific practices in commerce as unlawful. These practices were divided into four categories: (a) price discrimination between different buyers of goods of like grade and quality where the effect may be to lessen competition or to create a monopoly in any line of commerce;[177] (b) exclusive dealing and tying arrangements, where the effect may be substantially less competition or to create a monopoly in any line of commerce;[178] (c) corporate asset or stock mergers, where the effect may be less competition or to create a monopoly;[179] and (d) persons who serve as directors of competing firms.[180]

i. TYING DEVICES AND EXCLUSIVE DEALING ARRANGEMENTS

Section 3 of the Clayton Act[181] has been interpreted to regulate two types of business practices: tying arrangements and exclusive dealing agreements. They are in the nature of vertical restraints previously discussed in this study. Section 3 does not establish a *per se* illegality rule, the activities covered therein are illegal only when three conditions are present: (a) goods are involved; (b) the challenged act is lease or sale of goods; and (c) the effect of the activity may be substantially less competition or the tendency to create a monopoly.[182]

A. Tying Devices

Tying devices or tie-ins occur when a party offers to provide certain goods or service only to those who agree to accept other goods or services. All tie-ins are restraints of trade under Section 1 of the Sherman Act and where the products involved are tangible commodities, the tying device is also covered by Section 3 of the Clayton Act. The desired goods are the *'tying product'* and the product the buyer is compelled to take is the *'tied product'*.[183]

177 The Clayton Act, §2, *as amended by* The Robinson-Patman Act of 1936.

178 *Id.* § 3.

179 *Id.* § 7, *as amended by* The Celler-Kefauver Act of 1950.

180 *Id.*§ 8.

181 GOULD, *supra* note 88, at §14, 15-5. (Clayton Act, sec 3) Sale, etc., on agreement not to use goods of competitor.

182 MOORE et al, *supra* note 29, at 394.

183 BLACKBURN et al, *supra* note 98, at 577.

While tie-ins involving tangible goods (not services) covered under Section 3 of the Clayton Act are not within the *per se* illegality rule, such tying device may be declared to be a *per se* violation of the Section 1 of the Sherman Act[184] when the following requisites hold: (a) a substantial amount of commerce must be affected;[185] (b) two separate products must be involved; and[186] (c) sufficient economic power in the tying product to enforce a tie-in.[187]

Jefferson Parish Hospital District v. Hyde[188] clarified that the essential characteristic that makes a tie-in unlawful is the seller's exploitation of its control over the tying product by compelling the buyer to purchase a tied product, they did not want or may have wanted to purchase elsewhere, at different terms.

B. Exclusive Dealing Agreements

Exclusive dealing agreements exist when the sale of a product is conditioned, on the buyer's agreement to deal only in that product or not to deal in competitor's products. In the form of *'requirement contracts'*, they obligate the buyer to purchase all of its requirements of a given commodity from the seller or not to buy any goods from the competitor of the seller.[189] The results of these agreements may not be totally anti-competitive. There are certain instances when there are beneficial effects. They may ease planning and reduce costs to the seller[190] because he is protected against market fluctuations and afforded a predictable market for

184 In Northern Pacific, *supra* note 82, the defendant company required lessees of its land to transport agricultural commodities over its railroad. The United States Supreme Court held that the *per se* illegality standard is applicable to tying arrangements, stating: "They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition, in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. . ."

185 *Id.*

186 BLACKBURN et al, *supra* note 98, at 577. A situation which two or more products must be sold together does not necessarily involve an illegal tie-in. In determining if a particular arrangement is a valid package of goods or an illegal tie-in, the courts consider whether (1) others in the field offer the products separately; (2) the number of pieces in each package varies considerably; (3) the purchaser is charged separately for each item; and (4) some of the items are available separately to other consumers. For example, no tie-in exists even though it is impossible to buy a new car without a spare tire.

187 Times-Picayune Publishing Company v. United States, 345 U.S. 594, 611 (1953). The United States Supreme Court held: "The essence of illegality in tying arrangement is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next . . ."

188 466 U.S. 2 (1984). US Supreme Court upheld petitioner's agreement with Roux & Associates, that the latter would provide all anesthesiology services needed by petitioner's patients, reasoning that 70% of the patients residing in the parish enter hospitals other than East Jefferson, thus East Jefferson did not have dominance over the persons residing in the parish.

189 MOORE et al, *supra* note 29, at 396.

190 *Id.*

his products.[191] The buyer may also benefit, from a reduction of inventory costs.[192] Assured of a constant supply, he is protected against price increases and avoids the costs of storage.[193]

Inversely, the major detrimental effect is to foreclose a market to the seller's competitors. It is only after an evaluation that the agreements 'may substantially lessen competition or tend to create a monopoly in any line of commerce', that these agreements are invalidated.[194] The statutory language of the law provides the anti-competitive effect be 'in any line of commerce'. This requires the determination of the relevant market, as discussed in the section on monopolization. For there to be a Clayton Act violation, a probable competitive effect in a well-defined relevant market must be shown.[195]

In 1949, the first of two major exclusive dealing cases, *Standard Oil of California v. United States,*[196] established the doctrine that the agreements would violate Section 3, if competition has been foreclosed in a substantial share of the line of commerce affected. It did not require that competition actually be diminished since to interpret otherwise, would make the very explicitness a means of conferring immunity upon the practices it singles out thus rendering nugatory the expression of Congress that these practices are detrimental.[197] In *Tampa Electric Company v. Nashville Coal Company,*[198] the finding of the lower court that the value of the contract was the test of substantiality was reversed by the United States Supreme Court, holding that 'substantially' could not be measured in absolute quantities, but must be considered in terms of the relevant market. It applied an economic analysis similar to the type it had rejected in *Standard Oil of California,* as impractical.

On the surface, the rationales of *Standard Oil of California* and *Tampa Electric* appear to be in conflict with one another. The decisions may be reconciled on closer examination. The exclusive dealing arrangements in *Standard Oil of California* were

[191] BLACKBURN et al, *supra* note 98, at 582.

[192] MOORE et al. *supra* note 29, at 396.

[193] BLACKBURN et al, *supra* note 98, at 582.

[194] The Clayton Act, §3.

[195] MOORE et al, *supra* note 29, at 397.

[196] 337 U.S. 293 (1949) [hereinafter Standard Oil of California].

[197] *Id.* The validity of Standard Oil's exclusive dealing contracts with more than 6,000 independent service stations was challenged. The Court was faced with two conflicting problems, first the possible benefits of such agreements to buyers and sellers, the determination of which would require a complex economic inquiry into each contract's usefulness and competitive effects and secondly, that an inquiry into 6000 contracts was difficult at best. The refiners' market positions had remained constant and exclusive dealing agreements were a industry wide practice. It was virtually impossible to determine whether this indicated that, the exclusive dealing contracts had no competitive impact or had enabled established refiners to maintain their positions by preventing entrants from gaining a foothold in the market. The Court therefore rejected the complicated economic inquiry and held that the contracts were unlawful because competition had been foreclosed, in a substantial share of commerce affected.

[198] 365 U.S. 320 (1961). Tampa Electric contracted with Nashville Coal, to supply its coal requirements for 20 years.[hereinafter Tampa Electric].

not widely practiced in the coal industry. Tampa Electric and Nashville Coal had relatively equal bargaining power and the agreement conferred substantial benefits on both parties. Moreover, it did not appear that the seller was coercing an independent buyer. From these two decisions, it can be surmised that exclusive dealing arrangements are more likely to be found legal where they are not imposed by a dominant party on a weaker party and where they are not an industry- wide practice.[199]

ii. INTERLOCKING DIRECTORATES

Section 8 of the Clayton Act[200] prohibits persons from serving as directors of competing corporations. Interlocking directorates pose several potential anti-trust problems. An interlocking director can function as a liaison between the two companies, ensuring that the business pursuit of one does not seriously harm the other. A common director can also bring about a concerted action in competing firms. In the extreme, competition can virtually be eliminated. Potential competition from independent expansion and diversification can also be forestalled.[201]

Being purely preventive, Section 8 is within the principle of a *per se* illegality. A violation does not require proof of any probable anti-competitive acts. Neither is it necessary that any other violation of the antitrust laws has occurred.[202] Three conditions however, must exist for a violation to be found: (a) one of the corporations must have a minimum net worth, in the amount provided by law;[203] (b) the corporations involved must be horizontal competitors; and (c) the corporations must be related in such a way that if hypothetically, they reached an agreement to eliminate competition, the agreement would violate a federal anti-trust law.[204]

iii. MERGERS (Section 7, as amended by the Celler-Kefauver Act of 1950)

Responding to the perceived ineffectiveness of the Sherman Act as a device for controlling anti-competitive mergers, the U.S. Congress incorporated Section 7 into the Clayton Act.[205] Section 7 prohibits one corporation from acquiring the stock of another, where the effect may be to lessen competition between them or tend to create a monopoly. As initially enacted, however, it did not prohibit asset acquisitions and companies were able to circumvent the prohibition entirely by structuring their mergers as assets rather than stock acquisitions.

[199] BLACKBURN et al, *supra* note 98, at 583.

[200] GOULD, *supra* note 88, at §19, 15-11 to 15-12. (Clayton Act, §8) Interlocking directorates and officers.

[201] MOORE et at, *supra* note 29, at 392-393.

[202] *Id.*

[203] The Clayton Act, §8, par (5).

[204] MOORE et al, *supra* note 29, at 393.

[205] GOULD, *supra* note 88, at §18, 15-9. (Clayton Act, sec 7) Acquisition by one corporation of stock of another.

To plug the loophole, the Celler-Kefauver Antimerger Act was passed in 1950. The amendment expanded the provision to encompass all mergers, regardless of their form, and prohibited them where the effect tended to lessen competition or to create a monopoly, in any line of commerce and in any section of the country. It applied whether or not the merging corporations were direct competitors.[206] The purpose was to address the incipient anti-competitive danger of mergers on the competitive process.[207]

'Merger', as used in anti-trust law today, is a generic term that describes any permanent union of previously separate firms. The finer distinctions between mergers and consolidations or acquisitions or amalgamations and other forms of unions are generally irrelevant. The difference between a stock or asset merger has become insignificant for anti-trust purposes because of the Celler-Kefauver amendments. In whatever form, a union is a merger within the purview of anti-trust where it tries to achieve corporate growth by replacing independent decision-making institutions with a unified system of control.[208]

A. Analysis of Mergers

The resolution of whether or not a merger violates the prohibition is a two-step process: the determination of the relevant market and the assessment of the competitive effects of the merger.[209] The evaluation of the effects of a merger lies within the market where the firms sought to be regulated compete. Consequently, the first step in determining its legality is to define the relevant market and since Section 7 prohibits mergers that tend to create a monopoly, appropriately, the determination therefor focuses on markets capable of being monopolized.[210]

Section 7 is equally concerned with the protection of potential competition. Practices in violation of Section 7 occur despite the presence of available substitutes and in markets that are incapable of being monopolized. Thus, the relevant market in merger cases are more expansive than in monopolization cases.[211] The factors used in doctrine of reasonable interchangeability pronounced in *duPont*, are applicable in the determination of the relevant product market. Additionally, the courts consider other factors such as peculiar product characteristics, unique production facilities, distinct customers or prices, sensitivity to price changes, specialized vendors, and public or industry recognition. Reliance on these additional

[206] MOORE et al, *supra* note 29, at 406.

[207] Brown Shoe v. United States, 370 U.S. 294 (1962) [hereinafter Brown Shoe].

[208] MOORE et al, *supra* note 29, at 406.

[209] BLACKBURN et al, *supra* note 98, at 609.

[210] *Id.* at 606.

[211] *Id.* at 607.

factors seem to indicate the classification of a sub-market as an area subject to anti-competitive practices that falls short of monopolization.[212]

Subsequently, the inquiry turns to the competitive effect of the merger. Section 7 was intended to be a preventive measure. The focal point is not the actual lessening of competition but whether the merger *may* lessen competition. In determining the competitive effect, the following factors are considered: (a) direct elimination of competition;[213] (b) foreclosure of a significant portion of the market from competitors;[214] (c) entrenchment of a dominant competitor;[215] (d) potential for reciprocity;[216] (e) market trends;[217] and (f) post-merger evidence.[218]

[212] *Id.* For example, 90% of buyers in a market may have available substitutes, which would be included in the relevant market. However, 10% may find it very difficult to substitute because they are dependent on the product's peculiar characteristics. The latter form a distinct group of customers, when there are distinct producers, who distribute the product to them. The price of the product may be sensitive to the economic conditions affecting these distinct customers, the product itself would therefore be a relevant *sub*market based on the remaining 10% of the product demand.

[213] *Id.* at 608. A merger may replace two vigorous competitors with one new firm. However, for a violation to exists the elimination of competition need not be that direct. It is sufficient that the merger may result in the elimination of potential competition, such as when a possible entrant into a market acquires a firm already competing in such market The presence of foreclosure is to be evaluated from the viewpoint of the possible entrant and of those competitors already in the market. It requires an assessment of the likelihood that the possible entrant would enter the market anyway, if the merger were not allowed.

[214] *Id.* For example, when the customer and supplier merge. The competing suppliers are foreclosed from the business of the customer. More importantly, the competing customers may also be injured by the merger, if the supplier produces goods whose demand exceeds supply. Under these circumstances, the supplier might very possibly allocate the scarce resources to the customer with whom it is merged, to the detriment of the customer's competitors. *See also infra* note 231, 233.

[215] *Id.* When a larger firm acquires a smaller one, dominant in its market, the acquisition may have the effect of entrenching the smaller firm's position. Particularly, where the larger firm could have entered the market on its own or acquired one of the weaker firms already in the market. *See also infra* note 231, 235.

[216] *Id.* Reciprocity occurs when two companies agree to use each other's products. A merger between reciprocal companies may give each company an unfair advantage over its competitors. For example, X company manufactures goods whose market includes suppliers of Y company. A merger between X and Y companies may violate the prohibition of mergers under Section 7 because suppliers of Y company may purchase from X out of fear that otherwise, they will lose Y's business. *See also infra* note 234.

[217] *Id.* at 609. To place the mergers in its proper perspective, market trends are used by the courts. If a market is easy to enter and has attracted many new firms, a merger that directly eliminates a competitor may not be anticompetitive. However, a market that has become increasingly concentrated may be affected severely by a merger, that reduces competition only slightly.

[218] *Id.* Post-merger evidence indicating that a merger initially thought to lack anti-competitive effects had actually adversely affected competition, may form the basis for challenging a merger several year later. The merged companies may not seek sanctuary in the setting of prescription because the period does not begin to run until the anti-competitive effects of the merger has become apparent. Thus, a company that has acquired companies must watch its behavior long after the acquisition, to avoid a Section 7 attack.

B. Horizontal Mergers

Horizontal mergers occur when the firm acquires a direct competitor in the same or similar line of goods or services. It has the most consistent and immediate anti-competitive potential because the process replaces two competitors with a single, stronger firm.[219] The probable adverse effects of horizontal mergers is so obvious that some commentators argue that horizontal mergers ought to be declared *per se* illegal because when two competing firms merge, the dissolution of one competitor is in effect, as if the firms agreed to fix prices.[220] Presently, for a challenge under Section 7 to be successful, the probable anti-competitive effect must still be proved.[221]

United States v. Philadelphia National Bank[222] clarified the relevance of the statistical demonstration of concentration. The Court recognized and allowed in certain cases dispensing with elaborate proof of market structure, market behavior, or probable anti-competitive effects because a merger which produces a firm controlling an undue percentage share of the relevant market, is inherently likely to lessen competition substantially that it must be enjoined, in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects.[223] Accordingly, an analysis of a horizontal merger begins with the determination of the aggregate statistical evidence of market concentration and the resultant market share. Despite reservations that statistics concerning market share and concentration are not conclusive,[224] the courts have been primarily influenced by the market share of the merged firm.[225] Until the mid-70s, mergers which resulted in a post-merger market share of over 30% were *prima facie* illegal and those with as little as 10% after the merger were suspect.[226]

In 1974, the landmark case of *United States v. General Dynamics Corporation*[227] emphasized a wider variety of competitive factors and delved into the probable anti-competitive effect of mergers, instead of merely relying on statistics of relevant market share. Antecedent to this case, proof that the merger would enable

[219] *Id.*

[220] MOORE et al, *supra* note 29, at 407.

[221] *Id.*

[222] 374 U.S. 321 (1963) [hereinafter Philadelphia National].

[223] *Id.*

[224] Brown Shoe, *supra* note 207.

[225] MOORE et al, *supra* note 29, at 410.

[226] United States v. Von's Grocery Company, 384 U.S. 270 (1966). Despite only a 4.7% and a 4.2% share of the market, and thousands of other competitors, merger between two supermarkets was still held presumptively illegal, on the ground that the evidence showed that a trend towards a decrease in the number of competitors (from 5,365 to 3,590 in a 13 year period), which in turn showed that there was an increase in concentration.

[227] 415 U.S. 486 (1974). The contention of the government, when it filed suit to negate the merger was the probable lessening of competition in the production and sale of coal in the eight-state area, where the acquired firm and the subsidiary were operating. [hereinafter General Dynamics].

the firms to compete more effectively for national business against other firms from major cities was insufficient, even when neither of the firms was the dominant one in an industry.[228]

Defendant-General Dynamics was found to have successfully rebutted the presumption of illegality by focusing on the characteristics and structure of the market concerned. It emphasized characteristics contradicting the conclusion that a merger of two significant firms in a concentrated market is likely to trigger additional mergers, foreclose significant markets to competitors, or otherwise injure competition. After taking into consideration these factors as they apply to the coal industry, the Court refused to negate the validity of the acquisition by General Dynamics of United Electric, a strip mine operator, despite the fact that the former already owned a subsidiary which operated deep-shaft mines.

Additionally, in disputing *prima facie* violations, the significance of the post-merger market share and concentration levels is lessened if barriers to entry is low and potential new competitors are strong and likely to enter. The presumption may be further disputed with evidence of readily available substitutes to defendant's products and the consumers' willingness to switch if prices vary slightly.[229]

C. Vertical Mergers

A vertical merger involves the combination of firms operating in the same product at different stages of a production and distribution system where a buyer-seller relationship exists.[230] They are more difficult to evaluate than horizontal mergers because the same number of competitors remain in both the 'buyer' and the 'seller' markets. The factors that the courts have considered in negating a merger are: (a) the degree of market foreclosure; (b) the intent of the parties to the merger; (c) the level of concentration in the merging firms market; and (d) trends towards increasing concentration in either market, especially where the trend is towards vertical integration.[231]

D. Conglomerate Mergers

In its purest form, conglomerate mergers entail a combination of firms producing seemingly unrelated products and services. They pose the least immediate threat to competition because they do not reduce competition by fusion nor do they foreclosure markets previously open to competitors. Where however, they involve firms dealing in similar or related products, there may be other anti-competitive effects.[232]

[228] Philadelphia National, *supra* note 222.

[229] BLACKBURN et al, *supra* note 98, at 610.

[230] MOORE et al, *supra* note 29, at 407.

[231] BLACKBURN et al, *supra* note 98, at 610; *See supra* notes 213, 214, 217.

[232] *Id.* at 617.

In 1965, *Federal Trade Commission v. Consolidated Foods Corporation*[233] upheld the prohibition of a conglomerate merger because it found that the prospects for coercive reciprocal deals[234] resulting from the acquisition of Gentry, a producer of dehydrated onion and garlic sold to food processors by Consolidated, which in turn purchased processed foods from the very same food processors, sufficient to prohibit it. The next year, *Federal Trade Commission v. Procter and Gamble Company*[235] affirmed the invalidation of a merger between Procter and Gamble and Clorox, reasoning that in opting for the merger alternative, a potential entrant was eliminated whereas, in an independent entry of Procter and Gamble in the bleach market, the number of competitors would have increased. Despite these cases, in 1982, the new merger guidelines issued by the US Justice Department [236] seems to permit most conglomerate mergers.

E. Express Defenses in Merger Cases

The statutory language of Section 7 expressly recognizes two particular affirmative defenses - the *'failing company'* defense and the *'solely-for-investment'* defense, apart from the general defense of attacking the relevant market and anti-competitive effects alleged by plaintiff.

[233] 380 U.S. 592 (1965). When Consolidated acquired Gentry, the merged firm had in effect a buyer of processed goods(Consolidated) and a seller of dehydrated onion and garlic(Gentry) constituting the vertical merger. This merger was however classified as a conglomerate merger because the firms were not engaged in the same product. [hereinafter Consolidated] . *See supra* note 214.

[234] *See supra* note 216.

[235] 386 U.S. 568 (1966) Procter and Gamble, a billion dollar seller of household products acquired Clorox Chemical Company, the US leading manufacturer of household bleach. Classified as a conglomerate merger because Procter did not produce bleach, and there was no seller-seller relationship typical of horizontal mergers, nor was there a seller-buyer relationship which characterizes vertical mergers, FTC nevertheless invalidated the merger because Procter was a possible entrant on its own in the bleach market. FTC reasoned that had Procter not taken the merger route, it probably would have still entered the bleach market with its own independent production facilities. *See also supra* note 215.

[236] Author's Note: The purpose of merger guidelines is to reduce uncertainty for merging business. They do not have the force of law nor do they affect it or the government nor private parties bringing suit. The are useful nevertheless, for planning and in predicting the likely government response to a merger. In summary, the highlights of the 1982 merger guidelines captioned from MOORE et al, *supra* note 29 at 416-417 are as follows: 1) The guidelines define 'safe harbors' or a class of mergers that are not likely to be challenged. 2) They appear to permit most vertical and conglomerate mergers, except those exhibiting 'horizontal effects'. 3) They define the relevant product and geographic markets in terms of firms that are expected to respond to a 5% price increase by the merged firm. 4) With respect to measuring the effect of horizontal mergers, they abandon the four-firm concentration ratio and announce the intention to use a measure of market concentration known as the Herfindahl-Hirschman Index (HHI). The HHI is calculated by summing the squares of the individual market shares of all firms included in the market. The higher HHI indicate a more concentrated market. In addition, however, markets with one or two dominant firms result in higher HHI values than do one with several nearly equal firms. The Justice Department indicates that it is unlikely to challenge a merger resulting in a post merger HHI of less than 1,000. Where the post-merger HHI is above 1,800, the merger is likely to be challenged. For post-merger HHI values in between the two figures, a variety of factors will influence the decision, but a challenge is unlikely if the merger increases the HHI by less than 100 points. 5) The guidelines will apply the horizontal merger guidelines to vertical or conglomerate mergers where they have 'horizontal effects'. This may apply particularly to conglomerate mergers which are deemed to eliminate potential competition, but is unlikely to apply to most other vertical or conglomerate mergers.

Mergers which are otherwise unlawful under Section 7 may still be considered as lawful if one of the companies is failing, provided, two conditions exist: (1) the failing company must be about to die with no reasonable hope for survival except a merger; and (2) it must be shown that methods to save the failing company short of merger have been tried and have failed, or that such methods would be futile. Moreover, The acquiring company must also be either the sole company interested in acquiring the failing company or if there are other interested parties. It must be the company which poses the least threat to competition.

Additionally, Section 7 has no application to corporations purchasing stock on other corporations 'solely for investment and not using the stock by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition'.

iv. PRICE DISCRIMINATION

(Section 2, as amended by the Robinson-Patman Act of 1936)

Generally, price discrimination involves selling the same product to different customers at different prices.[237] Unlawful price discrimination is a difference in price offered by a seller to different similarly-situated buyers, 'the effect of which may be substantial less competition or tend to create a monopoly'. The discrimination prohibited under the original Section 2 is known as *'primary line discrimination'*. Typically occurring when a large national or regional seller cuts prices to retailers or dealers in selected localities, making it impossible for smaller, localized sellers to compete. The injury in these cases is caused at the seller's level and is termed as *'primary line injury'*.[238] Section 2 It was observed had many weaknesses. Among them, it permitted price discrimination based on differences in the grade, quantity or quality of the goods sold. This led to practices of large price differences disproportionate to the variance in the quality of the goods sold and did not correctly reflect the cost differences from quantity purchasing.

These led to the passage of the Robinson-Patman Act in 1936, amending Section 2 of the Clayton Act.[239] The intention of the statute was to specify in better detail prohibited types of price discrimination and to eliminate artificial advantages of large buyers.

A. Price Discrimination under Section 2(a)

Section 2(a), as amended, lays the basic prohibitions and the sellers' liability. A reading thereof shows the following elements for a price discrimination violation to exist: (a) the transaction involved must be a sale and not a lease; (b) the sale must involve goods and not services; (c) the goods must be of like grade and quality; (d) the sale must be for purposes of resale and not a final sale; (e) the goods

[237] MOORE et al, *supra* note 29, at 398.

[238] *Id.* at 399.

[239] GOULD, *supra* note 88, at sec 13(a), 15-4. (Robinson-Patman Act, sec 2a). Price; selection of customers.

were sold at different prices; (f) the price discrimination will result in probable injury to competition; and (g) the sale must be in interstate commerce.[240]

In *Federal Trade Commission v. Borden Company*,[241] the United States Supreme Court considered what constitutes difference in grade and quality, in relation to the requirement of probable injury to competition. The real issue, as deemed by the Court, is whether the preference, as created by the seller's advertising, results in competitive injury. It held that such issue can be resolved by ignoring customer preference based on advertising alone, since to do otherwise would permit a seller to discriminate, by making either product available to some customers and not to others. *Borden*, emphasized that to find a violation, the challenged pricing practice must be shown to result in the probable injury of competition and where a competitive injury is not established, such practice does not violate Section 2(a) as amended.[242]

Competitive injury is not limited to primary line and secondary line injuries. In certain few instances when the distribution system is longer and more complex, it reaches third and fourth line injuries to competition.[243] Whatever the length or complexity of the distribution system is, it is the standard applied to initially determine the location and probability of injury to competition from the alleged price discrimination, and to derive the resultant competitive injury.

Utah Pie Company v. Continental Baking Corporation[244] held that a reasonable possibility of injury to competition may still exist even where the plaintiff's volume of sales and profits continued to increase in the market, as long such particular market is expanding and at least some of the competitors in said market continue to operate at a profit. In such cases, the existence of predatory intent is sufficient to show the likelihood of injury to competition.

240 MOORE et al, *supra* note 29, at 400.

241 383 U.S. 637 (1966). Borden produced and sold evaporated milk under its label to retailers and distributors at lower prices, who in turn sold the same milk under their own private brands. The US Supreme Court concluded that the products were of like grade and quality, even though there was a distinct consumer preference for the Borden brand. After such finding, the case was remanded to the Circuit Court of Appeals, to determine whether or not the price difference caused probable or actual competitive injury.[hereinafter Borden]

242 *Id.*

243 MOORE et al, *supra* note 29, at 402.

244 386 U.S. 685 (1967). Defendants, each of them a major player in the national frozen pie market, entered the Salt Lake City pie market. Plaintiff, a small Utah pie corporation operating in Salt Lake City, thereafter also entered the same market. The major competitive weapon in the Utah market was price. Since plaintiff had a plant in the location and defendants did not, the former had natural advantages and offered its pies at a lower price. Defendants countered and sold at prices lower than it sold pies of like grade and quality in markets, which were considerably closer to its plants. Plaintiff filed suit and the defense asserted was that competitive injury was negated because the volume of sales and profits of the plaintiff were increasing. The US Supreme Court however upheld the finding of the trial court, that each of the defendants contributed to what proved to be a deteriorating price structure.

Texaco, Incorporated v. Hasbrouck[245] clarified a prior ruling that an injury to competition may be inferred from evidence, that purchasers had to pay their supplier substantially more for their goods than their competitors to exclude *'functional discount'* cases. It declared functional discounts as legal and construed the same to exist when the differences in price merely accords due recognition and reimbursement for actual marketing functions of the company afforded the discounted price. The Court also reiterated the doctrine in *Falls City Industries, Incorporated v. Vanco Beverages, Incorporated*,[246] that the competitive injury under a Robinson-Patman Act violation is not limited to injury to competition between the favored and the unfavored customer, but includes injury to competition between their customers.

Generally, the Robinson-Patman Act similar to the other federal antitrust statutes applies only to parties engaging in or affecting interstate commerce. Unlike the other statutes, however, where the term has been construed to affect almost all business activity, the Robinson-Patman Act is not as broad in its application. For Section 2(a) to apply, three conditions must be met: (a) the violator must be engaged in interstate commerce; (b) the discrimination must occur in the course of interstate commerce; and (c) either of the purchases must be made in interstate commerce.[247]

B. Defenses to An Alleged Price Discrimination under Section 2(a)

There are statutory defenses to a charge of price discrimination expressly provided for in Section 2(a) of the Robinson-Patman Act. They are cost justification, meeting-competition and changing - market conditions. Cost justification, as an available defense, is based on a proviso in Section 2(a), that price differences are justified when linked to 'differences in the cost of manufacturing, sale or delivery resulting from the differing methods used, or quantities in which such commodities are to such purchasers sold or delivered'. Notably, the law does not require a seller to give a cost break to a customer based on a cost saving. If he does, the difference in price is legal, if cost saving is supported by a reliable cost study.[248] However, when a seller offers lower prices based on cost saving to a particular

245 58 L.W. 4807 (1990). Petitioner-Texaco sold gasoline at its retail tank wagon prices to respondents, independent Texaco retailers. Texaco, however, granted substantial discounts to two distributors, Gull Oil Company and Dompier Oil Company. The business of the two distributors and the stations supplied by them increased dramatically, while respondents' sales suffered a corresponding decline. Respondents filed suit alleging that, the distributor discounts given by Texaco violated the Robinson-Patman Act. The defense of Texaco was that the price differentials were merely 'functional discounts' and therefore legal. This contention received support from the government (*amicus curiae*) because such defense endorsed the government's position advocated 35 years ago in the Report of the Attorney General's National Committee to the Study the Antitrust Laws. The US Supreme Court while recognizing the legality of functional discounts as a principle, nevertheless held Texaco guilty of price discrimination, because it found that such defense did not apply to the facts, as found in the case.

246 460 U.S. 428 (1983).

247 BLACKBURN et al, *supra* note 98, at 633.

248 *Id.* at 634.

buyer, it must give the same to others similarly situated, otherwise the defense of cost difference becomes unjustified and it may be held liable for price discrimination.[249]

Meeting-competition as a defense relies on Section 2(a) which exonerates a seller who discriminates in price if he can show that the lower price 'was made in good faith to meet an equally low price of a competitor'. As the term implies, the defense is available to meet the competition. But it cannot be used to beat the competitor. The concept is difficult to apply since it takes into consideration the different qualities of the products in competition. When a seller of a premium product reduced its price to meet a competitor of a non-premium product in the same market, the US Supreme Court has held that the effect of the reduction of price was beating the competition rather than meeting it.[250]

Lastly, sellers may reduce prices legally, in response to a change in market conditions, because the last proviso of Section 2(a) does not prevent price differences 'in response to changing conditions affecting the market for or the marketability of the goods'. Changing market conditions include threatened deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court processes and discontinuance of business in specified goods.[251]

C. Buyer Discrimination, Brokerage Payments, Promotional Allowances and Services under Section 2(f) (c) (d) (e), respectively.

Three subsections of the Robinson-Patman Act deals with discrimination other than price discrimination under Section 2(a). Section 2(f) makes it unlawful for a buyer to knowingly induce or receive price discrimination in violation of Section 2(a).[252] It was specifically designed to reach *'secondary line discrimination cases'* where high-volume purchasers are in a position to extract large discriminatory price concessions from the seller. Secondary price discrimination became more serious when large-volume retail outlets and chain stores emerged as a potent force to demand price concessions from manufacturers.[253]

[249] *Id.*

[250] Federal Trade Commission v. Anheuser-Busch, Incorporated, 363 U.S. 586 (1960). Anheuser-Busch reduced the price of its premium beer- Budweiser, in response to the prices charged by regional brewers for their nonpremium beer.Budweiser was held to have attempted to sell a premium product at a price that would enable it to compete against a nonpremium product. It rejected the defense of 'meeting competition' because such a reduction was not necessary to hold its customers.

[251] *See supra* note 239.

[252] GOULD, *supra* note 88, §18, 15-5. (Robinson-Patman Act, §2f). Knowingly inducing or receiving discriminatory price.

[253] MOORE et al,*supra* note 29, at 399.

In *Great Atlantic Tea Company v. Federal Trade Commission*,[254] the Federal Trade Commission found that buyer GATC violated Section 2(f) because it knew or should have known it was the beneficiary of an unlawful price discrimination from the seller, Borden. The US Supreme Court reversed on the ground that since the seller Borden had a valid 'meeting-competition' defense, the buyer, GATC could not be liable under Section 2(f). It can then be surmised from this ruling that for a buyer to be found guilty of violating Section 2(f), the seller must be similarly held guilty of a Section 2(a) violation.

Section 2(c) prohibits making or receiving brokerage payments, except when such payments are made for services actually performed.[255] This section was intended to eliminate brokerage fees that large buyer chains extracted from sellers, which were in reality disguised price concessions that unlawfully discriminated against unfavored buyers. Neither the requisites nor defenses under Section 2(a) are applicable to this provision. All that is required, for a violation to exist is a brokerage fee from seller to buyer or *vice-versa*, without supportive services rendered, there being no necessity to prove two transactions or competitive injury.[256]

The discrimination prohibited in the Robinson-Patman Act also encompasses discrimination related to promotional allowances, signs, displays, demonstrations, packaging, warehousing, return privileges, and other merchandising services. Sections 2(d) and (e) cover these potential abuses.[257] Section 2(d) requires that any payments or allowances by a seller to a buyer for promotional services must be available on proportionally equal terms to competing buyers while Section 2(e) provides that any services furnished by a seller to a buyer must be made available on proportionally equal terms to all other competing customers.

From the language of the law, the defenses of cost justification and lack of competitive injury are not available to Section 2(d) and 2(e) cases. Nevertheless, they have been considered by the courts in determining whether a promotional plan is discriminatory. Meeting-competition however, is available as a defense in a proper case under Section 2(d) and 2(e). When the defense is invoked, the seller must show that the more favorable treatment to any customer is in good faith, to meet and not to beat competition, just like Section 2(a) cases.[258]

[254] 440 U.S. 69 (1979). GATC was Borden's largest customer in the Chicago area. The former communicated to the latter that it wished to shift from selling the branded-label milk to a private label. Borden offered a discount to GATC for the sale of the non-branded milk. GATC solicited offers from other producers and received a more favorable bid from Bowman Diary. It communicated this to Borden, and in response Borden offered a more favorable discount, which GATC accepted.

[255] GOULD, *supra* note 88, §13(c), 15-4 10 15-5. (Robinson-Patman Act, §2c). Payment or acceptance of commission, brokerage or other compensation.

[256] BLACKBURN et al, *supra* note 98, at 699-640.

[257] GOULD, *supra* note 88, §13 (d), 15-5 (Robinson-Patman Act, §2d). Payment for services or facilities for processing or sale; §2(e).Furnishing services or facilities for processing, handling, etc.

[258] BLACKBURN et al, *supra* note 98, at 640.

v. FRANCHISING AGREEMENTS

Of special interest under the Clayton Act is the marked popularity of franchising in contemporary markets. Recently, franchising has expanded tremendously, enabling franchisors to establish national distribution networks with minimal capital. To the average person, franchising means fast-food chains but in fact includes a broader segment of the marketplace. Virtually anything that has a marketing plan and can be packaged into something saleable, can be franchised.[259]

'Franchising agreements' are defined as contractual relationships between two or more businesses where the franchisor either licenses a trade name or brand name to the franchisee, under which to do business, and/or sell branded goods to the franchisee for resale under certain terms and conditions. Typically, franchisees are required by the franchisor to maintain certain standards regarding among others, appearance, cleanliness, and product quality and to pay a royalty fee for the use of the trademark and brand name. In return, the franchisor promotes the entire business through national advertising, promotional plans and other types of assistance.[260] These agreements are regulated generally under vertical restraints of trade of the Sherman Act and more specifically under Section 3 of the Clayton Act.

Application of the more specific restriction of tie-ins and exclusive dealing arrangements under the Clayton Act to challenges of an alleged vertical restraint under Section 1 of the Sherman Act have, however, created problems when applied to franchise agreements. It is to be recalled that an unlawful tie-in requires two separate products and a legal tie-in does not preclude a packaging of related products.[261] United States courts have tended to hold challenged franchising agreements as valid under the principle that the restrictions involved like leases of property, equipment, and exclusivity are integral components of the product or method being franchised.[262]

A requirement in the franchise agreement of fast-food giant Mcdonald's, that the property and building to be used by the franchisees were to be leased exclusively from the former, was challenged by franchisees as restrictive. The United States Appellate Court found no violation of antitrust laws reasoning that the realities of modern franchising require that the question should not be directed to whether the alleged tied product/s are associated in the public mind with the franchisor's trademark but whether such product is an essential ingredient in the franchise system's formula for success. There being a single product, no tie-in can exist as a matter of law.[263]

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[259] *Id.* at 641.

[260] MOORE et al, *supra* note 29, at 398-399.

[261] *See supra* note 186.

[262] *See infra* notes 264, 265.

[263] 631 F.2d 303 (4th Cir. 1980).

This rationale was echoed in another case, where franchisees of the ice cream brand Baskin-Robbins challenged the requirement that they sell exclusively only Baskin-Robbins ice cream products. The franchisor's trademark was held as lacking in sufficient independent existence from the ice cream products allegedly tied to its sale to satisfy the two product requirement necessary for a finding of an unlawful tie-in.[264]

c. The Federal Commission Act

For different reasons, widely diverse proponents for more increased antitrust regulation to support the Sherman Act, favor the establishment of a separate government body of experts whose duty, among others, is to apprehend and deter unfair business conduct. The Federal Trade Commission Act of 1914 (FTC Act) creating the Federal Trade Commission was enacted to quell the clamor. The Commission was tasked to compile trade information, investigate business practices, and issue orders condemning unfair business practices.[265] The FTC Act in Section 5,[266] declared illegal 'unfair methods of competition in or affecting commerce and/or unfair or deceptive acts or practices in or affecting commerce'. The Commission was also given the authority to define unfair methods and prohibit the same through the issuance of cease and desist orders.[267]

i. UNFAIR METHODS OF COMPETITION

The term 'unfair methods of competition' in Section 5 is at best ambiguous. The rationale for this approach to regulation was succinctly stated in *Federal Trade Commission v. Texaco, Incorporated*,[268] upon the observation that legislative history of antitrust shows that the task of defining 'unfair methods of competition' was left to the Commission because Congress concluded that the best check on unfair competition would be an independent regulatory body.

Case law regarding the matter has attempted to define precisely the scope of the term. However, US courts have also made it clear such term has no specific meaning because the US Congress did not intend it.[269] It has also sustained as fact that Sherman Act violations are also violations of Section 5. These violations may be challenged by the Federal Trade Commission when the US Justice Department

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[264] Krehl v. Baskin-Robbins Ice Cream Company, 664 F.2d 1348 (9th Cir. 1982)

[265] MOORE et al, *supra* note 29, at 419.

[266] *Id.* Section 5 of the FTC Act, originally read 'that unfair methods of competition in commerce are hereby declared to be illegal'. In 1938, the section was amended by the Wheeler-Lea Act, to add the prohibition against 'unfair or deceptive acts or practices in commerce'. In 1975, the coverage of Section 5 was expanded when the phrase 'in or affecting commerce' was substituted in lieu of 'in commerce'.

[267] GOULD, *supra* note 88, at sec 45, 15-18 to 15-9 (Federal Trade Commission Act, sec 5) Unfair methods of competition unlawful; prevention by Commission.

[268] 393 U.S. 223 (1968). [hereinafter Texaco, Incorporated].

[269] MOORE et al, *supra* note 29, at 419.

opts not to so.[270] In addition, the US Supreme Court has repeatedly vouched that acts in their incipiency, which if allowed to continue would become Sherman Act violations, are within the purview of Section 5. In this sense, its intention is similar to the Clayton Act without the latter's specificity. In some cases, the courts have upheld the use of Section 5 to reach actions which are, while not precisely violations of either the Sherman or Clayton Acts, are believed to be inconsistent with their basic policy or intent.[271]

The vague language of Section 5 present existent and potential problems for business and seems contrary to the purpose of Congress when it was enacted to support the more specific Clayton Act. The difficulty lies in the lack of informed anticipation, on the part of business whether its particular actions are likely to be held unfair. The Commission has attempted to remedy this by issuing advisory opinions upon request of business and informing them in advance if a business practice is likely to violate Section 5. Nevertheless, the debate upon issue of the necessity of such a vague statutory language remains.[272]

ii. EXTENT OF THE POWERS OF THE COMMISSION

Federal Trade Commission v. Sperry & Hutchinson Company[273] answered in the affirmative two important issues relating to the extent of the powers of the Commission in repect to defining the scope of the term 'unfair methods of competition'. The United States Supreme Court sustained competency to define and proscribe an unfair competitive practice, even where such practice does not infringe either the letter or the spirit of the law and to proscribe practices as unfair or deceptive in their effect upon customers, regardless of their nature or quality as competitive practices or their effect on competition. The proposition was upon the observation that, when such agency was created and its powers and duties defined, Congress could have but rejected the notion to reduce the ambiguity of the phrase 'unfair methods of competition'.[274] The Court stressed emphatically the prevailing doctrine that, it is unfair trade practice contrary to public policy where the competitive method is shown to exploit consumers and children who are unable to protect themselves. Legislation confirmed this when Section 5 was amended in 1938 by the Wheeler-Lea Act to include 'unfair or deceptive acts or practice', in addition to the original 'unfair methods of competition'.[275]

iii. UNFAIR OR DECEPTIVE ACTS OR PRACTICES

While unfair deceptive acts and practices are delimited in the study because they are more properly within the scope of consumer protection rather than

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] 405 U.S. 233 (1972). [hereinafter Sperry].

[274] *Id.*

[275] Federal Trade Commission v. Keppel & Brothers, Incorporated, 291 U.S. 304 (1934).

competition laws, this subsection will briefly pass upon the matter to provide clarity for what is or is not included in the realm of unfair competition. Initially, Section 5 of the FTC Act was intended and interpreted to protect consumers by ensuring free competition.[276] The passage of the Wheeler-Lea Act to include 'unfair or deceptive acts and practices' however changed its complexion and its application has broadened to reach trade practices which injured consumers but at the same time to pose no threat to competition. Under the amended Section 5, the Commission can now move against a firm which deceives consumers or treats them unfairly even if no injury to competition can be proven. The Wheeler-Lea addition has been used primarily against pricing and advertising practices against consumers.

Section 5, as amended, protects consumers not merely indirectly by prohibiting 'unfair methods of competition', but also directly by prohibiting 'unfair or deceptive acts or practices'.[277] It has departed from its exclusive original character to become in addition to being an antitrust law, a consumer protection statute. The original prohibition of 'unfair methods of competition properly addresses itself to the first component while the latter to the Wheeler-Lea amendments. This has expanded the task of the Commission to include not only the promotion of competition but consumer protection as well; two distinct legal disciplines.

d. Remedies, Sanctions & Other Procedural Considerations

Considering that the corporate vehicle was undoubtedly the most popular persona in the commercial milieu, the acts of corporations engaged in or affecting interstate commerce became the focus of American federal antitrust statutes to deter their wide spread abuses that antitrust statutes were enacted. It is thus not surprising that the Sherman Act, a civil and criminal statute, and the Clayton Act, a civil statute, expressly define a 'person' to include juridical entities like corporations and associations.[278] Correlatively, Section 5 of the FTC Act also expressly provides that the Commission is empowered to enjoin persons, partnership and corporations, when it deems that a violation of provisions over which it has authority had occurred.[279]

[276] Federal Trade Commission v. Raladam Company, 283 U.S. 643 (1931), involved a deceptive advertising of a product sold as a remedy for obesity, which was found to have deceived customers, but did not harm competitors because such representation was common among many competing sellers of such products. Thus, the US Supreme Court held that business practices which injured customers, but did not harm any competitors could not be found to be an unfair method of competition under Section 5.

[277] *Id.*

[278] GOULD, *supra* note 88, at § 7, 15-3; § 12(a), par 3, 15-4, respectively.

[279] *See supra* note 267.

i. PUBLIC PRIMARY REMEDIES & SANCTIONS[280]

The Sherman Act is a criminal and civil statute, and its violations may be committed by juridical or natural persons. A person convicted of violating the provisions of the Sherman Act is guilty of committing a felony and punished criminally by fines or by imprisonment or both at the discretion of the court.[281] Notably, the acts of a guilty corporation are deemed to be the acts of the corporation's responsible officers, directors, agents; imprisonment, fine or both may be separately imposed on them.[282] Federal courts may also grant injunctive relief to prevent and restrain alleged violations pursuant to a specific statutory grant of jurisdiction.[283] Moreover, any property owned under any contract or by any combination or pursuant to any conspiracy mentioned in Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act and being in transit from one State to another or to a foreign country, shall be forfeited, seized, and condemned.[284]

As discussed, the Federal Trade Commission is impressed with authority to prevent persons engaged in commerce from using prohibited methods provided for in the Clayton Act or Section 5 of the FTC Act.[285] However, the Commission, then or now, has no authority to impose administrative sanctions on defendant firms for violations of Section 5 or any other statute. Its power has always been circumscribed to preventing or stopping unlawful business practices through the issuance of cease and desist orders. Court-directed civil penalties may be imposed for ignoring or disobeying a cease and desist order issued by the Commission.[286]

ii. OTHER REMEDIES

Dissolution, the breaking up of the defendant firm into separate units or divestiture and the selling-off of a portion of the defendant firm, may also properly issue, particularly, in monopolization cases.[287] Other than recovery of treble damages for violations of the Clayton Act, the remedies of preliminary injunctions, divestiture, 'putting back in place' and civil penalties are in the proper case also available. In merger cases, to obtain a writ of preliminary injunction against a merger, the plaintiff must show that it is likely to win the suit and that allowing the merger

280 Author's Note: Violations of antitrust laws allow for recovery of treble damages by a party injured as a result of such violation. This right to sue for damages actually sustained, plus costs and reasonable attorney's fees is provided for in the Clayton Act and have its origins in common law. The principles governing them today are generally based on commercial tort law. They will be discussed in the next following section on the tort component of unfair methods of competition.

281 *See supra* note 88, 89.

282 GOULD, *supra* note 88, at sec 24, 15-14. Liability of directors and agents of corporation.

283 *Id.* § 4, 15-3. Jurisdiction of courts; duty of United States attorneys; procedure.

284 *Id.* § 6, 1-3. Forfeiture of property in transit (Sherman Act, sec 4) ; at sec 11, 15- 4, Forfeiture of property in transit. (Wilson Tariff Act, sec 76).

285 *See supra* note 266; *See* also GOULD, *supra* note 88, at § 21, 15-12 to 15-13.

286 *See infra* note 290.

287 *See* Ch III, section B2, of the work.

to proceed would irreparably harm competition.[288] Where the merger is *fait accompli*, the remedy of divestiture is possible and the erring firm may be directed by the court to restore market conditions to what they would have been had the merger not transpired.[289] Additionally, any person or any officer, director, partner, employee or agent thereof may be liable for a civil penalty if he fails to comply with any of the provisions under the section on mergers or fails substantially to timely comply with any order required by the Commission.[290]

iii. PUBLIC ENFORCEMENT PROCEDURES

The Antitrust Division of the United States Justice Department has sole enforcement authority over the provisions of the Sherman Act. The Act vested exclusive enforcement power with the existing Justice Department rather than with an independent regulatory agency, like the Federal Trade Commission.[291] An antitrust suit under the Sherman Act typically starts with the United States Antitrust Division making an assessment of the alleged violation to determine whether it should institute a criminal or civil case against the alleged offenders. When the alleged violation is of the type that has been consistently held by the courts as *per se* illegal, criminal proceedings will generally be undertaken because under a *per se* violation, the alleged offenders are presumed to be aware of their illegality and hence, criminal intent is easier to prove.[292]

On the other hand, the enforcement of the Clayton Act was vested by the FTC Act on an independent regulatory agency as it established the Federal Trade Commission.[293] The Commission shares a part of this authority with the Antitrust Division because said statute provides that whenever the Commission files a complaint against a person for an alleged violation of the provisions of the Clayton Act, it is required to also serve the Attorney General a copy of such complaint. The Attorney General is granted the right to intervene and appear in such proceeding in behalf of the State.[294] Additionally, the FTC Act also vested exclusively upon the Commission administrative enforcement authority over Section 5 as previously discussed in better detail elsewhere in this work.

288 GOULD, *supra* note 88, § 18(f), 15-11. Preliminary injunctions; hearings.

289 Ford Motor Company v. United States, 405 U.S. 562 (1972). The merger between Ford Motor Company and Autolite Spark Plug was found illegal. The US Supreme Court upheld a court order directing Ford to divest itself of Autolite, and refrain from manufacturing spark plugs for 10 years and from using its trademark on spark plugs for 5 years.

290 GOULD, *supra* note 88, at sec 18(g), 15-11. Civil penalty; compliance; power of court.

291 *See supra* note 283.

292 MOORE. et al, *supra* note 29, at 353.

293 GOULD, *supra* note 88, at sec 21(b), 15-12 Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders.

294 *Id.*

C. The Antitrust Tort

When there is competition, it is likely there will also be unfair competition. Violation of the *'rules of the game'*, causing injury to fellow-competitors is the essence of unfair competition and it is the nature of the competition that determine those rules.[295] In its general context, unfair competition lies within the broader expanse of unfair trade practices. The latter has grown from its common law origins into many branches, to include among others malicious trade contract interference, interference with prospective business relations, work related torts and unfair competition. The latter is in turn constituted by among others, copyright, patent and trademark infringement, passing-off and misappropriation and private action arising from violations of antitrust laws. Their development and fission is discussed in the following sections primarily to identify which among the varied forms of unfair competitive conduct properly belongs to the realm of *'unfair methods of competition'*, the tort component of competition regulation. The other trade torts are subject to their own rules, except to the extent that their activities may impinge upon or otherwise affect competition as prescribed by antitrust laws. Then, despite their character, they may also be subject to the rules applicable to those of impairment of competition.

1. Common Law Origins

Unfair trade practices originated from Early English common law. Initially, its scope was limited to protection from direct physical injuries, direct trespass to property, or threats of the same and precluded protection of trade or other commercial relations. It did not provide for remedies for purely pecuniary harm.[296] Gradually, a body of tort law emerged protecting parties to trade and other advantageous relations from economically injurious interference from third persons. Relational interests were included by expanding the protection to include not only from direct but indirect physical interference causing only pecuniary harm.[297]

In the nineteenth century, the courts became particularly concerned with protecting relations of trust and confidence. They sought to prevent the unauthorized use of any writings or secrets, which were confidentially disclosed in the course of such relations. Out of these grew the common law of copyright and trade secrets.[298]

Meanwhile, a distinct branch eventually became known in the United States as unfair competition. It first came into use in a number of early cases involving attempts of one merchant to palm-off inferior goods as those of another more reputable merchant by making deceptive use of the other merchant's trademark. However, it became clear that 'palming-off' could be accomplished by many other deceptive means as well, such as deceptive substitution or alteration of goods.[299] It came to be associated primarily with the deceptive substitution or alteration of goods and the deceptive imitation of products and business features. It included misappropriation, the converse of palming-off, denoting the appropriation of the products of the competitor whereby the misappropriator subsequently sells them as his own instead of selling its own goods as those of a more reputable competitor.

On the other hand, trademarks were being recognized as a form of intangible property protected against infringement regardless of fraudulent intent or any actual diversion of customers.[300] Consequently, the tort of trademark infringement came to be distinguished from the tort of palming-off.

The conception of unfair competition was expanded further to virtually any purely predatory conduct in trade undertaken purely for the purpose of injuring another.[301] However, the ascendant public interest supporting competition influenced the courts to adopt the narrow view in condemning competitive conduct. A conduct attended by a vestige of legitimacy, despite being partly for vindictive or malicious motives, will not be judicially negatived. Under common law therefore, malicious competition became actionable only in relatively rare cases where the challenged actor could be shown to be operated purely for the purpose of causing economic injury to another and with the intention of terminating the business after that purpose has been accomplished.[302] Absent this, the refusal by one person or business to deal with another was held *damnum absque injuria* even when such refusal was motivated solely by whim, caprice or prejudice.[303]

2. Development of Statutory Sources

Perceived inadequacies and inefficiency of common law rules led to the development of statutory precepts of unfair trade practices that result in injury. Unlike non-commercial accidental injury whose rules are unified under the common principles of negligence, torts arising from unfair competition did not develop a single underlying concept. Neither did it result in the enactment of a general statute or a codification of rules governing injury caused by commercial conduct. Rather, it cleaved into different species, developing within each, its own parameters providing for remedies for injuries sustained from different and distinct types.[304]

Injuries sustained in employer-employee relations came to be treated under statutory labor law. The statutory form pre-empted common law rules because the latter has proved totally unequal to the task of balancing the competing inter-

295 ALTMAN, *supra* note 21, at Ch 1, 2.

296 MCMANIS, THE LAW OF UNFAIR TRADE PRACTICES, IN A NUTSHELL, 1983 Ed., USA at 11.

297 *Id.*

298 *Id.* at 17, 18.

299 *Id.*

300 *Id.* at 20. *See* also STICKELLS, *supra* note 87, at 19 - 20.

301 Keeble v. Hickeringill, 103 Eng. Rep. 1127 (1706)

302 Beardsley v. Kilmer, 236 N.Y. 80; 14 NE 203 (1923).

303 *Id.*

304 MCMANIS, *supra* note 298, at 10-36.

ests of business and labor in labor disputes.[305] Similarly, common law was criticized as having too often assumed that copying a product, idea or scheme costing time, labor or money constitute misappropriation. These assumptions were thought to have failed to consider the effect of granting such right to the competitive process.[306] The copyright statutes followed in the wake of the clamor and their intention was not merely to protect private interests but harmonize them with public concerns.

Moreover, the court ruled that trademarks could not be considered a discovery within the meaning of patent and copyright laws because they lacked sufficient novelty, invention or work of the brain. Trademark laws were specifically enacted providing for their recognition, registration, and remedies for their infringement.[307] Thus, torts arising from copyright, trademark or patent infringement or unfair competition, consisting of passing-off and misappropriation of goodwill came to be within intellectual property law, very much recognized in many countries singularly or collectively with international agreements as an independent discipline.

Common law was also believed to have failed in providing adequate remedies for conduct, manifestly undermining bargaining in the competitive process.[308] It was thought as deficient in providing adequate indemnity for injuries arising from joint efforts to restrain trade and unilateral abuse of market power.[309] Antitrust statutes were enacted to fill the void[310] which, aside from their substantive provisions, included relief to private parties for injuries sustained as a result of practices forbidden by anti-trust laws forming the *'anti-trust tort'* which has become inextricably linked to substantive anti-trust provisions. They form a distinct specie in the genus of unfair competition different from unfair competition as is understood under contract and intellectual property law.

3. *An Action for Damages Arising from Violations of Anti-trust Laws*

a. Recovery of Damages Suffered

A statutory grant for a private action for injuries, sustained as a result of antitrust violation, came with the enactment of the Clayton Act in 1914.[311] Section 4 thereof provided recovery for three-fold the damages sustained plus costs of suit and reasonable attorneys fees. Treble-damage claims serves a two-fold purpose: the recovery of damages suffered by the plaintiff and the private enforcement of antitrust laws.[312] A great majority of the antitrust cases today are private treble-damage suits.[313] As an enforcement measure, they are perhaps the more important remedy because it permits the competitor as well as members of the general public to seek enforcement of the law even if the government fails or refuses to do so.[314]

[305] *Id.* at 20.

[306] *Id.*

[307] *Id.* at 36.

[308] *Id.*

[309] *Id.* at 31-35.

[310] *Id. See* also Ch III, sec B1 of the work.

[311] GOULD, *supra* note 88, at § 15, 15-5. (Clayton Act, § 4) Suits by persons injured.

b. Laws, a Violation of Which Give Rise to a Damages Claim

In defining the scope of the statutory language of Section 4 of the Clayton Act that provides 'any person who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue', the United States Supreme Court has construed the phrase 'forbidden by anti-trust laws' broad as limited from its broad concept to the definition of anti-trust in Section 1(a) of the Clayton Act[315] and is exclusive under the principle of *espressio unius exclusio alterius*.[316] Section 1(a) of the Clayton Act defines antitrust laws as including the Sherman Act, Section 73-77 of the Wilson Tariff Act, the law amending Section 73-76 of the Wilson Tariff Act, and the Clayton Act.

The Wilson Tariff Act is a tariff statute, Section 73[317] which is antitrust in character. It declares null and void every concerted action when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article or any manufacture into which such imported articles enters or is intended to enter from any foreign country into the United States and when such concerted action is intended to operate in restraint of lawful trade or free competition in lawful trade or commerce or to increase the market price of any article imported or intended to be imported. The parties to such unlawful contract, combination or agreement are guilty of a misdemeanor and imprisonment or fine or both is imposable upon them.

Following the enumeration in Section 1(a) of the Clayton Act, violations of Section 3 of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act has been held not to give rise to an action for damages. On the other hand, Section 2[318] of the Robinson-Patman Act which is an amendment of the Clayton Act, as well as Sections 3, 7, 8[319] of the Clayton Act have been deemed to be anti-

[312] STICKELLS, *supra* note 87, at 706.

[313] MOORE et al, *supra* note 29, at 351.

[314] *Id.* at 352.

[315] GOULD, *supra* note 88, at § 12, 15-4. (Clayton Act, sec 1a) Words defined, short title, a) "Antitrust laws"

[316] Nashville Milk Company v. Carnation Company, 356 U.S. 373 (1958). In a footnote in the opinion of this case, the court pointed out there has been at least 71 statutes classified and complied as antitrust laws, 21 of which were in the statute books by 1914 and 49 became law thereafter.

[317] GOULD, *supra* note 88,, at sec 8, 15-3. (Wilson Tariff Act, sec 73) Trusts in restraint of import trade illegal; penalty.

[318] Price and buyer discrimination; brokerage payments; promotional allowance & services.

[319] Tying devices and exclusive dealing agreements; mergers; interlocking directors, respectively.

trust within the meaning of Section 4 of the Clayton Act and thus, a private cause of action arises upon their violation.[320]

c. Persons with Standing to Sue

A person[321] has a private cause of action to sue for treble-damages for injuries sustained from acts violating antitrust laws. A plaintiff may pursue an action under Section 4 of the Clayton Act if the defendant violated the pertinent antitrust law/s as defined in Section 1(a) of the Clayton Act and the plaintiff was injured in his business or property by reason thereof.[322] As a branch of tort law, with compensatory and punitive damages as the relief granted, the doctrines accepted in that branch of legal discipline applies. Under the doctrine of proximate cause, a private treble suit requires that plaintiff's injury must be the direct result of an antitrust violation. Mere speculation of injury is insufficient. The alleged tortious conduct must have materially or substantially contributed to the plaintiff's injury. Damages cannot be proved by mere conjecture but must be shown by facts from which their existence can be logically and legally inferred. Where the damage is merely incidental or consequential or if the defendant's antitrust acts are far removed from the injury, plaintiff cannot be said to have been *'injured 'by reason of anything forbidden in the antitrust laws'*.[323]

However, a distinction has to be made between plaintiff corporation and its stockholders. A stockholder does not, as a general rule, have standing to maintain a suit even where such stockholder owns all the stock of plaintiff corporation. The right to sue properly belongs to the injured juridical entity. However, when the injured corporation does not institute an action, such stockholder may maintain a derivative suit based upon the wrong and injury to the corporation.[324] This right to institute a derivative suit has not however been unanimously upheld. There are decisions indicating that because an action for treble damages is one at law, a derivative suit which is in equity would not lie.[325]

[320] New Jersey Wood Finishing Company v. Minnesota Mining & Manufacturing Company, 332 F2d 346, 352, aff'd 381 U.S. 311, (CA3 NJ 1964). At issue was whether or not a violation of Section 7 (Mergers) of the Clayton Act gave rise to a private cause of action for treble damages. The court rejected a prior dicta that plaintiffs cannot be damaged by a potential restraint of trade or monopolization and therefore there can be no claim for pecumiary damages for a violation of § 7. It held that a private action for damages may be maintained for a violation of § 7, Clayton Act.

[321] *See supra* note 278. Persons may include individuals, corporations, co-operative corporations, partnerships, and state governments and municipalities for injuries to their proprietarial properties.

[322] BLACKBURN, et al, *supra* note 98, at 697.

[323] *Id.* at 698-699, 735.

[324] STICKELLS, *supra* note 87, at 714.

[325] United Copper Securities Company v. Amalgamated Copper Company, 244 U.S. 261 (1917), held that 'whether or not a corporation shall seek to enforce in the court a cause of action for damages is . . . a matter of internal management, and is left to the discretion of the directors in absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust . . ." *See also* Fleitmann v. Welsbach Street Lighting, 240US 60 (1916).

In 1955, Section 4 of the Clayton Act was amended and the United States was granted the right to recover actual damages for injury to its property by reason of violation of antitrust laws.[326] In 1976, another important amendment to the recovery of damages arising from a violation of antitrust laws in American jurisdiction was instituted by the Hart-Rodino Antitrust Improvements Act. Pursuant thereto, a state attorney general may, under the doctrine of *parens patriae* sue a business for treble damages in behalf of its constituents, for allegedly violating the Sherman Act, in such manner which is harmful to persons living in that state.[327]

d. Measurement of Damages

In computing the amount of damages, the basic principles of damages normally apply to anti-trust cases but deviations and adjustments have been made owing to the difficulty of calculation of damages arising from antitrust violations. As a rule, damages must be of pecuniary estimation.[328]

This rule was adopted in *Keogh v. Chicago & N.R. Company*,[329] by the US Supreme Court. The bases for computing damages are not limited to specific items and the trial court may make such just and reasonable estimate of the damage on relevant data and may act upon probable and inferential as well as direct and positive proof. The actor should bear the risk of uncertainty which his own wrongful act had created.[330] *Eastman Kodak Company v. Southern Photo Materials Company*[331] held that damages are not rendered uncertain merely because they cannot be calculated with absolute exactness, it being sufficient that there is a reasonable basis for computation.

The amount of damages in treble damage claims arising out of violation of an antitrust law is primarily based on loss of profits. Generally, prior earnings is

[326] STICKELLS, *supra* note 87, at 706, 712 *citing* § 4a of the Clayton Act of 1914, 38 State 731 Ch 323, § 4A, as amended, 15 USCS, § 1A.

[327] GOULD, *supra* note 88, at § 15c, 15-6. (Hart-Rodino Antitrust Improvements Act) Actions by State Attorneys general a) Parens patriae; monetary relief; damages; prejudgment interest.

[328] American Infra-Red Radiant Company v. Lamber Industries Incorporated, 385 U.S. 920 (1966). The US Supreme Court denied a petition on certiorari assailing the appellate courts ruling that the expenses of defending a patent infringement should not be considered as a *per se* element in determining treble damages in an anti-trust counterclaim.

[329] 260 U.S. 156 (1922).

[330] Elyria-Lorain Broadcasting Company v. Lorain Journal Company, 358 F2d 790 (CA6 Ohio 1966).

[331] 273 U.S. 359 (1927). Plaintiff sold a complete line of professional photography supplies, purchased from the defendant. Defendant refused to sell to plaintiff after the latter took a line of goods used by amateurs. Plaintiff's trade in professional photography supplies decreased, and he filed for recovery of damages based upon the amount of gross profits of defendant's goods for the preceding year less estimated additional expense it would have incurred in handling the defendant's goods. Defendant countered that plaintiff's claim were purely speculative, there being no proof of the cost of handling the defendant's goods. The US Supreme Court held that 'it was permissibie to arrive at net profits by deducting from the gross profits of an earlier period, an estimated expense of doing business'.

made the basis of comparison, in a *'before and after test'*.[332] It is not necessary however, that the plaintiff operates at a loss to recover but that the recovery sought is the loss arising from the violation. Another method used in determining the amount of damage is the *'yardstick theory'* where a plaintiffs profits or earnings are compared with those of a similar business.[333] But factors, other than loss of profits, may be used in the measurement of damages, such as increased cost as a result of price fixing, loss of a contract or sale, impairment of capital or gross receipts. Prior participation may be used to reduce the amount of damages under a doctrine similar to contributory negligence.[334]

e. A Private Enforcement of Antitrust Laws

Generally, the purpose of awarding civil damages to injured persons is to place those persons in the monetary position;, they would have achieved had their rights not been violated. Treble damages in antitrust tort are permitted not merely to compensate plaintiff for actual injury but as a punitive measure to punish defendants for the violations as well. Such private action assumes to a certain degree a public character. To this extent, the term private enforcement of antitrust laws is appropriate. Being *quasi*-public, plaintiff is required to show, in addition to proving private damage, that there is injury to the public. However, it is not necessary to prove a specific monetary loss to such public, the phrase 'injury to the public' not being used in the limited sense.[335] On the other hand, American courts have held, in certain cases that harm to the public is deemed to exist by virtue of an antitrust violation. Thus, it was unnecessary to specifically allege public injury.[336]

The private right to sue for damages, while popularly referred to as a private enforcement of antitrust laws, is more a description, rather than a strict legal classification. Antitrust laws are public in character and are essentially different from the private action to enforce damages arising by the defendant's act in contravention of antitrust laws. An action by the government to enforce antitrust laws requires mere proof of illegality, while the latter requires that there be a direct legal injury. Recovery depends on proof of such injury to the plaintiff and legal injury is not automatically established by proof of an antitrust law violation. Thus, there have been cases, where, notwithstanding that the violation has been proved, the plaintiff cannot recover simply on that basis. The mere existence of an unlawful antitrust conduct, does not by itself prove legal injury to the claimants, there must

[332] Central Coal & Coke Company v. Hartman, 111 F 96 (CAS Mo. 1901). The court stated: 'The truth is that proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business".

[333] STICKELLS, *supra* note 87, at 724, citing Timberlake, *Federal Treble Damage Anti-trust Actions*, sec 21.11; Adair, *Disproof of Damages in Private Litigation*, 36 ABA Anti-trust LJ, 168, 180 (1967).

[334] *Id.* at 713-716.

[335] *Id.* at 706-708.

[336] *Id.* at 736-737.

be proof of damages to those who are directly affected thereby.[337] Pointing to the accurate classification, that it is a commercial tort and not an antitrust law enforcement measure, should not be taken as a diminution of its importance in the enforcement system of violations of unfair methods of competition.

IV. EVALUATION OF COMPETITION REGULATION IN PHILIPPINE JURISDICTION

A. Preliminary Statement

In Philippine jurisdiction, the legal basis of competition laws is fundamental and direct because the protection of free competition and fair competitors is expressly provided in the Constitution. Section 19, Article XII, of the 1987 Constitution embodies public policy,[338] by which the State is mandated to regulate or prohibit monopolies, when public interest requires and to disavow combinations in restraint of trade and unfair competition.[339] Congress is likewise directed to regulate or prohibit similar acts in commercial mass media.[340] Moreover, the protection of the Filipino enterprise against unfair competition is not limited to local concerns, but also includes the foreign competitor.[341]

Predicated on the characterization that the acts sought to be prohibited are inimical to national interest, the State is authorized to impose civil and criminal sanctions for acts that circumvent or negate any of the aforecited policies, not merely as an incident to its police power, but prescinding from an equally express grant of punitive power.[342] The force of these constitutional directives compels the State not merely to acknowledge its mandate, but to vitalize it from the cold niche of policy, by providing for a coherent and comprehensive competition law, capable of being effectively administered and enforced.

To determine if indeed, the current state of governmental activity providing for the deterrence of unfair methods of business competition effectuate the constitutional standard, this chapter will delve into four main areas. First, the clarification of the role of State, in regulating competition, and for this purpose, an analysis of a recent decision of the Philippine Supreme Court will be serve as a preview of the ease by which competition regulation may be misunderstood. Fur-

[337] Keogh, *supra* note 329. The court in this case held that injury implies violation of a legal right, thus plaintiff in this case could not recover simply on the basis that there was a conspiracy and if not for such conspiracy the rate might have been lower, as a rate in not necessarily illegal simply because it is a result of a conspiracy in restraint of trade.

[338] BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, A COMMENTARY, 1987 Ed., Rex Book Store, Mla., Phil., Vol II, at 464.

[339] PHILIPPINE CONSTITUTION, art XII, § 19.

[340] PHILIPPINE CONSTITUTION, art XVI, § 11(1).

[341] PHILIPPINE CONSTITUTION, art XII, § 1.

[342] PHILIPPINE CONSTITUTION, art XII, § 22.

ther, the prevailing laws and executive orders providing for deregulation, liberalization and privatization will be evaluated to determine if the rules adopted are sufficient to address the likelihood of proliferation of anticompetitive practices in markets with diminished direct government control. Secondly, the performance of Article 186 of the Revised Penal Code during the decades of its existence will be scrutinized. The observations and conclusions derived will serve as the bases for the specification of anticompetitive acts, which should be within the purview of a business competition statute, as well as the propriety of the location of such law in a penal code. Thirdly, Article 28 of the New Civil Code, the tort component of unfair methods of business competition, providing for a right of action for injuries sustained as a result of anticompetitive conduct will be analyzed, to determine its effectiveness as a remedy for private injured parties and as a *quasi*-public enforcement measure of antitrust laws. The prevailing status of criminal, civil and administrative liabilities and their enforcement will likewise be addressed, to pin point the areas which necessitate change and reinforcement. Lastly, the significant provisions of Senate Bill 996 introduced in 1989, the first tangible attempt at a comprehensive law which provide for a unified and autonomous regulation of business competition will be evaluated, as they impact on the topics herein outlined.

B. The Role of the State

Placing it in the concept of a game, the economic theories of free enterprise and competition dictates that the role of the State is relegated to the administration and supervision of the *'playground'* and *'the conduct of the players'*. Where in a government controlled economy, the state controls the specific actuation of the trade participants by regulation, oftentimes to the degree of entering the market itself, its preferred role is more like an *'umpire'*, with the power of the *'whistle'* demanding compliance of the rules of the game on pain of calling a *'foul'*. As *'umpire'*, it is neither concerned with the relations businesses entered into to achieve their profit objectives, the supply and demand variables in the market, the profitability of the firms engaged therein nor the price of the goods they offer, provided however that competitors are *'playing according to the rules of the game'*. Its primary function is an objective judge and enforcer of the rules of the playground, the purpose of which is to foster and maintain free and fair competition therein.

On the other hand, as seen in jurisdictions which have adopted *laissez-faire* by almost totally replacing government control with the instrument of contract, the latter could very well become a mere illusion. Amidst the realities of contemporary trade, relationships prevail over contracts and many trade contracts today are expressions of group pressure and customs forced upon the weaker business entity or individual. Without effective rules and their administration and enforcement, the problems seen in the American 'robber baron' economy,[343] more than a century ago will flourish in Philippine jurisdiction.

[343] *See* Ch. III, § A of the work.

1. Tatad v. Secretary of the Department of Energy,[344] an Informed Vision?

The perception of the Philippine Supreme Court of what the regulation of competition should be in the light of Section 19, Article XII was shown when it invalidated Republic Act 8180, which provided for the deregulation of the downstream oil industry. The Court struck down the law as unconstitutional because it allowed a 4% tariff differential and required the maintenance of a minimum amount of inventory, which was interpreted to create entry barriers *'which dampen competition and enhance the control of the market by the three existing oil companies'*.[345] The Court, characterized the argument of respondents that such differential will encourage new entrants to build refineries, as 'putting the cart before the horse'.[346] It invoked Section 19 of Article XII of the Philippine Constitution to strike down the statute. Relying on American sources for its definition of monopolies and combinations in restraint of trade,[347] it however overlooked certain significant principles, which it should have employed to *validate the law*.

First, a constitutional policy promoting competition invites legislative interference. In a deregulated industry, as perceptively observed 'people of the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices'.[348] Profit motivated private business entities need no incentive to pool resources together creating market barriers, requiring government regulation.[349]

However, the need to regulate the market to protect competition does not inhibit legislature from granting trade advantages, which may impair competition. The Supreme Court itself has previously validated governmental acts promotive of private monopolies reasoning that the constitutional policy allows the granting of exclusive franchises for public services or public utilities such as those which supply water, electricity, transportation, telegraph, if the public interest is so served.[350] It has consistently held that the public policy which decries monopolies is not an absolute prohibition against private monopolies because it uses the word *'regulate'* rather than prohibit. The directive enunciated in Section 19 of Article XII of the Constitution cannot be interpreted as a limitation on the police power of legislature regulate business activities, because it is fundamental that competition

[344] See *supra* note 10.

[345] *Id.*, at 360.

[346] *Id.*, at 359.

[347] *Id.*, at 355.

[348] MOORE, *supra* note 29, at 345, *quoting* Adam Smith.

[349] *See supra* note 84.

[350] Philippine Port Authority v. Mendoza, 138 SCRA 496 (1985); Anglo-Fil Trading Corporation v. Lazaro, (1983). Author's Note: While these cases were decided when the 1973 Phil. Const. was still in effect. The counterpart in the 1987 Constitution is merely a restatement. The only change embodied in the new provision is the deletion of the qualifying term 'private'. The amendment has broadened the regulation or proscription, to encompass all monopolies, when public interest so requires. See BERNAS, *supra* note 338, at 464.

regulation is directed towards *private* restrictive practices, not public regulation.[351] Even granting *arguendo* that the tax differential and inventory requirements constituted entry barriers, promotive of the formation of a monopoly or an oligopoly in the oil industry, such degree of diminishment or foreclosure competition in an industry sought to be deregulated lies within the exercise of regulation; and wisdom of providing for such is a political question, left to sound judgment of Congress. It is well-settled that the exercise of the power of judicial review is not absolute and is limited by the political question doctrine.[352]

Second, on the assumption, that the law was operative and the three existing oil companies used such *'market barriers'*, to monopolize the downstream oil market or exclude competitors as theorized by the Court. Then, such acts would have been appropriately punishable under Article 186 of the Revised Penal Code or where predatory pricing was used to attain monopoly power or exclude competitors, also under the challenged law itself. It is only at this point, that a justiciable controversy arises requiring adjudication. It is equally well-entrenched that one of the essential requisites for the exercise of the power of review is that there must be before the court an actual case calling for the exercise of judicial power[353] and the question before it must be ripe for adjudication.[354] To invalidate the law on the ground that the oil firms may use such tax differential and inventory requirements unlawfully is speculation, indeed putting the cart before the horse.

2. Effective Rules of the Playground?

A sampling of the laws which have adopted free enterprise, by the deregulation and/or liberalization of restrictively regulated industries or the privatization of government held assets, indicate that the Philippine government recognize the necessity of the preservation and maintenance of competition in a industry with diminished government presence and acknowledge their role as supervisors and administrators of the playground. In 1995, Republic Act 7925[355] was passed allowing telecommunications producers certain freedom to set their own rates. The National Telecommunications Commission however, as the administrator of the law, retained residual powers to regulate rates or tariffs when ruinous competition results or when a monopoly or a cartel or combination in restraint of free competition exists and the rates or tariffs are distorted or unable to function freely and the public is adversely affected.

Similarly, in opening the rice and corn industry to foreign participants, Presidential Decree 194 provided that foreign persons or business organization

[351] *See supra* note 82, 83.

[352] BERNAS, *supra note 338*, at 280.

[353] Philippine Association of Catholic Universities v. Secretary of Education, 97 Phil. 806 (1955).

[354] Tan v. Macapagal, 43 SCRA 678 (1972).

[355] R.A. 7925 (1995), An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Telecommunication Services, otherwise referred to as The Public Telecommunications Policy Act of 1995, § 5(f), § 17.

may engage in the rice and/or corn industry, subject to the National Grains Authority certification that there is an urgent need for foreign investment in the undertaking and that the same will not pose a clear and present danger of promoting monopolies or combinations in restraint of trade.[356] Also, Executive Order 205 regulating cable antenna systems, declares in its whereas clause that monopolies in commercial mass media shall be regulated or prohibited, when public interest so requires.[357] Executive Order 185 opening the domestic water transport industry to new operators and Executive Order 219, liberalizing aviation, likewise provided, that monopolies shall be regulated and prohibited when the public interest so requires and that no combinations in restraint of trade or unfair competition shall be allowed.[358] Lastly, the Asset Privatization Trust's authority to privatize government assets, as provided in Republic Act 1661 is conditioned upon the adherence to the principle that its disposition, must be with due regard for improving competition in business and preventing the creation or perpetuation of monopolies and cartels.[359]

From these provisions, it is undisputed that government endeavors to preserve and maintain competition in deregulated or liberalized markets. However, where there is neither specific acts delineated or measures prescribed, then they cannot with realistic effect be said to have provided for the *rules of the game*, necessary for the deterrence of anticompetitive conduct. On the other hand, it should not be taken that, it is proffered that each law contain it own particular rules, on the contrary it is advanced that there no compelling reason why competition regulation for application within such industries can not be provided in one law, prescribing for uniform rules. Evidently, the fact that in each industry the legislature must always provide, much like a mantra, for the proscription of monopolies and combinations in restraint of trade, means that there exists no comprehensive and effective, autonomous body of laws within the Philippine legal system that deters general forms of anticompetitive practices, wherever found in a defined sector of the market.

3. A Legislative Proposal

In 1989, there was a proposal to legislate a comprehensive law regulating competition. Being the more recent legislative *fiat*, it is significant in determining whether or not the measures prescribed therein are able to appropriately address

[356] P.D. 194 (1973), Authorizing Aliens, as Well as Associations, Corporations or Partnerships Owned in Whole or in Part by Foreigners to Engage in the Rice and Corn Industry, and for Other Purposes. sec 3(a).

[357] E.O. 205 (1987), Regulating the Operation of Cable Antenna Television (CATV Systems in the Philippines, and for Other Purposes, repealing PD 1512 of 1978, Whereas Clause.

[358] E.O. 185 (1994), Opening the Domestic Water Transport Industry to New Operators and Investors, Whereas Clause; EO 219 (1995), Establishing the Domestic and International Civil Aviation Liberalization Policy, Whereas Clause.

[359] R.A. 7661 (1993), An Act Amending Republic Act Numbered Seven Thousand One Hundred and Eighty-one Entitled "An Act Extending the Life of the Committee on Privatization and Asset Privatization Trust", § 2 (e).

the concerns of a competition policy. Senate Bill 996,[360] a 72 page antitrust legislation entitled 'An Act to Reexamine, Realign, and Recast into the requirements of the Constitution the Laws Prohibiting Monopolies, Combinations in Restraint of Trade and Unfair Competition and for Other Purposes' has for its purpose, among others the prevention of concentration of economic power, in a few persons and the restoration of natural, free, fair and full or unrestricted competition in trade, commerce or industry in Philippine jurisdiction.

Section 3 thereof enumerates the unlawful monopolies, oligopolies, cartels and combinations in restraint of production, trade, commerce or industry, declared to be *in themselves unreasonable*, and herein footnoted to show the full extent of the prohibitions.[361]

[360] The bill was introduced by Senators Guingona Jr., Pimentel Jr., Tamano, Laurel, Romulo, Mercado, Lina Jr., Salonga, Herrera, Aquino, Estrada, Tanada, Rasul, Shahani, Osmena, Maceda, Gonzales and Ziga. Author's Note: Up to today, Senate Bill 996 or a similar bill has not been enacted into law.

[361] Senate Bill 996, § 3. Unlawful Monopolies, Oligopolies, Cartels, Combinations, Agreements or Contracts, etc. - The following contracts, agreements, arrangements, courses of conduct, and/or market conditions are hereby declared to be against public policy and are *in themselves unreasonable restraints of trade, commerce or industry, and should therefore be considered and void*; 1.) any form of combination of capital, organized in trust or otherwise, which tends to concentrate economic power in the hands of a few and threaten to control arbitrarily the conditions of production, trade, commerce, or industry; or distort manipulate or constrict the discipline of the market or tamper with the free and untrammeled play of market forces, and eventually destroy free markets; 2.) any contract, arrangement, agreement, or combination made by, between or among persons in the form of trust or otherwise, or conspiracy to limit production of any merchandise, commodity, article, or object of trade or commerce for the purpose of destroying competition in production of such merchandise, commodity, article, or object of trade, commerce, or industry and thereby increasing prices of such merchandise, commodity, article, or object of trade, commerce or industry to the detriment of consumers or end-users thereof; 3.) any contract, arrangement, combination, or agreement fixing prices of merchandise, commodities, articles or objects of trade, commerce, or industry among competitors supplying a common market designed to forestall potential competition, regardless of the reasonableness of the prices fixed or the proportion of the market, controlled by the parties, and no showing of so-called competitive abuses or evils which such agreement is intended to eliminate or alleviate may be admitted and interpreted as a defense in a prosecution of a violation of this act; 4.) any combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of any merchandise, commodity, article, or object of trade, commerce or industry, in domestic trade or commerce; 5.) any unfair method of competition in trade, commerce, or industry and unfair or deceptive act or practice in trade, commerce, or industry which tends to eliminate competition, create or strengthen monopolies, oligopolies, cartels, and combinations or agreements in restraint of trade, commerce, or industry injures small business, or otherwise promote undue concentration of economic power in the hands of a few, suppress competition and centralize control over markets; 6.) any combination, trust, agreement, contract or conspiracy made between two or more persons, either of whom is engaged in importing any merchandise, commodity, article, or object of trade, commerce or industry from any foreign country into the Philippines which is intended to operate in restraint of trade of lawful trade, or free competition in lawful trade, commerce, or industry or to increase the market price in any part of the Philippines of any merchandise, commodity, article or object of trade, commerce, or industry; imported or intended to be imported into the Philippines, or of any manufacture, into which such imported merchandise, commodity, article, or object enters or is intended to enter; 7.) any contract, arrangement, agreement, or combination made between persons in the form of trust or otherwise or conspiracy in restraint of trade, commerce or industry or which tends to prevent free, fair, and unrestrained competition in the market place in any part of the Philippines; 8.) any course of conduct, arrangement or agreement, which in any way obstructs, delays, or adversely affect the free play of trade, commerce, or industry or the movement of any merchandise, commodity, article, or object in trade, commerce, or industry, and which thereby tends eliminate competition, create or strengthen monopolies, oligopolies, cartels and combinations in restraint of trade, commerce orindustry, injures small business, or distorts, manipulates or constricts the discipline of the market, or otherwise promotes undue concentration of economic power in the hands of a few; 9.) any retention of monopoly power by any person by persistently expanding capacity to meet anticipated demand and forestall competition; provided, that a firm or individual that merely possesses monopoly shall not be deemed as having violated this act, if the monopoly has been thrust upon such firm or individual by the economic character of the industry, or by virtue of superior skill, foresight and industry of such individual or firm; 10.) any contract, arrangement, agreement, combination, conspiracy or course of conduct made or entered into by, between and among natural persons or firms or other legal entities, in the form of trust or otherwise, which gives a natural person or firm or any other legal entity, a peculiar or decided advantage over other natural persons or firms or legal entities who are similarly situated, which enables such natural person, or firm or legal entity, to exclude or eliminate actual or potential competition from other natural persons or firms or legal entities in the business of supplying any form of professional services or goods, merchandise, article, or object of trade or commerce to the government or any of its branches, subdivisions, instrumentalities, and agencies, including government owned and controlled corporations: provided, that there shall arise a disputable presumption of violation of this provision, if more than 25% of the total value of professional services or goods, merchandise, article or object of trade or commerce supplied to the government or any of its branches, subdivisions, instrumentalities, and agencies, including government owned and controlled corporations is contracted for or assigned to or supplied by a particular natural person, firm or other legal entity; 11.) any concerted refusal to sell or conspiracy not to sell or to stop doing business on the part of suppliers of any merchandise, commodity, article or object of trade, commerce or industry such as food substances, motor fuel or lubricants or other articles of prime necessity; 12.) any conscious parallelism of action or course of conduct by rival business, establishment, including but not limited to price, leadership, coupled with similarity of policy and other terms of sale, such as quantity discount, price differential between various qualities and types of products, and freight charges or delivered price arrangement; 13.) any form of unreasonable market power acquired by any person which tends to undermine the competitive process, irrespective of the lack of nefarious conduct on the part of the person acquiring it, if such person had achieved a monopoly by maneuvers, which, though honestly industrial, where not economically inevitable, but were rather the result of such person's choice of business policies; 14.) any form of holding company, device organized to hold stock in other corporations which make possible the fusion of many independent concerns into a single giant unit towering over all the rest in its particular branch of industry, thereby making it easy to accomplish centralize control of rival business corporations; 15.) any acquisition by any person or persons of all or a large percentage of the plants engaged in the manufacture or production of any merchandise, commodity, article or object of commerce by the dismantling of some and regulating the output of others so as to restrict production, control prices, and monopolize the business; 16.) interlocking directors, officers or employees or two or more firms or companies whose lines of business are in substantial competition in each other; (emphasis supplied)

Section 5 provides for some specific forms of unlawful monopolies, oligopolies, cartels, courses of conduct in restraint of trade, commerce, or industry, such as monopolization, attempts to monopolize or combination or conspiracy with any other person to monopolize any object of trade, radio, communications, telecommunications by any form, including the acquisition of stock or interest in physical property of any telecommunications services; price discrimination; receiving of commissions or compensations for services not rendered; to induce or receive such discrimination; acquisition of stock or share capital or assets of any other corporation where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly, to a person to serve as director in two or more banking institutions. These provisions may seem to limit the broad scope of Section 3 however, the last proviso of Section 5 negates this effect because it provides that nothing contained therein shall be construed to alter, limit, negate or modify the force and effect of anything, that is forbidden or declared unlawful in Section 3.

Section 3 and 5 of the proposed Senate Bill make unlawful contracts, agreements, combinations, conduct, pooling together of economic power in restraint of trade 'which tends to concentrate economic power in the hands of a few and threaten to control arbitrarily the conditions of production, trade, commerce, or industry' or 'distort manipulate or constrict the discipline of the market' or 'which tends to prevent free, fair, and unrestrained competition in the market place in any part of the Philippines'. Since the bill declares the acts in Section 3 to be *'in themselves unreasonable'*, theoretically mere proof of its existence is sufficient and there is no need to evaluate the prohibited act's relative competitive effect in a relevant market. By use of such language, the necessary conclusion is that the standard demanded is perfect competition.

These provisions of Senate Bill 996 show a dangerous tendency of lawmakers in their fervor to prevent economic imperialism, to overlook the definitive economic concepts of competition. While the premise is that if free enterprise is to subsist, there must be free and fair competition, 'free and fair' competition is not congruent with perfect competition. Pure competition has proven to be merely an analytical device. It is accepted that in legal contemplation, an imperfect market whose results are 'reasonably competitive' with 'general economic welfare' should be sufficiently competitive.[362] Therefore, while the task of policing business activities is left to the economic mechanism of competition, such regulatory force is not required to be pure or perfect as envisage by Section 3 and 5 of the Senate Bill.

The standard of perfect competition, absent a consideration that workable competition is legally sufficient will in effect require the invalidation of business acts and transactions which are technically anticompetitive, for example, franchising agreements and exclusive distributorships notwithstanding that they do not impair efficient competition. This is an unacceptable criterion of legality because all contracts are inherently technical restraints of trade. Mere existence of a contract *'tending of prevent free and fair untrammeled play of market forces'* as a standard will lead to the absurd result of negating the entire body of contract law.

Pure competition and an absolute lack thereof, lie at extreme points of the competition continuum. The real world however has proved to be between these two theoretical extremes.[363] Therefore, it is the degree by which competition is impaired, that must be determinative of whether or not a trade act or transaction is unlawful, and public intervention in the form of competition laws must only be to such degree necessary to liberate the market from private trade restraints, which adversely impair efficient competition, to the extent of affecting public interest.

A competition legislation which conveniently declares all acts or transactions tending to be anticompetitive as in themselves unreasonable, negates its equally urgent duty to undertake the difficult task of devising standards of efficient competition, necessary to distinguish those which are sufficiently restrictive in a relevant market, to be classified as *legally anticompetitive*.

[362] AREEDA, *supra* note 39, at 37.

[363] MOORE, *supra* note 29, at 365.

Thus, in the enactment of the legal parameters of a business competition law the underlying consideration must be that the regulation of private business practices, adopted by profit motivated market participants in their battle for survival to promote competition is undeniably an introduction of a public force into an area of private activity, valuable to the actors as an aspect of their liberty and to the country as a source of national wealth. It must likewise be recognized that free enterprise is not to be taken as an abdication of government presence because it is a fallacy to assume that competition will happen as a matter of course, however, it is equally compelling that legislation preserving and maintaining competition must not to lose sight of reasonableness, in balance with the fundamental constitutional guarantees of freedom of contract, private property rights and economic individualism.

C. The Task of Specification

1. Restraints in Trade

Article 186 of the Revised Penal Code - Paragraph 1[364] like Section 1 of the US Sherman Act, prohibits two or more entities from pooling their economic power to restrain trade. Unilateral action does not violate Section 1 of the Sherman Act nor paragraph 1 of Article 186 of the Revised Penal Code, although an identical act made jointly would be illegal.[365] Basically, a contract in restraint of trade results from words, while illegal combinations are typically demonstrated by business conduct. A conspiracy is usually established initially by words, which are then followed by actions to carry-out the conspiracy plan.[366] In antitrust legislation, contract, combination or conspiracy is a term of art meaning joint or concerted action.[367]

The parallel of paragraph 1 of Article 186 of the Revised Penal Code with Section 1 of the Sherman Act, ends with their similarity in statutory language. While the American counterpart, as shown in the previous discussions on restraints of trade in American jurisdiction, have been largely effective in apprehending the malpractice they were enacted to address, the Philippine version, as shown by a dearth of cases has not traveled from the statute books into the world of enforcement. While the exact causes can be merely hypothesized, it can nevertheless be observed that the provision itself is fraught with legal infirmities, as identified and evaluated accordingly in the succeeding discussions.

[364] Act 3815 (1930), The Revised Penal Code of the Philippines, art 186, as amended by RA 1956 (1957). Monopolies and combinations in restraint of trade. The penalty of *prision correccional* in its minimum period of a fine ranging from two hundred to six thousand pesos, or both, shall be imposed upon: 1. Any person who shall enter into any contract or agreement or shall take part in any 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 in the market;

[365] BLACKBURN et al, *supra* note 98, at 562.

[366] MOORE et al, *supra* note 29, at 350.

[367] BLACKBURN et al, *supra* note 98, at 562.

a. The Dilemma of Language Arising from Location

A violation of the Section 1 is declared a felony, in the Sherman Act. It is probably this denomination that led the Philippine law makers to include the prohibition against monopolies and combinations in restraint of trade in the Revised Penal Code, because violations thereof are felonies in the Philippine jurisdiction. Seemingly, it was not however taken into consideration or was overlooked that the principles applicable to felonies in Philippine civil law jurisdiction are vastly different from the common law jurisdiction of American penal law.

Being an almost identical copy, the language of paragraph 1 of Article 186 of the Revised Penal Code is as ostensibly plain and unambiguous as Section 1 of the Sherman Act. Accordingly, it is axiomatic that there is no need for judicial construction because where the law speaks in a clear and unequivocal language, there is no room for interpretation, only application.[368] Difficulty arises however, because a contract inherently restrains the conduct of contracting parties, to the extent agreed upon therein. This predicament, observed by the United States Supreme Court, was succinctly stated in this wise:

> One problem presented by the language of Section 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But . . . *restraint is the very essence of every contract; read literally Section 1 would outlaw the entire body of contract law*. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets - indeed, a competitive economy to function effectively.[369] (emphasis supplied)

In 1911, American jurists have avoided the absurdity by adopting the common law principle of the rule of reason.[370] Thus, only contracts or combinations in restraint of trade, which were deemed to *unreasonably* affect or impair competition were invalidated. A forthright statutory application of the provision was not however abandoned. Under the principle of *per se* illegality, there are few acts which have been judicially ruled as *unreasonable in themselves* and therefore illegal without need to consider their effects on competition. Integrated with the statutory provision, these common law principles became the bases for the definition of the concerted activities are contemplated by the plain language of Section 1 of the Sherman Act. The approach allowed the provision to be enforced judiciously despite its unequivocal language.

When the United States Congress was given a chance to amend such language, both houses were in accord, when they concluded that the better course would be generality, because 'there were too many unfair practices to define and after writing twenty of them into the law, it would be quite possible to invent

[368] Cebu Portland Cement Company v. Municipality of Naga, 24 SCRA 108 (1968).

[369] National Society of Professional Engineers v. United States, 435 U.S. 679 (1979).

[370] Standard Oil, *supra* note 94.

others and if Congress were to adopt the method of definition, it would undertake an endless task, given the fact that there is no limit to human inventiveness in this field'.[371] It left the task of reducing the plain language and defining the specific acts to the administrative enforcers, with the safeguard of judicial review.

i. CONSTRUING 'RESTRAINTS OF TRADE'

Philippine jurisprudence has also adopted the common law principle that restraints of trade to be against public policy must be unreasonable. But they were done in the context of civil not penal laws. In *Lambert v. Fox*,[372] an agreement between plaintiff and defendant, mutually and reciprocally not to sell, transfer, or otherwise dispose of any part of their present holdings, until after one year from the date of agreement, was held as valid because it had a beneficial purpose, and resulted in the protection of the corporation as well as of the individual parties to the contract, and is reasonable as to the length of time of the suspension.

In *Ferrazini v. Gsell*,[373] the Philippine Supreme Court held that a stipulation that plaintiff should not enter into any enterprise in the Philippines, except upon written permission of defendant, during the period of employment and for a term of five years after its termination, without regard to the cause of such termination was clearly an undue and unreasonable restraint and void being against public policy. Other cases interpreting stipulations whereby the employee agrees to refrain for a given length of time after the expiration of the term of his employment from engaging in a business competitive with that of his employer as not necessarily void, as being in restraint of trade, if the restraints are no greater than that which is necessary to a afford a reasonable protection to the employer.[374]

Filipinas Compania de Seguros v. Mandanas,[375] involved an action to declare the legality of Article 22 of the constitution of the Philippine Rating Bureau, on the ground that it constitutes an illegal or undue restraint of trade. The Court applied the rule of reason and found that neither the purpose or the means availed of to achieve its objectives or the consequences of the accomplishment thereof was to eliminate competition, but to promote ethical practices among non-life insurance companies, although incidentally, it may discharge, and hence, eliminate unfair competition, through underrating, which in itself, is eventually injurious to the public.

The dicta in these civil cases however, cannot provide a solution to the statutory predicament of Philippine criminal provisions of restraint of trade. Being situated in the Revised Penal Code, the courts may not legally resort to the adoption of the rule of reason in the interpretation of Article 186 because such common

[371] Sperry, *supra* note 273 .

[372] 26 Phil 588 (1914).

[373] 34 Phil 697 (1916).

[374] Ollendorf v. Abrahamsom, 38 Phil 585 (1918); G. Martini, Limited v. Glaiserman, 39 Phil 120 (1918).

[375] 17 SCRA 391 (1966).

law principle cannot have application in the penal code. It is fundamental that the body of principles, usages and rules of action, which do not rest for their authority upon any express and positive declaration of the will of the legislature are not recognized with respect to felonies in Philippine civil law jurisdiction.[376] Otherwise, despite the expressed categorical will of the legislature as found in Article 186, it will be the court decisions which will be the final source of criminal law.

Moreover, because Article 186 is found in the Revised Penal Code, it is within the duty of the courts to respect and apply the law as it is found in the statute books, regardless of their opinions about the wisdom and morality of the laws and the manner which their judgments are executed and implemented.[377] The judicial recourse being, in cases where a strict enforcement would result in an imposition of a clearly excessive penalty, in relation to the degree of malice and injury caused, it may submit to the President, through the Justice Department, such statement as it may deem proper in the circumstances, without suspending the sentence.[378] If the judiciary is to be consistent with these principles, their task is merely apply the categorical language of paragraph 1 of Article 186. Consequently, avenues towards a judicial solution of the predicament of statutory interpretation arising from the location of Article 186 in the Revised Penal Code, are foreclosed. As a result, Philippine courts cannot temper the unequivocal and categorical language of the proscription of every contract in restraint of trade and must hold criminally liable all persons who enter such agreements.

ii. THE QUALIFYING CLAUSE

Arguably, a solution may be found in the provision itself. The Philippine version employs a qualifying phrase, *'or to prevent by artificial means free competition in the market'*, not found in the Sherman Act. Liberally read, it is an. expression of the rule of reason. However, a closer look at the phrase will show that it does not detract from the unequivocal language nor the sweeping scope of the paragraph 1 for the following reasons: (a) it is likewise general tenor, it does not prescribe a standard to measure the degree a contract should 'prevent free competition' to be legal or illegal; (b) it uses the term 'artificial', which by necessary implication allows the prevention of free competition by natural means, but in the domain of man-made contracts and agreements, it is doubtful whether there is such a denomination; and (c) it is in the alternative and thus cannot be said to constitute an additional requisite, for the general proscription of contracts, combinations or conspiracies in restraint of trade.

[376] REYES, THE REVISED PENAL CODE - CRIMINAL LAW, BOOK ONE, 1993 Phil., art. 2. [hereinafter REYES - 1].

[377] People v. Olaes, 105 Phil 502 (1959).

[378] Act 3815 (1930), Revised Penal Code of the Philippines, art. 5. Duty of the court in connection with acts which should be repressed but which are not covered by the law; and in cases of excessive penalties.

iii. INTERSTATUTE RECOURSE

An intraprovision solution not availing, more recent special laws will be investigated in the hope of finding an interstatute remedy. It is axiomatic that a general law and special law on the same subject are statutes in *pari materia* and should accordingly, be read together.[379] The Philippine legal system is not bereft of providing the term 'restraint in trade' with a semblance of a statutory standard in the context of competition regulation. Republic Act 7581, makes it unlawful for a person habitually engaged in production, manufacture, importation, storage, transport, distribution, sale or other methods of disposition of goods to engage in the acts of price manipulation of any basic or prime commodity or to engage in a cartel. A cartel is defined therein as any combination of or agreement between two or more persons likewise engaged in such activities of any basic commodity designed to artificially and unreasonably increase or manipulate its price. It is also provided that whenever two or more persons or business enterprises competing for the same market and dealing in the same basic necessity or prime commodity, perform uniform or complementary acts among themselves which tend to bring about artificial and unreasonable increase in the price of any basic commodity or when they simultaneously and unreasonably increase prices on their competing products, thereby lessening competition, they shall be *prima facie* deemed as engaging in a cartel.[380]

The acts defined are antitrust in character and within the meaning of restraints of trade or where they are done with intent to monopolize, they are within the ambit of conspiracies to monopolize.[381] Republic Act 7581 is a consumer protection law, accordingly it regulates competitive conduct as they may impinge upon consumers. Its proscription of cartels or conscious parallelism is conditioned upon an unreasonable increase in price. The predicate of effect indicates an unsettling tendency to equate the need for regulation of competition, with the reasonableness of the results. Otherwise stated, if the price is reasonable, the manipulation is not unlawful. However, competition regulation is focused towards the conduct, regardless of effect. It is the power to control the market and to fix arbitrary and unreasonable prices that is sought to be controlled by a competition statute because by eliminating competition, the fixers can dictate the *'reasonable price today, which however may through economic and business changes become the unreasonable price tomorrow'*.[382]

[379] Manila Railroad v. Rafferty, 40 Phil 224 (1919).

[380] R.A. 7581 (1992), An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities and by Prescribing Measures Against Undue Price Increases During Emergency Situations and Like Occasions, Otherwise Referred to as The Price Act, Repealing RA 4164, PD 1674, LOI 1305, LOI 1342, LOI 1359., sec 2 & sec 5(3).

[381] See Ch. III, § B2 - iii of the work.

[382] Trenton Potteries, *supra* note 104.

b. The Need to Define Commercial Activity Affected

The difficulty of statutory interpretation as experienced by American jurists is more severe in the Philippine jurisdiction. Section 1 of Sherman Act compared to Article 186 of the Revised Penal Code has limited application. The former applies only to interstate commerce and excludes intrastate transactions, leaving it to state laws to regulate them as may be necessary. The Philippine version however is all inclusive, providing for no specification as to the kind of commercial transactions affected. As presently expressed, even *balut* and fish ball vendors who either consciously follow each other's prices or agree to divide markets by selling only at designated street corners for the purpose of avoiding competing with one another are in violation of the law and may be found criminally liable.

On the other hand, paragraph 3 of Article 186 seemingly is in the positive direction of specificity.[383] It attaches criminal liability only to persons engaged in acts or transactions which involves a product imported from a foreign country. It was patterned after the Section 73 of Wilson Tariff Act, which declares every combination, conspiracy, trust, agreement or contract to be contrary to public policy, illegal and void when made by two or more persons, either of whom is engaged in importing articles into the United States, when such is intended to operate in restraint of trade or to increase the market price of such article.[384] Article 186 has expanded the provision to include producers, or processors of any merchandise or object of commerce from any foreign country, in addition to importers and manufacturers of imported materials. Thus, when the act or transaction involves an product imported from a foreign country, theoretically paragraph 3 applies. Otherwise, paragraph 1 is the applicable law when the unlawful contract, trust, agreement is entered into by parties engaged in purely domestic commerce.

Because Section 1 of the Sherman Act specifically applies only to interstate commerce, it necessitated the application of Section 73 of the Wilson Tariff Act, in importation transactions. It has been clarified however, that notwithstanding the broad scope of its language, Section 73 of the Wilson Tariff Act, has not been more comprehensive in scope than the Sherman Act, and serves only to specify the latter's application, as it relates to foreign commerce.[385] Paragraph 1 of the Revised Penal Code, however does not distinguish between purely domestic transactions or

[383] Act 3815(1930), The Revised Penal Code of the Philippines, art. 186 (3). Any person who, being a manufacturer, producer, or processor of any merchandise or object of commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, shall combine, conspire or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, of any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, processed, or imported merchandise or object of commerce is used.

[384] The Wilson Tariff Act, § 73, *supra* note 317.

[385] KINTNER & JOELSON, *supra* note 73, at 15.

those which involve importation. The prohibitions in paragraph 1 of Article 186, include all activities enumerated in paragraph 3 of Article 186. Without distinction as to scope, paragraph 3 of Article 186 is redundant.

The question of which commercial activities are to be appropriately regulated by a general competition statute arises. Does protection of competition require all commercial transactions in restraint of trade, regardless of kind be prohibited by a general law? The answer is a resounding no. This branch of law concentrates on limiting market power. It does not concern itself with the *'small fish'*, but enforcing standards of business competitive conduct on and reducing the power of large business enterprises.[386] This is supported by the constitutional policy to allow private enterprise ample room to develop subject to the duty of the State to intervene *'when common good demands.'*[387] The need to limit and define the commercial transactions covered is essential because it is well settled, that a law which fails to consider the substantial differences among individuals contemplated, where such is necessary fails the equal protection clause as one which discriminates without distinction.[388]

In summary, it is not surprising that after a diligent search no case has been found which has applied paragraph 1 of Article 186 of the Revised Penal Code. Had it been invoked, it would be vulnerable to a challenge for overbreadth, under the procedural due process test of reasonableness, notwithstanding the validity of its subject under substantive due process because of the constitutional competition policy. The solution to the statutory language problem and the broadness of scope is legislative. The restraint of trade provisions will have to be lifted out of the Revised Penal Code into a special law. The standard of *unreasonableness* in restraint of trade, as distinguished from *in themselves unreasonable* must be employed to attach criminal liability. The prohibition of concerted activities in restraint of trade must be directed towards unreasonableness of conduct, not price. Finally, the commercial activities in the purview of regulation not limited to restraints of trade must be delimited by the use of value or geographical criteria.

2. Monopolization, Attempts and Combinations to Monopolize

Paragraph 2 of the Article 186 of the Revised Penal Code,[389] provides any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize is criminally liable. It focuses on structure the monopoly of an industry as well as business conduct directed toward monopolization. Paragraph 2 provides the legal means to break-

[386] *Id.*, at 5.

[387] 1987 PHILIPPINE CONSTITUTION, art. XII, § 6.

[388] Villegas v. Hiu Chiong Tsai Pao Ho, 86 SCRA 270 (1978).

[389] Act 3815 (1930), The Revised Penal Code of the Philippines, art 186 (2) any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize said merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other artifice to restrain free competition in the market.

up existing monopolies and to prevent the development of new ones. It is directed towards the acts of monopolization and not monopolies. Rationalizing that bigness attained by legitimate means are not prohibited, the rule of reason has been consistently applied in Section 2 cases by American courts.[390] The major distinction between restraint of trade and monopolization is the number of firms engaged in the violation. The second is directed at the activities of only one business person, while at least two such persons are required to violate the first. One firm may monopolize, but at least two are needed to contract, combine or conspire.[391]

While paragraph 2 of Article 186, unlike Section 2 of the Sherman Act does not include expressly 'attempt to monopolize', it is deemed incorporated because the Revised Penal Code, punishes not only consummated felonies, but also those in the frustrated and attempted stages.[392] The frustrated stage, where all acts of execution are performed, but for causes independent of the will of the perpetrator the felony is not produced, finds no application in paragraph 2 because monopolization being the exercise of monopoly power within a relevant market with the intent to monopolize does not require that the intended effect be realized for it to be punishable, it being sufficient that a business entity deliberately acted with intent.[393] Thus, the following acts under paragraph 2 are unlawful: monopolization, attempts to monopolize, and combining with others to monopolize.

a. Structure, Not Price

The Philippine version incorporates a qualifying clause, not found in the Sherman Act. It is provided that monopolization and combinations with other persons to monopolize be *'in order to alter the price thereof by spreading false rumors or making use of any other artifice to restrain free competition in the market'* to be punishable. In Philippine law therefore monopolization for purposes other than to alter the price is not unlawful.

However, this opposes the primary antitrust concept that monopolization is directed towards market structure and not price.[394] Price manipulation by spreading false rumors or otherwise, may or may not be the purpose of an alleged monopolist in the attempt or combinations thereof. It is the willful acquisition and exercise of monopoly power to preserve or increase monopoly power in a relevant market that the law seeks to prohibit. Predatory practices are merely proof of the specific intent required in attempts or combinations to monopolize cases.[395] This is unnecessary in monopolization cases, where general intent or 'deliberateness' will suffice.[396]

[390] *See supra* note 137.

[391] MOORE et al, *supra* note 29, at 350.

[392] Act 3815 (1930), The Revised Penal Code of the Philippines, art. 6. Consummated, frustrated and attempted felonies.

[393] *See* Ch III, sec B2 - v.A. of the work.

[394] *See* Ch III B2 - v.A. of the paper.

[395] *See supra* notes 165, 166.

[396] *See supra* notes 152, 153.

The *Alcoa* view maintains that mere monopoly power in a relevant market, can show that the alleged monopolist used monopolization to achieve it, without need to prove any *'purposeful act'*.[397] While the law is commendable because it seeks to protect consumers from undue increase in prices, it is not contemplated in competition regulation, but consumer protection laws. The purpose of the prohibition will be attained, if the willful unilateral or concerted act of a business entity to achieve monopoly power be punishable as an attempt to monopolize and, where such power already exists the deliberate exercise thereof to maintain and preserve its market position be unlawful under monopolization, regardless of the purpose or means employed.

By adding the qualifying phrase *'in order to alter price thereof'*, even in the alternative to other artificial methods, the provision is becomes severely limited in its application, as to be inutile. As shown in the American experience, where predatory practices are necessary as proof of the required specific intent, the difficulty of obtaining such evidence has resulted in few successfully prosecuted cases.[398] The phrase serves no analytical use to determine the acts declared illegal.

b. A Purely Criminal Violation?

The laws surveyed in restraint of trade shows only Article 186 of the Revised Penal Code provides for an express statutory prohibition of monopolization, which is not in the nature of a policy statement. The primary purpose of regulation monopolization is the ability of the law not only to prevent but to break-up existing monopolies, where such monopolies were achieved in violation of the law. Criminal sanctions are imposed to heighten the deterrent effect of the violation. However, such deterrence would not be achieved, if the felonious characterization of the acts would defeat the very purpose of the regulation.

Monopolization and attempts thereof, are inherently unilateral violations and the overt acts for the acquisition/maintenance of unlawful monopoly power generally happen in the boardrooms and office suites of large business enterprises. This nature of monopolization argues strongly against attaching only criminal liability for the commission of these acts. The higher quantum of evidence required in criminal prosecutions, as well as establishment of intent necessary in proving felonies makes it difficult if not impossible to prove monopolization criminally.

Given these considerations, it is appropriate to attach to an unlawful act of monopolization and attempts or combinations thereof, not merely criminal liability, but also civil or administrative liability. The imputation of criminal liability should be reserved only in cases where the acts declared unlawful are committed with the criminal intent. As such, an alleged monopolist may be prosecuted criminally, civillly or in an administrative proceeding, allowing the enforcer flexibility to break-up or prevent constitutive acts of monopolization.

[397] *See supra* note 147.

[398] See Ch III, sec B2 - a.v. of the work.

As it stands, Paragraph 2 of Article 186 being a felony precludes this approach. While civil liability is impliedly instituted in criminal actions, the civil liability contemplated is the recovery of private damages and not as an enforcement measure.[399] Necessarily therefore, the provision is more appropriately: (a) treated in a special law; (b) without reference to price, but structure; and (c) enforced not only criminally, but civilly and administratively, as well.

3. A Vacuum - the Failure to Provide for Acts of Incipient Danger

Of equal significance to the vitalization of the spirit and intent of the competition policy is to address business conduct, which while not in actual restraint of trade or monopolization, nevertheless poses the dangerous probability of impairing or foreclosing competition that they must be regulated, under the *incipiency rule*. Incipient danger acts unlike actual combinations in restraint of trade or monopolization and attempts or conspiarcies thereof, are not contemplated to be acts *mala in se* like the actual violation, precisely because they fall short of it. While such act may form part of an actual restraint of trade or monopolization, standing alone they cannot be recognized under Article 186 of the Revised Penal Code or even constitute even an attempt thereof, because they do not require the criminal intent necessary in *mala in se*. Without a law expressly regulating them, they fall outside the ambit of Article 186 and thus, the enforcers must wait for the actual violation to be committed, before they may be apprehended.

It is rather unfortunate, there is at present still no law that specifically treats of the general application of the incipiency doctrine, despite the fact that when the Philippine Revised Penal Code was enacted in 1930, statutes providing for such were already being enforced in the American antitrust legal system as early as 1914. These laws would have sufficed as reference for the enactment of a Philippine counterpart.

A legislative predetermination of conduct which appropriately falls within the doctrine is necessary in a competition regulation. The inclusion of these activities in the regulation are imperative to provide a solution to major problems of competition regulation, namely: (a) to provide advance anticipation of the acts sought to be apprehended; (b) to allow the law to reach activities that have proven to be presumptively anticompetitive; and (c) to provide for better enforcement.

Although the provision for acts of incipient anticompetitive dangers is concerned with probabilities, not certainties and exists for dealing with what had proven to be clear-cut menaces to competition,[400] there is a need to clarify certain principles. First, it must be stressed that they are not actual anticompetitive practices. If criminal liability is to attach, these acts are in the nature of legal presumptions, declared by legislative expression to be *mala prohibita*. Secondly, the law must provide for a particular set of facts to be proved before the presumption of anticompetitiveness may attach. Third, in such set of facts, the standard required is an actual probability of anticompetitive effect an not ephemeral *possibility*. Being the *raison d'etre* for the prohibition, the competitive effect in the relevant market must always be a requirement for a violation to arise.

[399] Act 3815, The Revised Penal Code of the Philippines, art. 100. Civil liability of persons guilty of a felony; in relation to art 104. What is included in civil liability.

[400] Brown Shoe, *supra note* 207.

As mere incipient dangers of adversely affecting the competitive processes and unlawful as declared by a positive legislative act, they must: (a) be expressly and specifically provided; (b) constitute a lower level of criminal culpability, as distinguished from actual violations; and (c) must include a specification of a set of facts founded on probable anticompetitive effect, from which unlawful anticompetitiveness may be legally presumed.

a. Interlocking Directorates

Gokongwei, Jr. v. Securities and Exchange Commission,[401] illustrated the factual situation sought to be addressed by the incipiency doctrine. In this case, the Philippine Supreme Court, validated the reasonableness of an amendment of corporate by-laws, which renders a stockholder ineligible to be a director, if he is also a director in a corporation whose business is in competition with that of the other corporation. It considered the constitutional competition policy in the 1973 Constitution and cited Article 186 of the Revised Penal Code, categorizing them as *'antitrust laws'*. It then proceeded to *'borrow'* Section 8 of the Clayton Act, which prohibits interlocking directorates in competing corporations,[402] and based its determination thereon.

Interlocking directorates,[403] are not unlawful under Article 186 of the Revised Penal Code, because as discussed it falls short of an actual violation and cannot even constitute an attempt thereof. Accordingly, to cite Article 186 of the Revised Penal Code as *antitrust*, and hold the challenged corporate by-laws as lawful because interlocking directorates is prohibited under an American *antitrust* law by inference is dubious.[404] To prohibit interlocking directorates because of its incipient danger of anticompetitive effect, there must be a positive legislative predetermination that it is indeed unlawful. Notably, there was and there is still no law prohibiting interlocking directorates in Philippine jurisdiction for general application.

b. An Executive Order Recognizing the Incipiency Rule

While there is no legislative act, defining and prescribing acts of incipient danger for application to all sectors in the commercial arena, Philippine jurisdic-

[401] 89 SCRA 336 (1979).

[402] *Id.* at 337.

[402] See note 204, *supra*.

[404] Author's Note: It is not to be taken however that the challenged by-laws should have been invalidated. While agreeing with the result, it is however submitted that the Supreme Court could have instead invoked the public policy against unification of competing economic forces as being in combination in retraint of trade, without touching upoin Article 186 of the Revised Penal Code.

tion is not bereft of the recognition of its efficacy. Executive Order 212 providing for the acceleration of demonopolization and privatization of Philippine ports provides that there shall be no interlocking stockholders, directors, or officers or common management between or among cargo handlers, port service contractors or other port-related companies operating in the port or terminal facility. Violations are on pain of suspension or cancellation of any service contract with the Philippine Ports Authority.[405] Consistent with incipiency doctrine, actual monopolization or a restraint of trade is not required. No consideration however, has been made to balance the conflicting interests of the private person, in precluding him to act as a director of two or more companies and the public interest, sought to be achieved by the prohibition. The Order does not provide for conditions or a set of facts, which prove, the incipient danger of impairment of competition presumed great enough to affect public interest.[406]

Moreover, Executive Order 212, in accelerating demonopolization also prohibits for discrimination between producers. It provides that free access to the ports is allowed to all sectors of the industry and that there shall be no discrimination in the provision and availment of services or contracts.[407] Much like its provisions against interlocking directorates, it provides for no set of conditions or elements[408] and reaches all port-related companies in the port or terminal facility without qualification. Even if the discrimination is for meeting the competition, or in response to changing market conditions or it justified by cost differences,[409] they may still be considered violations.

c. Mergers

The Philippine Corporation Code provides that the sale or other disposition of assets of the corporation are subject to the provisions of existing laws on illegal combinations and monopolies.[410] It also provides that no voting trust agreement shall be entered into for the purpose of circumventing the law against monopolies and illegal combinations in restraint of trade.[411] These provisions seek to address incipient danger of the adverse effect of mergers on competition. The Code itself however, provides no standards or specific conduct, and merely directs attention to other laws proscribing illegal combinations and monopolies. Significantly, there is only Article 186 of the Revised Penal Code, which cannot address incipient dangers.

[405] E.O. 212 (1994), Accelerating the Demonopolization and Privatization Program for Government Ports in the Country, § 4.

[406] *See supra* notes 203, 204.

[407] E.O. 212 (1994), Accelerating the Demonopolization and Privatization Program for Government Ports in the Country, § 4.

[408] *See supra* note 240.

[409] *See supra* notes 248, 250, 251.

[410] B.P. 68 (1980), The Corporation Code of the Philippines, § 40.

[411] B.P. 68 (1980), The Corporation Code of the Philippines, § 59.

While there are provisions regulating mergers in the Corporation Code,[412] it is ominously silent as to mergers, prohibited by reason of their incipient danger of anticompetitive effect in a relevant market. Mergers are an important aspect of the incipiency doctrine. The scope of an anticompetitive effect of a mergers is generally of greater impact to market forces than the other incipient acts because it contemplates acquisition, unions, conglomerates of business interests clearly showing a unification of economic power. They can be easily be apprehended by the expedient of requiring premerger notifications, and allowing the enforcers the information and time necessary to prohibit the same.

However, not all mergers are sought to be proscribed. Mergers *per se* allow for the flow of investment capital, necessary in expanding economies. It is recognized as an efficient form of growth, provided its anticompetitive tendencies are sufficiently apprehended. It is necessary in a law providing for the regulation of mergers, that the set of facts, from which the law presumes that a merger poses the danger of unification of economic power of sufficient adversarial effect to the competition mechanism that it needs to be prohibited, be clear and expressed.

Unfortunately, despite the past decade of deregulation, liberalization and privatization activities, there is presently still no rule in Philippine jurisdiction that provides for this. As such, it demands to be addressed.

d. A Contemporary Legislative Outlook of the Incipiency Doctrine

Senate Bill 996 will be explored to determine the contemporary legislative outlook of the application of the incipiency doctrine in the Philippine legal system. Notably, Section 3 and 5 thereof includes in its enumeration acts of incipiency. It prohibits *inter alia* interlocking directors, officers or employees of two or more firms[413] or companies whose line of business are in substantial competition with one another, or any form of holding company device organized to hold stock in other corporations which makes possible the fusion of many independent concerns into a single giant unit or any corporations engaged in trade, commerce or industry to acquire directly or indirectly, the whole or art or any part of the stock or other share capital or the whole corporate assets of another corporation, where such acquisition may be to substantially lessen or tend to create a monopoly. Section 6, provides that all violations enumerated in Section 3 and 5 are felonies, to be punished criminally. It fails to distinguish and consider that acts within the incipient danger rule, the violator has not done any actual anticompetitive act so unreasonable as to merit the same criminal liability as an actual violation.

[412] B.P. 68 (1980), The Corporation Code of the Philippines, Title IX, § 76-80.

[413] Senate Bill 996, § 5 (14) provides that the prohibition on interlocking directors shall apply when one of the firms where the person as serves director, officer or employee has a capital surplus and undivided profits aggregating more than P1,000,000.00. However, § 3 (16) provides for the prohibition of interlocking directors, officers or employees of two or more firms in substantial competition with each other, without qualification as to any value of the firms. The last paragraph of § 5 provides that nothing in § 5 should be construed as to limit the application anything forbidden or declared unlawful in § 3.

The Bill however, overlooks the necessity that a law which has for its object the comprehensive and coherent regulation of unfair methods of business competition needs to be substantively two-tiered. The first layer are violations *mala in se*, those which are actual violations of concerted activities in restraint of trade or acts of monopolization and attempts and combinations thereof. Secondly, there are those presumed by a legal predetermination to pose a danger sufficiently clear and strong to be declared unlawful. The latter is in the nature of *mala prohibita*. These aspects require different treatment and should distinguished from each other as to penalties, sanctions, enforcement and other remedial considerations. Otherwise, the a law fails to understand that the underlying principle of prohibiting these acts is mere *incipiency*.

The importance of an appropriate application of the incipient doctrine cannot be over emphasized. Its adoption offers solutions to underlying statutory problems of *mala in se* prohibitions, discussed elsewhere in this work. It makes for better enforcement and provides businesses with predictability of what is prohibited which is necessary for planing business strategies and programs.[414] Clarity and advance anticipation were markedly increased, complementing the open-textured *mala in se* prohibitions. On the other hand, care must be taken to provide for standards or a set of facts from which the probable anticompetitive may be logically and relevantly inferred. The legal predetermination of acts falling within the incipient danger rule must be able to circumscribe the application of the incipiency doctrine to those acts or transactions, whose anticompetitive effect are sufficient to affect public interest.

4. An Approach to Excluded Transactions

Under *Tatad*, there may be areas in economy where competition is undesirable or unnecessary. The constitution has granted legislature authority to pinpoint these areas, in the interest of the public. Article 186 of the Revised Penal Code makes no mention of transactions, which are excluded from the ambit of the law. A look at Section 4, of Senate Bill 996, provides clues to the legislative approach of providing exclusions from a general competition statute. Section 4 provides for exempted transactions, among which are corporate acquisition of assets for investment purposes only; joint agreements by persons engaged in team sports; any organization or; individual entering into a combination or agreement having the view of increasing wages and other advantageous terms of work; organizations of producers of any farm products the purpose of which is to maintain collectively a fair and reasonable price for their products; contracts or agreements providing for minimum prices for products bearing a trademark, trade name or brand; associations exclusively for export trade, or the acquisition of the stock or ownership of any corporation, which in whole or part engages in export trade.

A general competition law must be able to comprehend all acts circumscribed by its substantive provisions, regardless of purpose or kind of industry

[414] See Ch III, § B2 of the work.

where the act is employed. While there are recognized excluded transactions, because it may be deemed that competition is not necessary or desirable or that other interests are preferred over the maintenance of competition, these exclusions are more appropriately situated in the law governing such special interests, rather than providing for them in a general business competition law. Resort to this approach is the better method because each type of excluded act or transaction should not be totally immune to an antitrust challenge, but may be held liable to the degree that their activities may impinge upon the competitive process, in a manner not within their immunity.

For example, patents and public utility franchises enjoy a recognized exemption from the scope of certain antitrust proscription via State conferred monopoly, making them resistant to an attack of restraining trade, monopolization or attempts to monopolize. Where the patentee or franchisee obtains his patent or franchise illegally or where he employs trade practices, unilaterally or in concert with others which violate other antitrust provisions, bearing no relation to its natural monopoly however, they may be sued accordingly. Labor unions and team sports are likewise excluded from antitrust coverage only with respect to their undertakings as such. Labor unions, team sports are not susceptible to a challenge of a restraint of trade, despite closed shop or exclusivity provisions. Business entities in export trade or farmer's collective organizations are likewise excluded because they are considered preferred industries which promote the country's national productivity.

The legal contemplation of the technical terms patent, franchise, labor unions, team sports, export trade, cooperatives are defined in the special laws that govern them. As a consequence, the extent that their actions allow them a defense against an antitrust challenge, is properly a matter for such special law to also provide.

D. The Tort Component of Unfair Methods of Business Competition Methods

Article 28 of the New Civil Code[415] prescribes one of many rules of conduct under the title governing Human Relations in the Civil Code of the Philippines allowing recovery of damages, to a person injured as a result of unfair competitive conduct against the party liable. The relief was deemed necessary in a system of free enterprise because democracy becomes a mockery if a person's fair chance to engage in business or earn a living will be foreclosed by a person or group of persons using any unjust or high handed method.[416]

The words 'free enterprise' and 'democracy' used by the commissioners, indicate that the 'unfair competition' by enterprises mentioned in Article 28 of the

[415] R.A. 386 (1950), The Civil Code of the Philippines, Ch 2, art. 28. Unfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machination or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who thereby suffers damage.

[416] SANTAMARIA, *supra* note 20, at 45, *citing The Report of the Code Commission*.

New Civil Code pertains to acts which restrain competition, different from the unfair competition as defined in the Philippine Intellectual Property Code.[417] The latter is a special kind of commercial tort distinct from the tort of malicious interference of contractual relations[418] or the other special torts likewise found in Chapter 2 of the New Civil Code[419] or those which arise from unfair, unconscionable, deceptive sales act or practices, such as sale of defective products, false advertising or misrepresentation provided for in the Philippine Consumer Act.[420] This theory is confirmed when the Philippine Supreme Court referred to Article 28 of the Civil Code, as part of the statutory embodiment of the *'anti-trust'* policy in the Constitution.[421]

The private cause of action arising in Article 28 is similar to a American private treble damages suit arising from violations of antittrust laws.[422] However, unlike the American counterpart which has a private and public aspects, Article 28 of the New Civil Code is purely a private remedy. This can be discerned from the provisions on Damages in the Civil Code of the Philippines.[423] Recoverable damages in the Philippine legal system are limited to actual, moral, nominate, temperate, liquidated, exemplary, interest and attorney's fees in certain instances. Philippine law on damages has no provision allowing for the recovery of punitive damages, which constitute the *quasi*-public character of the American private antitrust damage claim.

The development of unfair competition in Philippine jurisdiction has been limited to those other than the tort component of unfair methods of business competition, such as that which pertains to copyrights, trademarks and trade names and malicious interference of contractual relations. There is virtually no jurisprudence where Article 28 of the New Civil Code has been invoked to seek recovery of damages for injuries caused by a restrictive trade practice, unlike in contemporary American jurisdiction where as high as 90% of antitrust suits are damage claims.[424]

On the other hand, Section 38 of Senate Bill 996 allows a private injured person to recover threefold damages against an offender. The recovery of damages is imbued with a private enforcement character, a component found to be necessary in the deterrence of violations of a competition law. The Senate Bill is perhaps too generous in applying treble damage claims, as it provides that all acts declared punishable therein, both by under Section 3 and Section 5, without distinction gives rise to cause of action for an award of treble damages.

[417] R.A. 8293 (1998), The Intellectual Property Code of the Philippines, § 168, 169, 170.

[418] R.A. 386 (1950), The Civil Code of the Philippines, art. 1314.

[419] R.A. 386 (1950), The Civil Code of the Philippines, arts. 19, 20, 21, 22, 23, 24, 25, 26, 27, 32.

[420] R.A. 7394 (1992), The Consumer Act of the Philippines, Title III, Protection Against Deceptive, Unfair And Unconscionable Sales Acts Or Practices.

[421] Tatad, *supra* note 10.

[422] *See supra* note 311.

[423] R.A. 386 (1950), The Civil Code of the Philippines, Title XVIII, art. 2197, 2208, 2209, 2210, 2211, 2212.

However, prescinding from the inherent differences between actual violations, which are *mala in se* violations and incipient danger acts, which are *mala prohibita* offenses, it becomes imperative that this distinction be recognized. Actual violations cannot not be placed in the same plane of liability as a mere incipient dangers because they differ vastly in the degree of malice and the effect sought to be penalized. The measure of damages allowed for acts which impair or foreclose competition must reflect this fundamental difference. Accordingly, treble damages suit should be unavailing for those acts which pose merely an incipient danger of impairment of competition; the recovery of treble damages should be reserved only for violations *mala in se*. Otherwise stated, violations of mergers, price, allowances, services or buyer discrimination, interlocking directors should give rise only to ordinary damages, while only combinations in restraints of trade and monopolization and attempts or combinations thereof should allow the recovery of treble damages.

E. Attaching Criminal, Civil, & Administrative Liabilities

1. Criminal Penalties[425]

Article 186 of the Revised Penal Code, like the Sherman Act and Wilson Tariff Act, provides for the penalty of imprisonment. The term of imprisonment in American jurisdiction is not to exceed three years for Sherman Act violations and a term not less than three months and not more than twelve months for violations of the Wilson Tariff Act; while in the Philippines, the period prescribed is *prision correccional*, in its minimum period,[426] and when the act or transaction affects any food substance, motor fuel or lubricants and other prime commodities, the period of imprisonment imposable is *prision mayor*, in its minimum and medium periods.[427]

Both imposeof fines, however, the disparity of amounts is great, Philippine law prescribes a paltry range of Php 200 to 6000, (approx. $5 to 150), while the American provision prescribes $10,000,000 (approx. Php 400,000,000) if a corpora-

[424] MOORE et al, *supra* note 29, at 351.

[425] Act 3815 (1930), The Revised Penal Code, art 186. If the offense mentioned in this Article affects any food substance, motor fuel or lubricants, or other articles of prime necessity, the penalty shall be that of *prision mayor* in its minimum and medium periods, it being sufficient for the imposition thereof that the initial steps have been taken toward carrying out the purposes of the combination. Any property possessed under any contract or by any combination mentioned in the preceding paragraphs, and being the subject thereof, shall be forfeited to the Government of the Philippines. Whenever any of the offenses described above is committed by a corporation or association, the president and each one of the directors or managers of said corporation or association or its agent or representative in the Philippines in case of a foreign corporation or association, who shall have knowingly permitted or failed to prevent the commission of such offenses, shall be held liable as principals thereof.

[426] Act 3815 (1930), The Revised Penal Code, art 27, in relation to art 64, *prision correccional* in its minimum period = 6 months and 1 day to 2 years and 4 months.

[427] Act 3815 (1930), The Revised Penal Code, art 27, in relation to art 64, *prision mayor* in its minimum to medium periods = 6 years and 1 day to 10 years.

tion and $350,000 (approx. Php 14,000,000) if any other person for Sherman Act violations,[428] and for Wilson Tariff Act violations, $100 (approx. Php 4,000) to $ 5,000 (approx. Php 200,000).[429]

In both jurisdictions, the penalty of forfeiture of property, subject of any contract or combination in violation of the law is also prescribed. However, in American jurisdiction only property *in transitu* is subject to forfeiture, and only for violations of Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act,[430] while the Philippine law does not make a distinction and applies also to paragraph 2, as well as paragraph 1 and 3 of Article 186 of the Revised Penal Code. The first distinction is a consequence of the fact that American law contemplates only interstate commerce, while the Philippine law does not distinguish. The second distinction can be rationalized, at least in American jurisdiction by the difference of the treatment of Section 1 violations from Section 2. The rule of reason is always used in monopolization cases, while in restraints of trade, there are acts judicially determined to be unjustifiable in themselves deserving a harsher penalty. The analysis required to determine monopolization cases makes it difficult is not impossible to determine what property of a guilty party should be forfeit.

2. The Corporation, As A Person Criminally Liable[431]

The manner in which liability may attach to a corporate offender is best determines the sufficiency and capability of imputing liability for violation of a competition law since legislative history of antitrust laws shows the juridical order was directed primarily at insidious corporate self-interest. Article 186 of the Revised Penal Code, consistent with the principles of malice and intent in Philippine criminal law,[432] excludes the juridical entity itself as a liable person. Instead, providing for imprisonment of the president and each one of the directors or managers of the violating corporation, association, its agent or representative in the Philippines in case of a foreign corporation or association, who have knowingly permitted or failed to prevent the commission of such offenses, as principals.[433]

It is settled, thatin Philippine jurisdiction juridical entities, having personality only by legal fiction are deemed incapable of formulating the criminal intent or malice necessary in the commission of felonies, whether by *dolo* or *culpa*.[434] Criminal actions are restricted to the officials of the corporation rather than the corporation itself and the courts have no authority to bring corporations before them in criminal actions, as defendants are brought before the court through warrants of arrest, issued only against natural persons.[435]

[428] The Sherman Act, § 1, 2, *supra* note 88, 89.

[429] The Wilson Tariff Act, § 73, *supra* note 317.

[430] The Sherman Act, § 4; The Wilson Tariff Act, § 76.

[431] Author's Note: The propriety and methodology of imposing criminal sanctions on corporations has been the subject of a thesis by Yvette Marie Rodriguez, *The Deterrence of Corporate Crime Through Criminal and Administrative Liability*, Ateneo L. J, Vol XLI, No 1, (1997). As such, the work will not delve into the details but, only with reference to corporate antitrust violations. [hereinafter *Deterrence of Corporate Crime*]

[432] REYES - 1, *supra* note 376, at 37 to 47.

[433] Act 3815 (1930), The Revised Penal Code, art. 186.

[434] REYES -1, *supra* note 376, at 47.

Consequently, in Philippine civil law jurisdiction, the juridical business enterprise enjoys perpetual immunity from criminal culpability for violations of Article 186 of the Revised Penal Code. The hiatus is incongruous with the spirit and legislative history of antitrust law. Statutory antitrust laws is essentially directed towards the corporation, which is still the primary persona in the commercial milieu.

From the perspective of Section 6 of proposed Bill 996, an insight of the contemporary legislative appreciation of this corporate accidental immunity may be gleaned. It prescribes for criminal fines of not less than Php 5,000,000 and not more than Php 100,000,000 if the offender is a corporation, or not exceeding Php 200,000, if a natural person, dissolution, is offender is a legal entity. Significantly, these may be imposed on persons, natural or juridical. The bill however did not care to provide for administrative fines.

The manner of prescribing penalties in the Senate Bill was primarily patterned after the American federal antitrust laws which expressly provide that the term 'person' includes corporations, partnership and associations.[436] Huge criminal fines are imputable on the corporation, proven to have violated antitrust laws. In addition, when a corporation is found to have violated any of the penal provisions of antitrust laws, such violations shall be deemed that of the individual directors, officers, or agents of such corporations who have authorized, ordered, or done any of the acts constituting in whole or in part such violation. Imprisonment, a separate fine, or both may be imposed on the responsible officials of such corporation.[437] The imprisonment of liable officers of the corporation in the American antitrust legal discipline has been imposed only when there is found a *per se* illegality and only when such officers can be proved to have acted with the individual intent necessary for criminal violations.[438]

The principle that a corporation is incapable of forming the criminal intent necessary for violations *mala in se* is implacable in Philippine penal jurisdiction. It cannot be conveniently derogated by the transfer of the provisions of Article 186 of the Revised Penal Code to a special law. The proposition that a corporation may be made criminally liable must still be consistent with the philosophical quandary of establishing intent on a juridical being, incapable of formulating such. A harmony may be found by such recourse to special laws and to circumscribe the attachment

[435] West Coast Life Insurance Company v. Hurd, 27 Phil 401 (1914). A criminal case for libel was filed against West Coast, a foreign corporation, as well as its officers. The Philippine Supreme Court held that the law restricted liability to the officials of the corporation and is never directed towards the corporation itself.

[436] *See supra* note 278.

[437] *See supra* note 282.

[438] *See* Ch III, sec B2, of the work.

of criminal liability on a juridical entity only for violations *mala prohibita* and not offenses *mala in se.*

Moreover, from the vantage of enforcement, corporate anticompetitive activites happens beyond closed doors, in the boardrooms. This, together with the quantum of proof required in criminal proceedings make successful criminal prosecution of corporate felonious anticompetitive acts difficult at best, if not improbable. In order to police the corporate offender, resort must be made to other sanctions requiring a lower quantum of proof. Administrative and civil penalties are the most feasible. First, while concededly, administrative fines are different from criminal fines, the distinction for all practical purposes argues strongly in favor of administrative sanctioning.[439] It allows for practicality and capability to apprehend the acts sought to be prohibited. It is noteworthy that American jurisdiction does not employ administrative sanctioning to violations of antitrust laws. Their administrative enforcement has been limited to the issuance of cease and desist orders, and the Federal Trade Commission is without authority to impose any kind of sanction.

Taking the foregoing into consideration, criminal liabilities attaching to corporate actuation must be distinguished. A competition law must provide for acts which are declared to be against public policy and *mala prohibita*, to enable the law to reach corporate offenders, as distinguished from offenses requiring intent. In the former, the juridical entity may itself be made criminally liable, for example for violations of acts of incipiency. The corporate person cannot be held so liable for actual anticompetitive acts, which are *mala in se*, however where these acts are committed by a juridical entity, the criminal liablity is imputable to the officers responsible.

Additionally, to supplement the inability to hold the corporate offender for acts *mala in se*, when a juridical entity violates the provisions of a competition law, a civil suit may be instituted by the regulatory agency pursuant to which, the courts may enjoin the violation and direct the offending corporation to unto the anticompetitive damage, by divestiture of unlawfully held assets, forfeiture or dissolution, on pain of civil penalties and/or being cited for contempt. Administrative liabilities may also attach to acts forming part of, but not equating to either type of offense, such as predatory pricing and other unilateral acts of excluding competitors.

[439] *Deterrence of Corporate Crime, supra* note 411, at 62.

[440] R.A. 4152 (1964), An Act Amending Sections One And Two Of Republic Act Numbered Two Thousand Seven Hundred Five, As Amended, Entitled "An Act Prescribing The Duties And Qualifications, And Fixing The Number And Salaries, Of The Members Of Legal Staff In The Office Of The Secretary Of Justice, § 2.

F. Directions in Enforcement Mechanisms

1. Criminal & Civil Jurisdiction

In Philippine jurisdiction, it is the duty of Justice Department through one of its divisions, to initiate and take such preventive or remedial measures, including appropriate judicial proceedings, to prevent or restrain monopolization and allied practices or activities of trusts, monopolies and combinations. The attorneys assigned to this division, acting in accordance with law and behalf of the Attorney General (Solicitor General) in all such proceedings and may, whenever necessary, take appropriate punitive or coercive action against those responsible for such forbidden acts or practices.[440] The lack of competition caseshowever, strongly implies that the above provision is only given lip service.

The Philippine Supreme Court has original and concurrent jurisdiction, with the Regional Trial Courts, to hear and adjudicate actions brought to prevent and restrain violations of law concerning monopolies and combinations in restraint of trade.[441] In order to avoid a situation where the Supreme Court tries and decide a contentious issue at the first instance, and thus deny the losing party his right to appeal for errors of judgment or a review of such decision for errors of jurisdiction, the original jurisdiction of criminal and civil actions, as well as the recovery of damages arising out of a violation of competition rules must be lodged exclusively with the lower court. The Regional Trial Court should then be conferred with exclusive original jurisdiction over criminal, civil and private suits instituted to prosecute violations of the provisions of the unfair methods of competition law. The Court of Appeals should be vested with appellate jurisdiction over the decisions of the Regional Trial Court, and the rulings and orders of a regulatory agency, in the exercise of its *quasi*-judicial authority.

2. Administrative Enforcement

The 1987 Administrative Code provides that the Undersecretary for Domestic Trade shall supervise the Bureau of Trade Regulations and Consumer Protection, which shall formulate and monitor the implementation of programs for the effective enforcement of laws, correct interpretation and adoption of policies on monopolies and restraint of trade, mislabeling, product misrepresentation and other unfair trade practices.[442]

The President, during national emergencies, has *quasi*-legislative powers to issue such rules and regulations as may be necessary to carry out the protection from hoarding, profiteering, injurious speculations, manipulation of prices, product deceptions, and cartels, monopolies or other combinations in restraint of trade, or other pernicious practices affecting the supply, distribution and movement of

[441] R.A. 296 (1948), The Judiciary Act Of 1948, as amended by RA 5440 (1968) § 2. An Act Amending Sections Nine And Seventeen Of The Judiciary Act Of 1948, § 17(4).

[442] E.O. 292 (1987), The Administrative Code Of 1987, Title X, § 1(par 5), sec 10.

food, clothing, medicine and medical supplies, office and school supplies, fuel, fertilizers, chemicals, building materials, implements, machinery equipment and spare parts required in agriculture, industry and other essential services, and other articles of prime necessity, whether imported or locally produced or manufactured.[443]

In the area of investments, the Omnibus Investments Code, pursuing its declared policy to accelerate the development of the economy by dispersal of industries, promotion of small and medium scale industries, under conditions which will encourage competition and discourage monopolies provides that the State shall employ such programs that will increase national productivity and meet the tests of international competitiveness. It encourages private enterprise, with deregulation and self-regulation of business activities to be generally adopted and defined the principal role of the State, to play a supportive role, rather than a competitive one.[444]

The law requires investments made by a non-Philippine national to secure authority from the Board of Investments, which authority be granted unless the proposed investment could pose a clear and present danger of promoting monopolies or combinations in restraint of trade. Similarly, no alien and no business organization, domestic or foreign shall do business or engage in any economic activity in the Philippines or be registered, licensed, or permitted by the Securitites and Exchange Commission or by any other bureau, office, agency, political subdivision or instrumentality of the government, to do business, or engage in any economic activity in the Philippines without first securing a written certificate from the Board of Investments to the effect that the entry of applicant will not pose a clear and present danger of promoting monopolies or combinations in restraint of trade.[445] However, despite these authority granted there has been no generation of detailed administrative rules to regulate 'antitrust' activities, in Philippine jurisdiction.

On the other hand, Senate Bill 996 proposed to create, the Antitrust Commission in Title VII and defines in Section 22 thereof, its powers and functions, the more significant ones are as follows: to enforce and administer antitrust laws, to investigate and prosecute violations, to initiate and prosecute civil action to enforce antitrust and consumer protection or prevent and restrain any threatened violation thereof; to make civil demands to obtain information; to compel the production of documents; to copy any documentary evidence; to deputize any officer or employee of any office, agency, instrumentality of the government, and in Section 33 to file a complaint with the proper Regional Trial Court or administrative agency for a cease and desist order to enjoin violations of antitrust laws. This is an important provision because in providing for a single regulatory commission, it

[443] R.A. 6826 (1989), An Act To Declare, In View of the Existence of a National Emergency, a National Policy in Connection Therewith and to Authorize the President of the Republic of the Philippines for a Limited Period and Subject to Restrictions, to Exercise Powers Necessary and Proper to Carry Out the Declared National Policy and for Other Purposes, § 3(1).

[444] E.O. 226 (1987), The Omnibus Investments Code of 1987, art. 2.

[445] E.O. 226 (1987), The Omnibus Investments Code of 1987, art. 47 (b), art. 48 (5).

has facilitated the enforcement of the law, in a unified manner and has put an administrative agency into a position of acquiring expertise in the field.

The Senate proposal fulfills the vision of establishing an independent agency specially competent to deal with the problems of unfair and anticompetitive business practices by reason of information, experience and a careful study of the business and economic conditions of the industry affected filling a significant void in Philippine antitrust enforcement. The highly technical nature of competition statutes necessitates an expert agency to protect the competitive structure from the inroads of anticompetitive practices.

An important consideration that Senate Bill 996, has overlooked is to grant such regulatory agency the power to prosecute offenses in a court of justice and more importantly confer such body with *quasi*-judicial powersmaking it unnnecessary to go to court for the prosecution of administrative offenses. Resort to the Regional Trial Court should be limited only to those violations, where the enforcer elects to prosecute either criminal or civil suit against an alleged violator. This proposition anticipates that the violations for public enforcement purposes must be viewed as layered and distinguished into two types. Violations that are punishable and enforceable administratively and those that are administratively prosecuted but requires judicial determination.

V. PROPOSED FUNDAMENTAL FRAMEWORK FOR THE REFORM OF THE LAWS ON BUSINESS COMPETITION

To the degree that the study in Chapter IV has subjected Philippine competition provisions to a comparative analysis of the fundamental concepts and major doctrines of American federal antitrust laws, it is self-evident that viewed in the light of results, Philippine law has performed inadequately. The *exact* reasons for the inadequate performance of the legal institution to shape competition law can only be speculated, given the lack of necessary data. But in all probability, no single institution is wholly responsible. Nevertheless, a common factor to all is the absence of a coherent rudimentary norm. At this point, the logical complement of the paper is to marshal the directions towards which the knowledge so far acquired herein, may realize the objectives of the study.

This chapter of the work will neither rehash the arguments discussed, lay down their implications in detail, nor provide for the exact statutory text. Rather, it will set out the main conclusions that flow from them, along which the fundamental framework for the reform of the Philippine law on unfair methods of business is proposed.

A. Clarifying the Underlying Philosophy of Goverment Regulation of Competition

The economic policy of free enterprise lies at the pulsating center of government regulation of competition. Its belief is that undue concentrations of power are inherently destructive to the objectives of a free society, particularly upon the freedom of the individual to carry on a business of his choice, as an aspect of his natural liberty, as much as a property right. Competition rules arise from the cardinal principle that if free enterprise is to survive, competition must be fair as well as free. Its objective is the preservation and enhancement of competition, by enacting, implementing and enforcing laws, which promote economic efficiency by encouraging the production of better products and services, at lower prices to consumers and with a more efficient utilization of a country's limited economic resources.

The role of anti-trust or competition laws lies at that stage of the economic process in which the production and distribution of goods and services are organized in accordance with the value that consumers choose by their willingness to purchase. Competition or antitrust laws is about the effects of business behavior on consumers. Consumer welfare is greatest when the nation's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. In this sense, consumer welfare is a representation for the wealth of a nation.

Competition inherently prefer material prosperity, but have nothing to say about the ways such prosperity may be distributed. Those are matters for other laws. It is not concerned with deciding who would be rich or poor or how much

wealth should be expended to reduce pollution or to mitigate the anguish of environmentalists at the havoc caused by technological progress. It can only increase collective wealth by requiring that any lawful product, be produced and sold under conditions most favorable to consumers.

Accordingly, it must remain within the confines of the production and distribution areas of the market, notwithstanding that one of its more visible goals is consumer welfare. The mission of the law is to preserve, improve and reinforce the powerful economic mechanisms that compel businesses to respond to consumers. Its task is to put up an effort to improve the allocation of productive forces and materials without impairing productive efficiency so greatly as to produce no gain or net loss to the wealth of the nation.

B. Identifying the Characteristics of a Business Competition Law

1. Generality and Pervasiveness

It is in the nature of competition that acts which impair and erode it are constantly changing. Entrepreneurs shuffle and hustle resources, create, combine and separate them, in the endless pursuit of greater net revenues. A law which regulates competition by specification of particular acts, will soon be obsolete, requiring recurring amendments. It can also be imperceptibly impaired by acts in contravention with its spirit and essence, but escapes its muster. It is characteristic of a competition law to be general in language.

It is likewise within the complexion of competition rules to include in their purview acts which are actually anticompetitive and those which pose an incipient danger of being anticompetitive. The language of a competition law is sweeping in its generality. A material criterion is that prices are fixed or competition is actually excluded, and the power to do so exists. There are specific acts therefore, that must be declared unlawful even in the absence of an actual restraint of trade or act of monopolization.

The expedient of a general and sweeping language give rise to at least three major identifiable problems. First, the dilemma of statutory interpretation; second, the problem of uncertainty of the acts sought to be prohibited, both for the enforcers and market participants; and third, the quandary of declaring an act unlawful because it technically falls within the language, but is nevertheless otherwise legitimate or beneficial to national wealth or its effect to the competition process is not of sufficient degree to warrant public interference.

Accordingly, certain principles must be taken into consideration to fine tune the general language, and give it more precision and clarity, thus:

1. Although economists have structured a conception known as perfect competition, such is not the desirable nor attainable goal of regulation. The standard is lowered to merely efficient or workable competition, and consequently acts that may

technically impair perfect competition but maintains workable competition are saved from proscription;

2. Standards should be devised to test the presence of efficient competition, using business conduct and performance, market structure. They are drawn with the attempt to make evaluation consistent with a rapidly advancing economy, allowing enforcers to timely respond to evolving business strategies;

3. Employment of the common law rule of reason and its specific application, in the form of the *per se* illegality rule. The former being the general rule requiring an analysis of the effects of the challenged act on competition, while the latter is the exception needing only proof of its existence;

4. Providing for more specific violations, such as interlocking directorates, mergers, price and buyer discrimination, which provide predictability necessary to the business community;

5. Administrative enforcement with sufficient authority conferred to define the general language of the conduct declared unlawful and issue administrative guidelines and advisories, such as but not limited to indices, which while not having the force of law, nevertheless reduce uncertainty;

Limitation of the breadth of the sweeping language, without sacrificing the need to apprehend incipient dangers is achieved by utilizing qualifications such as:

1. The law is made applicable only to a section of trade, such as inter-provincial or inter-city (highly urbanized and independent), those transactions, where one of the parties imports goods from a foreign country, and regulates only persons engaged in or affecting commerce;

2. In monopolization and attempt to monopolize, intent, general or specific is a necessary requisite as such it must be established, as well as, monopoly power in a relevant product and geographical market;

3. Where the term 'substantially to lessen competition or tend to a create monopoly' is used, there arises a need to establish competitive effect in the relevant market. However, disputable presumptions may be provided for, to transfer the burden of proof to the defendant;

4. Special defenses are to be expressly prescribed for certain unlawful acts, in mergers, for instance those solely for investment purposes or the acquisition of a failing company are not unlawful;

5. Qualifications in minimum net worth of the offending business entity or the amount of goods unlawfully transacted, to be within the ambit of a particular prohibitions may be utilized.

2. Corporate Imputability

The wellspring of the deterrence of unfair methods of competition demands that the legal order recognizes the blameworthiness of the business enterprise itself. It is a distinct feature of competition laws to be initially sought and still predominantly seeks to treat the rapacity and predation of profit motivated corporations. There are also specific anticompetitive acts, such as interlocking directorates and stock mergers, the violation of which only occurs in a corporate setting.

A competition law must be able to impute criminal liability and impose sanctions on the corporate offender, as well if not greater that its responsible officers. An offending corporation should be penalized with more force than the other violators. The 'accidental' immunity of corporations against criminal prosecution arising from a violation of Article 186 of the Revised Penal Code may corrected, by the repeal of such provision by a general competition law, which defines therein the term 'persons' to include both natural and juridical persons. Accordingly, the courts are conferred with sufficient jurisdiction to bring corporations before them in criminal actions for violations *mala prohibita* and make the juridical entity itself criminally liable.

The question of probability of a successful prosecution may be addressed by providing for a layered structure of offenses, and prescribing not solely criminal remedies, penalties and sanctions, but also civil and administrative, in accordance with the hierarchy of offenses, proposed in the succeeding discussion.

When the offender is a juridical person, the liability of the directors, officers, agents or employees, who carried out the violation in the physical worldshould be addressed declaring the acts of the corporate entity for violations *mala in se*, and is deemed the individual act of such director, officer, agent or employee, and punishable as such.

3. Duality of Direction

A competition law has a dual aspect. On one hand, the proscription of contracts, combinations in unreasonable restraint of trade and monopolization are sought because of their public consequences. To this end, they must be pursued by an administrative agency, with prosecutorial functions, upon pain of public sanctions disposed of by a court of justice or the regulatory agency itself, such as imprisonment, criminal and administrative fines, dissolution, closure of operations, divestiture of unlawfully acquired property.

On the other hand, private injury arising from contravention of antitrust laws is equally important. Article 28 of the Civil Code of the Philippines, providing for the recovery of damages in Philippine jurisdiction for injuries sustained by actions repugnant to free enterprise is inextricably linked to the prohibitions of a general competition law. Its conception must be absorbed by a general competition law, which should allow a private cause of action for injured parties, including the State, in its proprietarial character, for recovery of damages sufficient in amount to insure interest and vigilance, in the prosecution of their claims. This tort component in a general competition law is subject to the principles of damages in general, and in addition thereto also comply with proof of public injury.

Presently, the *parens patriae* suit allowed in American jurisdiction is considered by the proponent to be ill-advised. The lack of technical knowledge arising from the novelty of the discipline in Philippine jurisdiction will expose the system to the apprehensions that an overzealous prosecutor may unduly infringe legitimate business activity, without the safeguards of an informed and experienced judiciary. It is submitted, that at a future time, this may become appropriate.

The public level enforcement reserved to government, on one hand, and the private enforcement made available to injured parties through the medium of damage claims on the other, has distinct principle and consequences. They can and should be viewed however, as related components of the entire enforcement system of the law treating of the deterrence of unfair methods of competition, wherein a neglect in one diminishes the other. A unified view of their complementary roles provide a useful holistic process of their interplay in such enforcement.

C. Specifying the Acts that Constitute a Violation

To rely on competition as a police measure is a daunting task. The need for government interference to regulate the force of competition *vis-a-vis* freedom from undue government concentration of power in free enterprise always hangs in balance. Equilibrium may not be attainmed, because it constantly swings in motion, given the fast and novel ways of doing business and technological development, as well as the changing public sentiment.

Legislation as a matter of practical necessity and legal clarity needs to be kept to its basic minimum, considering the time and effort required to enact, amend or repeal laws, the principle of *dura lex sed lex* and the consideration that the acts sought to be prohibited can facilitate flow of investment capital, channel business assets into areas of greater efficiency, replace ineffective managers with new leaders capable of revitalizing inefficient or failing industries. The lawmakers must entrust to the judiciary and a *quasi*-legislative agency the interpretation and provision of subordinate details to keep abreast with market developments, with least risk of interference with legitimate business operations.

Unlike other legal disciplines, which is exclusively within the study of law, competition regulation requires not merely a mastery of legal precepts, but also a working knowledge of affinitive economic principles. In American jurisdiction

where the discipline has developed into a formidable force, the debate upon certain issues are unending due in no small measure perhaps to the inherent complexity of the conflicting interests involved. In the Philippines, the difficulty is more pronounced because despite laws on the matter, it has not had much real-world experience in antitrust laws. A basic yet strong general law, with the details to be filled up jurisprudentially, in certain cases and in others, administratively by body of persons with specialized learning, will have a better chance of attaining its objectives, with a lesser probability of costly learning-process mistakes and challenges.

The law should be reformed so that it strikes at six major classes of behavior, in a hierarchy of three layers:

A. Violations *mala in se:*

1. Concerted activities in *unreasonable* restraints of trade, such as but not limited to horizontal or vertical, including group boycotts, intraenterprise conspiracy, conscious parallelism, tying devices or exclusive dealing arrangements;

2. Monopolization and attempts and combinations to monopolize;

B. Violations *mala prohibita*:

3. Price discrimination, brokerage payments, promotional allowances and services, buyer discrimination in resale transactions;

4. Mergers;

5. Interlocking directorates; and

C. Administrative Violations:

6. The catch all 'unfair methods of competition'.

Significantly, these six major categories must be qualified to avoid generality and pervasiveness . It must always be a consideration that monopolies and bigness by itself is not unlawful; and reasonable restraints are not penalized. The test of reasonableness is always a standard, except only in cases of price fixing, horizontal divisions or markets, group boycotts, tying devices and exclusive dealing arrangement, where subject to certain conditions as may deemed appropriate in the economic climate, the courts may declare them to be *per se* unreasonable. Moreover, the inclusion of 'deceptive acts and practices' to expand the scope of unfair methods of competition is not pertinent to a competition statute, being more appropriately in the realm of consumer protection and not competition.

D. Reinforcing the Enforcement Measures

1. Remedies Generally

As touched upon in the dual aspect of a competition law, the sanctions and remedies that should be provided by a competition statute for the violation of its provisions are multiple. They can be criminal, civil, administrative and private. Criminal penalties should include imprisonment, criminal fines or both at the discretion of a court. It also includes forfeiture. Civil penalties should include dissolution of the business entity, divestiture of unlawfully acquired or held assets or stocks and prohibitory or mandatory injunctions. Administrative remedies that should be included are fines and desistance from operations. Private remedy is the recovery of damages.

The penalties should be imposed in four layers, in respect to the enumerated vices of competition. The most pervasive is the administrative penalties and remedies, which may be imposed on all six (6) types of violations and need be proved only by substantial evidence. This is necessarily so because unfair methods of competition contemplates all violations, one to five. Civil penalties are applicable to violations *mala in se* and *mala prohibita*, and requires only preponderance of evidence. *Mala in se* violations attract the application of all three public penalties, subject to the quantum of proof required by the kind of action or proceedings. *Mala in se* also gives rise to a cause of action for a treble damage suit, *mala prohibita* gives rise to ordinary damages. *Mala prohibita* offenses and administrative violations may form part of *mala in se* as specific acts of restraint of trade or monopolization, depending upon the dominant purpose or intent of the perpetrators.

2. Enforcement Processes

The test of a good law is not only its draftsmanship but it's capability of being implemented and enforced. In the same manner that the draftsmanship of competition laws are faced with its own peculiar conditions, antitrust implementation and enforcement are fraught with its own dangers. Unlike the prosecution of drug cartels, gambling monopolies, work-related discrimination, brigandage and conspiracies and agreements to commit murder, kidnapping and similar concerted criminal activities, where the target of the enforcers are clear and identifiable; the prosecution of trade cartels, conspiracies and combinations in unreasonable restraint of trade, industry monopolization and other violations of a competitionlaw, with few exceptions lurk in shades of relativity.

Implementation and enforcement of competition laws, are to be pursued with practicality, rather than stringent legality. Violations are classified according to the number of ways they can be enforced. *Mala in se* violations are to be prosecuted criminally or civilly by the Commission in a court of justice. Private parties seeking to recover damages must institute the appropriate civil action against the person liable, likewise in a court of justice. Actions involving *mala prohibita* offenses are to be pursued by the Commission criminally or civilly or any private person also with the courts while administrative proceedings may be conducted by the Commission itself for acts that constitute unfair methods of business competition.

Illustratively, for example a charge of monopolization, which is *mala in se* is brought against an alleged monopolist. It may be prosecuted criminally, civilly and as well as privately for treble damages, depending on the proof established. However, where such monopolization includes a merger, as a deliberate act thereof, and the proof available meets only preponderance of evidence, the Commission may opt to institute a civil case against the merger praying for an order directing the breaking-up of the unlawfully merged firms. A private party injured as a result of the merger, may institute an independent private action or intervene in the civil proceedings for the recovery of ordinary damages. If available proof meets only substantial evidence, the Commission may conduct administrative proceedings and impose administrative penalties and sanctions, as may be warranted, on the offender. This is of course, subject to the constitutional proscription against double jeopardy and the rules on damages with respect to double recovery.

Each act of enforcement, while closely inter-related, is independent of the other; a finding of criminal guilt is not necessary for the administrative or civil aspect to proceed. In the same manner, private injury is not necessary to obtain a guilty verdict for a criminal violation or illegality in an administrative proceeding. However, it is not to preclude a situation whereby a single act may be simultaneously prosecuted criminally, civilly and administratively. An errant party may be imprisoned, in the case of natural defendants or officers of a corporation; criminaliy fined, dissolved, divested of unlawful assets or stocks, it operations closed-down, ordered to pay administrative penalties and an award of treble or ordinary damages in favor of the injured party.

3 Jurisdiction

The administration and implementation of a competition code, as well as the prosecution of violations thereof will be more effectively realized, if undertaken by a single regulatory agency or commission. There is no cogent reason to adopt the American enforcement system of dividing the prosecution of certain violations in one agency and the administrative implementation of others in a separate agency because such dichotomy detracts from and diminishes the purposes for which the establishment of an independent regulatory agency is aimed at. The main functions of such commission is the administrative enforcement of the business competition law and the prosecution of criminal and civil suits against alleged offenders in the courts of justice. It is also tasked with the compilation of data necessary for the continuing review and assessment the laws on the matter.

To perform them, such commission must be conferred *quasi*-legislative and *quasi*-judicial powers, to issue rules and regulations detailing the acts sought to be prohibited, requiring notification or advisory opinions or certifications. This commission will investigate complaints, preside over administrative proceedings, issue orders such as, but not limited to show cause orders and cease and desist orders. The agency must be granted authority to impose administrative penalties *motu proprio*, or upon complaint, to enforce its implementing rules and orders and to issue investigative demands to facilitate the resolution of an alleged malpractice, subject to the fundamental rights and liberties granted in Article III of the Constitution.

On the other hand, the jurisdiction of the criminal and civil aspects of violations *mala in se* and *mala prohibita*, the private action for recovery of damages, treble or otherwise should be lodged with the Regional Trial Court, at the first instance. They should also have the jurisdiction to entertain prohibitory or mandatory injunction suits. The Court of Appeals or in the proper cases, the Supreme Court should have the power of review over the decisions of the Regional Trial Court and the administrative orders issued by the Commission. For a more expeditious resolution of inherently complicated controversies, the courts should be given the authority to consider and approve, aside from remedies provided in the Rules of Court, *nolo contendre* pleas and consent decrees.

VI. THE PROPOSED DRAFT OF THE BUSINESS COMPETITION CODE

Daunting but necessary, complex yet fascinating — the interplay of the multifarious facets, aspects and considerations of competition regulation as discussed in this work demands acknowledgment of its existence as an independent discipline in the Philippine legal system. The relevant provisions of existing laws that specially treat of the matter, particularly Article 186 of the Revised Penal Code and Article 28 of the Civil Code of the Philippines, should be drawn together. With the addition of new supplementary substantive and remedial directions discussed in the immediately preceding chapters, they are envisioned to be a cohesive and coherent force, capable of apprehending the malpractice, they are tasked to deter. It is proffered that they constitute a unified and autonomous body of law - *The Philippine Business Competition Code*, which endeavors to form an effective statutory embodiment of the competition policy enshrined in Article XII of the Constitution.

REPUBLIC ACT _______

AN ACT TO INSTITUTE THE BUSINESS COMPETITION CODE AND ESTABLISH THE COMMISSION ON BUSINESS COMPETITION, PROVIDE FOR ITS POWERS AND FUNCTIONS AND FOR OTHER PURPOSES.

TITLE I
TITLE AND DECLARATION OF POLICY AND OBJECTIVES

SECTION 1. *Title.* This Act shall be known and cited as "The Philippine Business Competition Code of 19__"

SECTION 2. *Declaration Of Policy And Objectives.* Pursuant to Section 19, Article XII and Section 11(1), Article XVI of the 1987 Constitution, it is declared to be the policy of the State to:

1. Recognize that an effective competition system is vital to the development of the economy of the Philippines and enact such measures as will promote, preserve and maintain effective competition by the deterrence of unfair methods of business competition in the production and distribution side of any trade, industrial or commercial activity;
2. Prohibit, prevent, restrain, dismantle, or dissolve and/or penalize any unfair method of competition in or affecting trade, commerce or industry which eliminate or tends to foreclose or impair effective competition, create or advocate concerted activities in restraint of trade, monopolization, attempts or combinations, thereof and other commercial conduct or structure which promote undue concentration of economic power, adversely affecting public interest;
3. Affirm and strengthen the virtues of a competitive free market economy in improving the allocation of productive forces and materials, without impairing productive efficiency so greatly as to produce no gain or net loss to the wealth of the nation and to reasonably diffuse economic power to a wider base of the populace, whereby commercial activities shall operate under the checks and balances imposed by a free and fair interplay of market forces, which invigorates competition as the regulator of an effectively competitive Philippine free market economy;
4. Reexamine, reinvent, adjust and recast into contemporary requirements and strengthen in the process, the existing laws on private monopolies, oligopolies, combinations, agreements or contracts or other courses of concerted acts or conduct to restrain trade, industry and commerce.

SECTION 3. *Definitions.*

Cartel - an association by agreement of companies or sections thereof having common pecuniary interests, designed to undertake to prevent competition and to allocate markets or it is also a combination of producers of any product joined together to control its production, sale and price of a commodity or a group of independent industrial corporations, which agree to restrict free trade to their mutual interests.

Conscious Parallelism- a common or parallel behavior among competitors to control or unduly influence a market variable, without need of explicit evidence of a conspiracy or trade-restricting contract or agreement.

Competitive sale - means the gross revenue for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year.

Commission - the Philippine Commission on Business Competition.

Trade, Industry or Commerce - those who, having legal capacity to engage in trade, industry or commerce habitually devote themselves to such trade, industry or commerce.

Exclusive dealing agreements - when a sale of a product is conditioned, on the buyer or lessee agreement to deal only in that product or not to deal in the products of the competitor of the seller or lessors.

Franchising Agreements- a contractual relationship between two or more firms where the franchisor either licenses a trade name or brand name to the franchisee, under which to do business, and/or sell branded goods to the franchise for resale under certain terms and conditions.

Import trade - trade, industry or commerce in goods, wares, merchandise or any object of trade, industry or commerce imported into the Philippines from a foreign country. It does not include the production or manufacture, for consumption or resale within the Philippines of such goods, wares, or merchandise or any act in the course of such production or manufacture.

Intraenterprise conspiracy - when two or more parts of the same enterprise agree to restrain trade, industry or commerce.

Mergers - as prohibited under this Act, it is a more or less permanent union of previously separate firms, whether executed by the acquisition of stock, other share capital or assets, where independent decision-making is replaced with a unified system of control. A horizontal merger is the union of two firms by the acquisition of the stocks, other share capital, or assets of a direct or indirect competitor in the same or similar line of goods or service, in a relevant market. A vertical merger is the union of two companies, in different levels of the production or distribution process. A conglomerate merger is a union of companies producing or distributing unrelated product or services or engaged in an activity not affecting the same line of trade, industry or commerce.

Monopolization - as prohibited by this Act, is the possession of monopoly power in a relevant market and the willful acquisition or maintenance of that power to exclude competitors, from any part of the trade, industry or commerce, irrespective of the purpose and regardless of the means used. Attempt to monopolize is the willful employment of methods, means and practices, which if successful would attain monopolization, or if not would nevertheless approach so close as to create a dangerous possibility of it. Combination or conspiracy to monopolize is the willful employment of methods, means and practices, by two or more persons in combination or conspiracy with each other, which if successful would attain monopolization, irrespective of purpose and regardless of means used, with intent of monopolizing a relevant market.

Monopoly - a privilege or peculiar advantage vested in one or more persons consisting in the exclusive right or power to carry on a particular business, trade or manufacture of a product, article or object of trade, industry or commerce or control the sale of the whole supply of a particular commodity, article, merchandise, or object of trade, commerce or industry. It is a form or structure in which one or only a few persons dominate the total sales of a product or service.

Monopoly power - the power to exclude competitors or to control any market variable in a relevant product market in relevant geographical area.

Officer of a corporation - means an officer elected or chosen by the Board of Directors.

Person - whenever used in this Act shall be deemed to include corporations, associations or organizations existing and authorized by the laws of the Philippines, unless otherwise provided.

Relevant market - has two aspects, first, the relevant product market is that market composed of products which have a reasonable interchangeability, for the purposes for which they are produced; and second it also refers to the place where the seller-competitors of a relevant product market compete, in any trade, industry or commerce, in whole or in part.

Tie-in - occur when a party offers to provide a merchandise or service only to those who agree to accept another merchandise or service. The product desired by the buyer or lessee is called the tying product and the product the buyer or lessee is compelled to purchase is called the tied product.

Total sale - means the gross revenue for all products and services sold by one corporation over that corporation's last completed fiscal year.

Unfair methods of competition - is the employment of methods, means and practices of competition in trade, industry or commerce, which do not leave to each actual or potential competitor a fair opportunity for play of his contending force, engendered by an honest desire for gain. Its scope cannot be previously defined, and what constitutes 'unfair methods of competition' must be determined in particular instances, upon evidence presented, in the light of a particular competitive conditions and of what is found to be a specific and substantial public interest.

Vertical price fixing - an agreement, express or implied to fix prices between a buyer and seller of different levels of the manufacturing and/or distribution process of the market.

Vertical division of a market - an agreement between a buyer and seller, express or implied at different levels of the production process, to divide the market based on territory, customer or otherwise.

TITLE II
THE COMMISSION ON BUSINESS COMPETITION

SECTION 4. *Creation Of The Commission.* To carry into effect the objectives of this Act, an independent regulatory agency, the Commission on Business Competition is hereby created and established.

SECTION 5. *Composition.* The Commission shall be a collegial body composed of a Chairman and two (2) Associate Commissioners, who shall be appointed by the President, with the concurrence of the Commission on Appointments and each member shall hold office for a term of seven (7) years, without reappointment. *Provided however*, that of those first appointed, the Chairman shall hold office for

seven (7) years, an Associate Commissioner for five (5) years, and the other Commissioner for three (3) years, as fixed in their respective appointment. They shall continue in Office in accordance with the terms and conditions of their appointment, until the expiration of their respective terms. *Provided further*, that upon the expiration of his term, a member shall serve as such until his successor shall have been appointed and qualified; and *Provided lastly*, that an appointment to any vacancy shall be only for the unexpired term of the predecessor and in no case shall any member be appointed or designated in a temporary or acting capacity.

SECTION 6. *Rank And Salary.* The Chairman and the Associate Commissioners shall have the same rank, privileges and salaries as the Chairman and members respectively of the Constitutional Commissions. Their salaries shall not be reduced during their term of office.

SECTION 7. *Qualifications.* The Commissioners shall be Filipino citizens, at least forty-years of age, of recognized probity and independence. The Commission shall at all times, except as otherwise herein provided, be composed of a Chairman and one Associate Commissioner who are shall members of the Philippine Bar, who must have been a judge or engaged in the practice of law for ten (10) years prior to their appointment and the other Associate Commissioner shall be of recognized expertise in the field of Economics. *Provided*, that no person who has been a candidate for any elective national or local office in the immediately preceding election whether regular or special maybe appointed to the Commission.

SECTION 8. *Deputy Commissioners.* The Commission shall be assisted by one Deputy Commissioner to be known as the Senior Deputy Commissioner and one Deputy Assistant Commissioner each for Luzon, Visayas and Mindanao, who shall be appointed by the President, with the concurrence of the Commission on Appointments and each deputy shall hold office for a term of seven (7) years, without reappointment The Deputy Commissioners shall be Filipino citizens, at least forty years old, of recognized probity and independence, members of the Philippine Bar, must have been a judge or engaged in the practice of law for ten (10) years, and shall be subject to the same qualification and disqualification of a member of the Commission.

SECTION 9. *Removal And Filling Of Permanent Vacancy.*

1. Any member of the commission shall be removed from office upon a conviction of a violation of the Constitution, treason, bribery, craft and corruption, other high crimes, betrayal of public trust and a conviction of a crime or offense to which the law prescribes a maximum penalty of six (6) years imprisonment, irrespective of the other imposable accessory penalties and regardless of the civil liability of whatever nature, kind or amount, arising out of or predicated upon the offense.
2. In case of vacancy in the Commission, by reason of death, resignation, removal or permanent disability of any of any incumbent commissioner, the Senior Deputy Commissioner shall be appointed in a concurrent capacity until a new commissioner shall have been appointed. In cases where the Senior Deputy Commissioner cannot assume office, the Deputy for Luzon, Visayas, Mindanao shall successively assume such vacancy in a concurrent capacity until a new commissioner shall have been appointed. *Provided however*, that if the vacancy occurs in the office of a commissioner, expert in the field of Economics, the appointee shall have the same qualifications, and shall be filled not later than one (1) month after the vacancy arises. In cases, where the such vacancy occurs before the expiration of the term of the office of the commissioner, the appointment shall only be for the unexpired portion of the term of the predecessor.

SECTION 10. *Temporary Absence Or Disability.* In case of temporary absence or disability of any of the commissioners, the Senior Deputy Commissioner shall perform the duties of such commissioner, until the later returns or is able to perform his duties. *Provided however*, that such exercise of duty shall not exceed a period of one (1) month, from such absence or disability.

SECTION 11. *Prohibitions And Disqualification.*

1. The members of the Commission and their deputies shall not during their tenure hold any other office or employment. They shall not during their tenure, directly or indirectly practice any profession, participate in any business or be financially interested in any contract with, or any franchise, or special privilege granted by government or any subdivision, agency or instrumentality thereof, including government owned and controlled corporations or their subsidiaries. They shall strictly avoid conflict of interest in the conduct of their office. They shall not be qualified to run for any office in the election immediately succeeding their cessation from office. They shall not be allowed to appear or practice before the Commission for two (2) years immediately following their cessation from office.
2. No spouse or relative by consanguinity or affinity within the fourth civil degree and no law, business, or professional partner or associate of any one of the commissioners or their deputies may appear as counsel or agent on any matter pending before the Commission or transact business directly or indirectly therein one year preceding his appointment.
3. This disqualification shall apply during the tenure of the official concerned and shall apply with equal force and effect into the law, business or professional firm for the same period.

SECTION 12. *Disclosure Of Relationship.*

1. The commissioners and their deputies shall upon assumption of office, individually make under oath a public disclosure of the identities of and their relationship with, the persons covered by the prohibition and disqualification contained in the immediately preceding section.
2. The disclosure shall be filed with the Office of the President and the Commission before the appointee assume office, and every year thereafter. The disclosure made pursuant to this section shall form part of the public records and shall be available to any person or upon a written request.

SECTION 13. *Structural Organization.*

1. The authority and responsibility for the exercise of the mandate of the

Commission and for the discharge of its powers and functions shall be vested in the Commission. The Chairman shall have the general executive control, direction and supervision of the work and operation of the Commission and of its members, bodies, boards, personnel and all its administrative business.

2. The Office of the Chairman shall organize within the Commission such offices, bureaus and other allied services, including but not limited to the following:
   (a) Office of the Chairman and Associate Commissioners
   (b) Legal Affairs Office
   (c) Office for Operations and Supervision
   (d) Investigation, Prosecution and Litigation Office
   (e) Office for Economic Policy and Research
   (f) Office for Foreign Commerce
   (g) Documentation and Records Office
   (h) Administrative, Financial and Personnel Services Office
   (i) Office of the Regional Directors

SECTION 14. *Mandate.* The Commission is hereby vested with *quasi*-legislative authority to issue rules, regulation and guidelines for the implementation and administration of this Act. The Commission is hereby conferred with *quasi*-judicial jurisdiction to conduct and preside, subject to due process requirements, appropriate administrative proceedings for an alleged commission of unfair methods of business competition or alleged violations and/or non-compliance of its investigative demands or orders and/or its implementing rules and regulations; and upon a just determination thereof duly impose administrative sanctions for the violation thereof. The Commission shall act promptly and expeditiously on all complaints for violations of the provisions of this Act and file and prosecute the corresponding criminal or civil complaint with the appropriate court, as the facts and the laws may warrant. *Provided,* that nothing herein contained shall be construed as denying the Commission or any of its Deputies the right to act *motu proprio* on what they perceive as unfair methods of business competition in violation of this Act; conduct the corresponding investigative or administrative proceedings respecting the same; issue appropriate orders, including but not limited to cease and desist orders, show cause orders, and investigative demands; and impose the appropriate administrative penalties and sanctions. The Commission shall compile data and information respecting forms of business competition and conduct a continuing review and assessment of this Act and other laws respecting the same subject matter and recommend to the President or Congress any adjustment and refinement, it finds necessary and appropriate, in the circumstances.

SECTION 15. *Powers And Functions.* The Commission shall perform and exercise the following powers and functions:

1. Subject to the powers vested in the courts, to enforce and administer any and all provisions of this Act. In pursuance thereof and in the exercise of its *quasi*-legislative powers herein vested, the Commission *en banc* shall promulgate, issue and publish rules, regulations and guidelines for the efficient and effective implementation of the provisions of this Act.

2. In the exercise of its *quasi*-judicial powers herein vested, to initiate and conduct the proper administrative proceedings to prevent and/or penalize violations of the provisions of this Act, with special emphasis on unfair methods of business as provided in Section 23 of this Act. Any member of the Commission, and his deputies shall have the authority to administer oaths, issue *subpoena duces tecum*, to summon witnesses to appear and testify under other before them and/or to bring books, documents and other things under their control, and to secure the attendance or presence of any absent or recalcitrant witnesses. After a determination of the merits, the Commission shall render such orders or resolutions and impose such penalties and sanctions as is appropriate and just, taking into consideration the facts and law of the case.
3. To impose administrative fines and sanctions for the violations of the provisions of this Act, its implementing rules and regulations or any orders or resolutions duly rendered, without prejudice to other penalties, sanctions and remedies as may be imposed by the proper court. *Provided,* that its authority to impose administrative fines shall not exceed fifty thousand pesos (P50,000.00) per offense. The Commission shall likewise have the authority to issue cease and desist orders, effective provisionally or permanently.
4. To investigate on its own initiative, or upon the complaint of any person, any and all violations of this Act, and upon a *prima facie* showing that a violation of Section 20 and 22 has been committed, institute or file before the proper Regional Trial Court, the appropriate information and prosecute the same to its final conclusion.
5. To initiate and prosecute the appropriate civil action before the proper court or administrative agency to enforce or implement the provisions of this Act or to prevent or restrain permanently, any threatened or actual violations thereof.
6. Subject to the relevant limitations imposed by Article III of the Constitution, and in accordance with the provisions of Section 16 of this Act, to make investigative demands to obtain information relative to any activity that constitute a past or present violation of this Act. *Provided,* that the Commission shall have the authority to make an investigative demand to obtain information as to any activity that will constitute a violation of this Act, to enable it to abort its commission or happening.
7. Subject to the relevant limitations imposed by Article III of the Constitution, the Commission shall have the power to compel a prospective civil defendant to produce documents at an investigative process before the complaint is filed. Provided, that the demand cannot be used to obtain personal documents from a natural person.
8. By general or special orders, in accordance to the implementing rules and regulations duly promulgated and issued, to require persons engaged in trade, industry or commerce to file and register with the Commission, in such form as the Commission shall prescribe premerger notification, annual or special reports or answers in writing to specific questions and to furnish the Commission such other information as it may require as to the organization, business conduct, practices, management, performance and

other similar matters of the respective natural or juridical persons or entity. Such reports or information shall be filed with the Commission at such reasonable time as the Commission shall prescribe, unless additional time is granted.

9. To submit annual and special reports to Congress, including therewith recommendations for adjustment, refinement or additional legislation for the regulation of anticompetitive practices of persons engaged in trade, industry or commerce, and provide for the publication of its reports and resolutions in such manner as may be best adopted for public information, dissemination and use.
10. To perform such other functions and discharge such other powers as may be necessary to carry out the purposes of this Act.

SECTION 16. *Investigative Demands.*

1. Whenever any member of the Commission or any of their deputies has reason to believe that a person may be in possession, custody, or control of any documentary material, or may have any information, relevant to any investigation, he may, prior to the institution of a criminal or civil action thereon, issue in writing, and cause to be served upon such person, an investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony concerning such documentary material or information, or to furnish any combination of such material, answers or testimony.
2. Each demand shall:
   (a) State the nature of the following, which are under investigation and the provision of law applicable thereto:
      (1) The conduct constituting the alleged violation of this Act; or
      (2) The activities in preparation for a merger, acquisition, joint venture, or similar transaction which if consummated, any result in a violation of this Act;
   (b) If the demand is for the production of documentary material:
      (1) describe with reasonable particularity, the class or classes of documentary material to be produced thereby, as to permit such material to be identified;
      (2) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and
      (3) identify the custodian to whom such material shall be made available.
   (c) If the demand is for answers to written interrogatories:
      (1) propound with definiteness and certainty the written interrogatories to be answered;
      (2) prescribe a date or dates at which time answers to written interrogatories shall be submitted; and

      (3) identify the custodian to whom such answers shall be submitted.
   (d) If the demand is for giving of oral testimony:
      (1) prescribe a date, time and place for giving of oral testimony;
      (2) identify the investigator who shall conduct the examination and custodian to whom the transcript of examination shall be submitted.
3. No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony, if such material, answers, or testimony would be protected from disclosure under:
   (a) the standards applicable to a *subpoena ad testificandum* or *subpoena duces tecum* issued by a competent court.
   (b) the standards applicable to the modes of discovery under Rule 24, 25, 27, 29 of the Rules of Civil Procedure, to the extent that the application to such demand is appropriate and consistent with such provisions, intent and objectives of this Act.
4. Any such demand may be served by an investigator, or by any other officer duly designated or deputized by the Commission, at any place within the territorial jurisdiction of the geographical area of the Deputy concerned.
5. Any such demand may be served upon any person, in such manner as service of pleadings, judgments and other papers, in accordance with Rule 13 of the Rules of Civil Procedure, to the extent that the application thereof to such demand is appropriate and consistent with the provisions, intent and objectives of this Act.
6. A verified return by the individual serving any such demand setting forth the manner of such service shall be proof of such service. In case of service by registered mail, shall be accompanied by the return post office receipt of delivery of such demand.
7. The production of documentary materials in compliance with a demand, pursuant to subsection 2(b) of this section, duly served shall be in the form and manner prescribed by Rule 27 of the Rules of Civil Procedure. Each interrogatory in a demand, pursuant to subsection 2(c) of this section, duly served shall be answered in the form and manner provided for in Rule 23 of the Rules of Civil procedure. The examination of a person pursuant to a demand for oral testimony under subsection 2(d), duly served shall be taken in the form and manner prescribed by Rule 23 of the Rules of Court.
8. Any person who refuses or fails to comply with a demand duly served pursuant to this section shall be liable for contempt, in accordance with Section 37 of this Act, without prejudice to the imposition of administrative sanctions, as may be imposed by the Commission.

SECTION 17. *Administrative Proceedings By Commission.*

1. Whenever any member of the Commission and their deputies shall have reason to believe that any such person, partnership, or corporation has been using or is using any unfair method of competition in or affecting trade, industry or commerce as provided for in Section 22, and if it shall

appear to such Commissioner that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve or cause to be issued and served upon such person, partnership, or corporation an administrative complaint stating its charges in that respect and containing a notice of a hearing, upon a day and at a place thereon fixed at least thirty days after the service of the complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commissioner requiring such person, partnership, or corporation to cease and desist from the violation of law, so charged in said complaint. Any person, partnership or corporation, may make an application. and upon good cause shown may be allowed by the Commissioner to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of said member of the Commission.

2. If upon such hearing, said Commissioner shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make an order in writing in which it shall state its findings, as to the facts and shall issue and cause to be served on such person, partnership or corporation as order requiring such person, partnership or corporation to cease and desist from using such method of competition. If the circumstances warrant, the order shall include in its resolution the imposition of administrative sanctions and fines, stating clearly and distinctly the reasons therefor and the facts and the provisions of law, upon which it is based.
3. A final order of any Commissioner issued under this section shall be appealable to the Commission *en banc* by a verified petition, which shall by majority vote resolve the assignment of errors raised by the petitioner or as it shall deem proper, modify or set aside, in whole or in part, the questioned order made or issued by a Commissioner, under this section.
4. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or if a review has been filed within such time then until the record of the proceedings has been filed in the Court of Appeals, as hereinafter provided, the Commissioner or the Commission *en banc* as the case may be, may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any order made or issued by it under this section.

SECTION 18. *Actions To Prevent A Violation.* Whenever any member of the Commission has reason to believe that a person is about to commit a violation of this Act, and in its opinion in a proceeding conducted in respect thereof would be in the public interest, it shall file or cause to be filed with the proper Regional Trial Court, a complaint for injunction in accordance with Section 36 of this Act, stating in particular its charges in that respect, and containing a notice of hearing upon a day and at a place fixed by the court. If upon such hearing, the court shall be of the opinion that the matter complained is true, it shall issue an order, stating its finding as to the facts and shall issue and cause to be served upon the defendant, a

mandatory or prohibitory injunction, restraining the commission or continuance or the act or acts or the performance of some act or acts, complained of. *Provided*, that any temporary restraining order issued pursuant to this section shall be in accordance with Section 36 hereof. Nothing herein contained shall be construed as to deny the Commission of any availment of any other remedy provisional or otherwise, as may be provided by law or the Rules of Court.

SECTION 19. *Administrative Rules And Regulations.* The Commission *en banc* shall promulgate and issue the implementing rules and regulation and rules of procedure for the effective exercise or performance of the powers, functions and duties of the Commission, under this Act, including a specification of administrative penalties, sanctions and remedies, in conformity with Section 15.3 hereof. The rules and procedure thus promulgated shall take effect after fifteen (15) days following the completion of their publication in the Official Gazette or in two (2) daily newspapers of general application.

TITLE III

PROMOTION, PRESERVATION AND MAINTENANCE OF EFFECTIVE COMPETITION IN TRADE, INDUSTRY OR COMMERCE

SECTION 20. *Unlawful Acts, Contracts, Transactions And Conduct.* The following contracts, agreements, arrangements, courses of conduct and/or market conditions are hereby declared to be against public interest and therefore illegal and void.

1. *Unreasonable Restraints Of Trade.* Every contract or agreement, combination or conspiracy, or any concerted action in unreasonable restraint of trade, industry or commerce between and among two or several provinces, highly urbanized or independent cities or with foreign nations, is declared to be illegal. It includes, but is not limited to willful agreements or concerted activities to fix prices, divide or allocate markets, geographically or otherwise, intraenterprise conspiracies, conscious parallelism, group boycotts and other similar joint or concerted actions affecting trade, industry or commerce. Every person who shall enter into a contract or agreement, express or implied; engage in a combination, of whatever kind or conspiracy; perform a concerted conduct herein declared illegal shall be criminally, civilly and administratively liable, as hereinafter provided.
2. *Monopolization, Attempt Or Combination Or Conspiracy To Monopolize.* Every person who shall monopolize, or attempt to monopolize, or combine or conspire, with any other person or persons to monopolize in the relevant market any part of any sector of trade, industry or commerce among the several provinces, highly urbanized or independent cities or with foreign nations, shall be criminally, civilly and administratively liable; as hereinafter provided.
3. *Unreasonable Restraints In Import Trade.* Every contract, combination or conspiracy, or any concerted action, intended to operate in unreasonable restraint of trade, industry or commerce is declared illegal, when such is made by and between two or more persons, either of them, as principal or agent is engaged in the importation of any article from any foreign country into

the territorial jurisdiction of the Philippines. Every person who shall be engaged in the importation of any commodity from any foreign country, in violation of this section or who shall conspire or combine with another to violate the same shall be criminally, civilly and administratively liable, as hereinafter provided.

4. *Tying Devices And Exclusive Dealing Agreements Actually Impairing Competition.* Every person engaged in trade, industry or commerce, in the course of such trade, industry or commerce, who shall lease or make a sale or contract for the sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use of consumption or resale, or the render services, anywhere in the Philippines, on the condition, agreement or understanding that the lessee or purchaser thereof shall agree not to use or deal in the goods, wares, merchandise, machinery, supplies or other commodities or services of a competitor or competitors of the lessor or seller, where the lessor or seller has sufficient economic power to enforce the tie-in or the requirement contract and the effect of such lease, sale or service or contract for sale or service or such condition, agreement or understanding is to substantially lessen competition in any line of trade, industry or commerce shall be criminally, civilly or administratively liable.

SECTION 21. *Prima Facie Unreasonable Restraints Of Trade.* Upon proof made, at any hearing on a complaint under the preceding section, that there has been committed acts, contracts, transaction or conduct enumerated hereinafter, the burden of rebutting the *prima facie* case thus proved by showing justification, shall be upon the person charged with a violation of this section; and unless the justification shall be affirmatively shown, the proper court is authorized to render such judgment, in its discretion as may be appropriate under Section 33 and 34 of this Act. The commission of the following acts, contracts, transactions or courses of conduct are hereby declared *prima facie* evidence that the persons involved are engaged in a contract or combination or conspiracy or courses of conduct in unreasonable restraint of trade in violation of Section 20.1 of this Act:

1. *Horizontal Price Fixing.* An agreement, express or implied, between two or more persons who are competitors at the same level of the distribution or production chain, to fix prices of the goods or services they offer to the public; and including agreements to stabilize prices, to set a floor under the prices or to set a ceiling.
2. *Horizontal Divisions Of Markets.* An agreement, express or implied, between two or more persons who are competitors at the same level of the distribution or production chain to divide up the market or customers, geographically or otherwise.
3. *Cartel.* Any formalized agreement between two or more persons who are competitors in the same level of the distribution or production chain to jointly determine prices or any market variable.
4. *Resale Price Maintenance.* An agreement between a manufacturer or distributor and retailer or between a franchisor or franchisee to fix the minimum or maximum retail prices.

5. *Group Boycotts.* A concerted action by a group of firms at one level of the market to induce or coerce a group of firms at another level to refuse to deal with the competitors of the former.

SECTION 22. *Prohibition Of Specific Forms Of Acts, Contracts, Transactions Or Structures.* The following specific forms of acts, contracts, transactions or structures, while not falling in Section 20 hereof, nevertheless pose such dangerous possibility of impairing or foreclosing competition, that they are declared to be against public policy and *mala prohibita.*

1. *Mergers.* No person engaged in trade, industry or commerce or any activity affecting trade, industry or commerce shall acquire, directly or indirectly, the whole of part of the stock or other share capital or the assets of another person also engaged in trade, industry or commerce or in any activity affecting commerce in any part of the Philippine territory, the effect of such acquisition, or the use of such stock by voting or granting proxies or otherwise, maybe to substantially lessen competition or to tend to create a monopoly. *Provided,* that this subsection shall not apply to persons purchasing such stock solely for investment purposes and not using the same by voting or otherwise bring about, or in attempting to bring about the substantial lessening of competition or tending to create a monopoly. *Provided further,* that nothing contained in this subsection shall prevent a corporation engaged in trade, industry, commerce or any activity affecting trade, industry or commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or natural and legitimate business, or the natural and legitimate branches or extensions thereof, from owning and holding all or part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition. *Provided lastly,* that this subsection shall not apply to acquisitions of failing companies, where such company has no reasonable hope for survival except a merger and that all methods to save the failing company short of a merger have been tried and have failed or that such methods will be futile.

   Nothing herein contained shall be held to affect or impair the acquisition by any person, engaged in trade, industry or commerce or in any activity affecting trade industry or commerce, of any stock or other share capital or assets of any other person also engaged in trade, industry or commerce or in any activity affecting trade, industry or commerce, where such acquisition is not to substantially lessen competition in the relevant market and the anticompetitive effect thereof in the relevant market if any, is insignificant

2. *Tying Device And Exclusive Dealing Agreements Tending To Impair Competition Or Create A Monopoly.* Every person engaged in trade, industry or commerce, in the course of such trade, industry or commerce, who shall lease or make a sale or contract for the sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented,

for use of consumption or resale anywhere in the Philippines, or fix a price charged therefor or discount from, or rebate upon, such price on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade, industry or commerce.

3. *Interlocking Directorates.* No person shall at the same time, serve as a director or officer in any two corporations, engaged in whole or in part in trade, industry or commerce; and by virtue of their business and location of operations, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of this Code, if each of the corporations has capital, retained earnings and undivided profit aggregating more than ten million pesos (P10,000,000.00).

Notwithstanding the provisions of the preceding paragraph, the simultaneous service as a director or officer in any two corporations shall not be prohibited in the following instances:

(a) The competitive sales of either corporation, for a fiscal year is less than five million pesos (P5,000,000.00);

(b) The competitive sales of either corporation are less than 5 *per centum* of that corporation's total sales;

(c) The competitive sales of each corporation are less than 10 *per centum* of that corporation's total sales.

Provided, that the eligibility of a director or officer under the provisions of paragraph (a) shall be determined by the capital, retained earnings and undivided profits, exclusive of dividends declared but not paid to stockholders, of each corporation at the end of that corporation's last completed fiscal year. *Provided further*, that the thresholds of this subsection shall be increased or deceased annually by an amount equal to the percentage of increase or decrease in the gross national product, as determined by the National Economic Development Authority or its successor. *Provided however*, that when any person elected or chosen as a director or officer of any corporation subject to the provisions hereof is eligible as the time of his election or selection to act for such corporation in such capacity, his eligibility to act in such capacity shall not be affected by any of the provisions hereof by reason of any change in the capital, surplus and undivided profits, or affairs of such corporation from whatever cause, until the expiration of one (1) year from the date on which the event causing his ineligibility occurred.

4. *Price Discrimination.* It shall be unlawful for any person engaged in trade, industry or commerce in the course of such trade, industry or commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of

the purchasers involved in such discrimination are likewise engaged in trade, industry or commerce, where such commodities are sold for use, consumption, or resale within the territorial jurisdiction of the Philippines, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. *Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. *Provided however*, that the Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established. *Provided further*, that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade. *And provided lastly*, that nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

5. *Buyer Discrimination.* It shall be unlawful for any person engaged in commerce in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

6. *Promotional Allowances, Commission, Rebates Or Other Compensation.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage or other compensation, or any allowance or discount.