

Intellectual Property Rights and Competition Law: A Context for Coordination and Harmonization

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I. INTRODUCTION.....	III
II. OVERVIEW OF THE PHILIPPINE COMPETITION ACT.....	13
III. THE INTELLECTUAL PROPERTY CODE	20
IV. INTELLECTUAL PROPERTY AND COMPETITION.....	32
V. COORDINATION AND HARMONIZATION	53

I. INTRODUCTION

The Intellectual Property Code of the Philippines¹ (IP Code) was enacted in light of the State policy to protect and secure, for a specific statutory duration, the exclusive rights of scientists, artists, and other gifted citizens of their intellectual and industrial property under the 1987 Constitution.² Since its effectivity in 1998,³ the IP Code has provided the legislative and

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1. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Powers and Functions, and for Other Purposes [INTELL. PROP. CODE], Republic Act No. 8293 (1998).
2. PHIL. CONST. art. XIV, § 13.
3. The Intellectual Property Code (IP Code) took effect on 1 January 1998 and, by its express provision, repealed the following laws: the Trademark Law, the Patent Law, Articles 188 and 189 of the Revised Penal Code, the Decree on Intellectual Property, and the Decree on Compulsory Reprinting of Foreign Textbooks. The IP Code was enacted to strengthen the intellectual and industrial property system in the Philippines as mandated by the country's accession to the Agreement Establishing the World Trade Organization. *See* INTELL. PROP. CODE, §§ 2 & 240 (as amended).

institutional framework for the protection and enforcement of intellectual property rights (IPR) across patents, trademarks, copyright, geographic indications, and trade secrets.⁴ It reflects the core inducement for innovation and artistic creation in the grant of exclusive rights to use and exploit an invention or artistic work. However, the welfare effects of the IPR protection under the IP Code remain unclear, such that under the Philippine Development Plan 2017-2022 (PDP 2017-2022),⁵ the country's performance in the science, technology, and innovation (STI) sector remained dismal.

Against this backdrop, competition law and policy was sought to be implemented with the enactment of Republic Act No. 10667, or the Philippine Competition Act (PCA),⁶ in 2015. This is of particular interest, because at the center of competition law and policy is the prevention of harm arising from abusive and exclusionary business conduct.⁷ Given the foregoing, questions arise. Is active competition law and policy enforcement in the field of intellectual property (IP) likely to bring about the adverse effect of further chilling domestically-generated innovation and creativity? Or will it provide the necessary impetus for research and development

4. INTELL. PROP. CODE, § 4.1.

5. The Philippine Development Plan 2017-2022 (PDP 2017-2022) brings together the long-term vision called AmBisyon Natin 2040, the 2030 Agenda for Sustainable Development, and President Rodrigo R. Duterte's zero- to 10-point Socioeconomic Agenda, provided under Executive Order No. 27, Series of 2017, which direct all government agencies and instrumentalities, including local government units, to implement the Philippine Development Plan and Public Investment Program for the period 2017 to 2022. See NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PHILIPPINE DEVELOPMENT PLAN 2017-2022: ABRIDGED VERSION 51-53 (2017) [hereinafter NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PDP ABRIDGED] (citing Office of the President, Directing All Government Agencies and Instrumentalities, Including Local Government Units, to Implement the Philippine Development Plan and Public Investment Program for the Period 2017-2022, Executive Order No. 27, Series of 2017 [E.O. No. 27, s. 2017] (June 1, 2017)).

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

7. United Nations Conference on Trade and Development, Why competition and consumer protection matter, *available at* <http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx> (last accessed May 4, 2018).

(R&D), as well as enhance IP diffusion, technology transfer, adaptation, or adoption?

For 30 years, competition-related issues arising from the creation or invention of IP — as well as its use and exploitation — have been addressed under the framework of the IP Code. With the enactment of the PCA, an examination of the intersection between IP law and competition policy is necessary to ensure that their shared policy objectives are efficiently and fully attained. Together, IP and competition laws ensure that enterprises succeed because of efficiency and innovation, rather than through anti-competitive business practices and collusive conduct.⁸

It is in the context of this interplay between IP protection and competition law that this Article seeks to provide a broad view of the IP landscape — a view that has developed under the IP Code and upon which competition law is now envisioned to apply, towards reaching a balance between the incentives for the enhancement of innovation and creativity and the examination of the use, exploitation, and commercialization of IP. The Article begins with a broad discussion of the legal and institutional framework for the enforcement of competition policy under the PCA. It then proceeds with an overview of the basic framework for the grant and exploitation of IPR under the IP Code and what developments might be expected given the overlay of competition policy, with particular attention to the provisions on technology transfer arrangements (TTA) under the IP Code on voluntary licensing. The Article will close with a note on proposals for harmonization of these two policy areas towards achieving the outcomes under PDP 2017-2022, and seeing a strategic coordination between the relevant institutions.

II. OVERVIEW OF THE PHILIPPINE COMPETITION ACT

With the passing of the PCA, the Philippines joined over 120 jurisdictions in the world implementing competition policy and antitrust legislation.⁹ The PCA is considered as the primary competition legislation in the country, as it consolidates concepts and principles previously fragmented,¹⁰ consistent with

8. *See* Atari Games Corporation v. Nintendo of America, Inc., 897 F.2d 1572 (Fed. Cir. 1990) (U.S.).

9. Ma. Joy V. Abrenica & Johannes R. Bernabe, *The Case for the Philippine Competition Law*, XVI & XVII PUB. POL'Y J. 156 (2017).

10. *See* Tristan A. Catindig, *The ASEAN Competition Law Project: The Philippines Report*, available at https://www.jftc.go.jp/eacpf/02/Philippines_r.pdf (last accessed May 4, 2018) & Anthony R.A. Abad, *Recommendations for*

the constitutional mandate to regulate or prohibit monopolies when the public interest so requires.

The PCA was passed with the declared policy of:

- (a) Enhanc[ing] economic efficiency and promoting free and fair competition in trade, industry[,] and all commercial economic activities;
- (b) Prevent[ing] economic concentration that will unduly stifle competition, lessen, manipulate, or constrict the discipline of free markets; and
- (c) Penaliz[ing] all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.¹¹

A unique feature of this law is the mandate to “establish a National Competition Policy [(NCP)] to be implemented by the Government [] and all of its political agencies as a whole.”¹² Indeed, the PCA was passed based on the premise that “the provision of equal opportunities to all promotes entrepreneurial spirit, encourages private investments, facilitates technology development and transfer[,] and enhances resource productivity.”¹³

The PCA provides for the scope of its application, proscribed conduct, enforcement modalities and tools, fines and penalties, and the creation of its principal implementing agency.¹⁴ One point of distinction — as against competition and antitrust legislation elsewhere — is that the PCA also sets out the analytical approach to determine anti-competitive conduct and prohibited mergers and acquisitions.¹⁵

Conduct proscribed under the PCA comes under three categories: (a) anti-competitive agreement or conduct as set out in Section 14 of the law,¹⁶ (b) abuse of dominant position under Section 15,¹⁷ and (c) anti-competitive

Philippine Antitrust Policy and Regulation, in Toward a National Competition Policy for the Philippines (Erlinda M. Medilla ed., 2012).

11. Philippine Competition Act, § 2, para. 2 (a)-(c).

12. *Id.* § 2, para. 2 (a).

13. *Id.* § 2, para. 1.

14. *See* Philippine Competition Act, ch. II.

15. *Id.* ch. IV.

16. Philippine Competition Act, § 14.

17. *Id.* § 15.

mergers and acquisition, or those that result, or are likely to result, in the prevention, restriction, or substantial lessening of competition, dealt with under Sections 16 to 23.¹⁸

Under the law, anti-competitive acts generally refer to concerted conduct or agreement between competitors, such as price fixing and bid rigging. Section 14 (a) of the PCA states that

[t]he following agreements, between or among competitors, are [per se] prohibited:

- (1) Restricting competition as to price, or components thereof, or other terms of trade; and
- (2) Fixing price at an auction or in any form of bidding[,] including cover bidding, bid suppression, bid rotation[,] and market allocation[,] and other analogous practices of bid manipulation[.]¹⁹

On the other hand, under Section 14 (b), “(1) [s]etting, limiting, or controlling production, markets, technical development, or investment; [and] (2) dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers[,] or any other means,” are prohibited only upon a determination that they have “the object or effect of substantially preventing, restricting[,] or lessening competition.”²⁰ A catch-all provision prohibits other types of agreements, such as those that do not involve competitors, which have “the object or effect of substantially preventing, restricting[,] or lessening competition,” so long as “[t]hose which contribute to improving the production or distribution of goods and services[,] or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of [the law].”²¹

Abuse of dominance is proscribed under Section 15 of the PCA. Although the concept of abuse of dominance as articulated under this provision is drawn from Article 102 of the Treaty on the Functioning of the European Union,²² Section 15 of the PCA provides a comprehensive but

18. *Id.* §§ 16-23.

19. *Id.* § 14 (a).

20. *Id.* § 14 (b).

21. *Id.* § 14 (c).

22. Abrenica & Bernabe, *supra* note 9, at 163 (citing Consolidated Version of the Treaty on the Functioning of the European Union art. 102, May 9, 2008, 2008 O.J. (C 115) 47).

non-exhaustive list of acts considered to constitute abuse of dominance. Conduct specifically identified under Section 15 includes the following:

- (a) Selling goods or services below cost[,] with the object of driving competition out of the relevant market[;]²³
- (b) Imposing barriers to entry[,] or committing acts that prevent competitors from growing within the market in an anti-competitive manner;²⁴
- (c) Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;²⁵
- (d) Setting prices[,] or other terms or conditions[,] that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially[;]²⁶

23. Philippine Competition Act, § 15 (a). Section 15 (a) of the Philippine Competition Act (PCA) further provides —

That[,] in the Commission's evaluation of this fact, it shall consider whether the entity or entities have no such object[,] and the price established was in good faith to meet or compete with the lower price of a competitor in the same market selling the same[,] or comparable[,] product or service of like quality[.]

Id.

24. *Id.* § 15 (b).

25. *Id.* § 15 (c).

26. *Id.* § 15 (d). Section 15 (d) of PCA also states that the following are considered permissible price differentials:

- (1) Socialized pricing for the less fortunate[;]
- (2) Price differential which reasonably or approximately reflect differences in the cost of manufacture, sale, or delivery resulting from differing methods, technical conditions, or quantities in which the goods or services are sold or delivered to the buyers or sellers;
- (3) [Those] offered in response to the competitive price of payments, services[,] or changes in the facilities furnished by a competitor; and
- (4) Price changes in response to changing market conditions, marketability of goods or services, or volume.

Id.

- (e) Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict[,] or lessen competition substantially[;]²⁷
- (f) Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or service to be supplied;²⁸
- (g) Directly or indirectly imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisherfolk, micro-, small-, medium-scale enterprises, and other marginalized service providers and producers;²⁹
- (h) Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers[,] or consumers[;]³⁰ and
- (i) Limiting production, markets[,] or technical developments to the prejudice of consumers[.]³¹

Abuse of dominance may be unilateral and collective in character. It should be emphasized that mere possession of dominance in a relevant market is not prohibited.³² Nor is acquiring, maintaining, and increasing market share through legitimate means that do not substantially prevent,

27. Philippine Competition Act, § 15 (e). The same provision states that nothing contained in the Philippine Competition Act (PCA) shall prohibit or render unlawful:

- (1) [p]ermissible franchising, licensing, exclusive merchandising[,] or exclusive distributorship agreements[,] such as those which give each party the right to unilaterally terminate the agreement; or
- (2) agreements protecting intellectual property rights, confidential information, or trade secrets.

Id.

28. *Id.* § 15 (f).

29. *Id.* § 15 (g).

30. *Id.* § 15 (h).

31. *Id.* § 15 (i).

32. See Philippine Competition Act, § 15.

restrict, or lessen competition proscribed.³³ Indeed, the law recognizes having a superior product or process, business acumen, or legal rights as exemptions from abuse of dominance in three instances under Section 15 involving imposition of “barriers to entry,”³⁴ “unfair purchase or selling price on [] competitors, customers, suppliers[,] or consumers,”³⁵ and “limiting production, markets[,] or technical developments to the prejudice of consumers[.]”³⁶ Moreover, conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit, may not necessarily be considered abuse of dominant position.

The PCA prohibits merger and acquisition agreements that “substantially prevent, restrict[,] or lessen competition in the relevant market”³⁷ and grants the competition authority the power to review merger and acquisition agreements.³⁸ For this purpose, two modalities of review have been established: compulsory notification and *motu proprio* review.³⁹ The law establishes a compulsory notification regime for mergers and acquisitions that breach the threshold as currently set under the law.⁴⁰ In the Implementing

33. *Id.* § 27, para. 4.

34. Philippine Competition Act, § 15 (b).

35. *Id.* § 15 (h).

36. *Id.* § 15 (i).

37. *Id.* § 20.

38. *Id.* § 16.

39. *Id.* §§ 17 & 31.

40. Philippine Competition Act, § 17. *See also* Philippine Competition Commission, PCC Policy Statement 17-001: On the ₱1 Billion Threshold for Compulsory Notification of Mergers and Acquisitions, *available at* <http://phcc.gov.ph/pcc-policy-statement-17-001-₱1-billion-threshold-compulsory-notification-mergers-acquisitions> (last accessed May 4, 2018). *But see* Philippine Competition Commission Amendment of Rule 4, Section 3 of the Implementing Rules and Regulations of Republic Act No. 10667 (Threshold Adjustment) [PCC Memo. Circ. No. 18-001], § 1 (Mar. 1, 2018).

The Philippine Competition Commission raised the threshold to ₱5 billion for the size of person and ₱2 billion for the size of transaction as defined in the Implementing Rules and Regulations. MC 18-001 effectively amends Rule 4, Section 3 of the Implementing Rules and Regulations. It also establishes the automatic adjustment of the threshold every year, beginning 1 March 2019, based on the official estimate of the nominal Gross Domestic Product growth of the previous calendar year. PCC Memo. Circ. No. 18-001, §§ 1-3.

Rules and Regulations, specific criteria based on size of party and size of transaction for determining the PCC set the thresholds and remain effective today. A merger or acquisition agreement that is “consummated in violation of th[e] requirement to notify [] shall be considered void and subject the parties to an administrative fine of [1%] to [5%] of the value of the transaction.”⁴¹

The Philippine Competition Commission (PCC), upon its own initiative, may still review mergers and acquisitions that do not come under mandatory notification. The PCC, through its Mergers and Acquisitions Office, monitors transactions for non-notification and gun-jumping. Merger or acquisition agreements prohibited under the PCA may be exempted, should the parties establish either efficiency gains or that a party to the agreement is faced with actual or imminent financial failure and the agreement represents the least anti-competitive arrangement among the known alternative uses for the failing entity’s assets.⁴² However, in the event the PCC determines that an agreement has or is likely to give rise to substantial lessening of competition, it may prohibit its implementation, unless and until it is modified by changes specified by the PCC, or the pertinent party or parties enter into legally enforceable agreements specified by the PCC.⁴³

The PCA established the PCC as the country’s primary competition authority.⁴⁴ The PCC is a quasi-judicial body with a broad mandate to implement the law and other competition-related laws and regulations, as well as the NCP.⁴⁵ It has original and primary jurisdiction in the enforcement and regulation of all competition-related issues, even in cases involving both competition and non-competition issues.⁴⁶ In the latter case, the sector regulator concerned “shall be consulted and afforded reasonable

41. Philippine Competition Act, § 17, para. 2. *See also* Philippine Competition Commission, Rules on Merger Procedures, *available at* <http://phcc.gov.ph/wp-content/uploads/2017/07/PCC-MERGER-PROCEDURE-GUIDELINES-31-July-2017.pdf> (last accessed May 4, 2018).

42. Philippine Competition Act, § 21.

43. *Id.* § 18.

44. *Id.* § 5.

45. *Id.*

46. *Id.* § 12.

opportunity to submit its own opinion and recommendation before the [PCC]” renders a decision.⁴⁷

As awareness of the PCA increases, a deeper appreciation of competition policy and its role in promoting consumer welfare and inclusive growth is expected. Under the PDP 2017-2022, it is envisioned that “by 2022, the Philippine market will be more efficient and competitive, where small entrepreneurs and firms thrive beside[] larger players, [] allowing consumers to have better and wider choices of goods and services.”⁴⁸ The principal strategy under the PDP is to craft and implement an NCP

in order to achieve the sector’s expected outcomes of improving consumer welfare and market efficiency.

The NCP aims to steer regulations and administrative procedures of government agencies toward promoting competition, as well as to strengthen the enforcement of [antitrust] or competition laws, and effectively ensure competitive neutrality (level playing field for state-owned and private businesses).⁴⁹

III. THE INTELLECTUAL PROPERTY CODE

Under the IP Code, “intellectual property rights” refer to:

- (a) Copyright and related rights;
- (b) Trademarks and service marks;
- (c) Geographic indications;
- (d) Industrial designs;
- (e) Patents;
- (f) Layout designs ([t]opographies) of integrated circuits; and
- (g) Protection of undisclosed information.⁵⁰

47. *Id.* § 32, para. 2.

48. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PDP ABRIDGED, *supra* note 5, at 33.

49. *Id.*

50. INTELL. PROP. CODE, § 4.1. In the case of *Air Philippines Corporation v. Penswell, Inc.*, the Supreme Court stressed that trade secrets are protected as a form of intellectual property, and may not be subject to compulsory disclosure —

A trade secret is defined as a plan or process, tool, mechanism[,] or compound known only to its owner and those of his employees[,] to whom it is necessary to confide it. The definition also extends to a

secret formula or process [which is] not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value. A trade secret may consist of any formula, pattern, device, or compilation of information that: (1) is used in one's business; and (2) gives the employer an opportunity to obtain an advantage over competitors who do not possess the information. Generally, a trade secret is a process or device intended for continuous use in the operation of the business, for example, a machine or formula, but can be a price list or catalogue or specialized customer list. It is indubitable that trade secrets constitute proprietary rights. The inventor, discoverer, or possessor of a trade secret or similar innovation has rights therein which may be treated as property, and ordinarily an injunction will be granted to prevent the disclosure of the trade secret by one who obtained the information 'in confidence' or through a 'confidential relationship.' American jurisprudence has utilized the following factors to determine if an information is a trade secret, to wit:

- (1) the extent to which the information is known outside of the employer's business;
- (2) the extent to which the information is known by employees and others involved in the business;
- (3) the extent of measures taken by the employer to guard the secrecy of the information;
- (4) the value of the information to the employer and to competitors;
- (5) the amount of effort or money expended by the company in developing the information; and
- (6) the extent to which the information could be easily or readily obtained through an independent source.

...

The Court laid down the rule that any determination by management as to the confidential nature of technologies, processes, formulae[,] or other so-called trade secrets must have a substantial factual basis which can pass judicial scrutiny.

...

That trade secrets are of a privileged nature is beyond quibble. The protection that this jurisdiction affords to trade secrets is evident in our laws. The Interim Rules of Procedure on Government Rehabilitation, effective 15 December 2000, which applies to: (1) petitions for rehabilitation filed by corporations, partnerships, and associations pursuant to Presidential Decree No. 902-A, as amended; and (2) cases for rehabilitation transferred from the Securities and Exchange

In *Mirpuri v. Court of Appeals*,⁵¹ the Supreme Court emphasized the advantages of protecting intellectual and industrial property rights in this wise

Intellectual and industrial property rights cases are not simple property cases. ... For this reason, all agreements concerning industrial property, like those on trademarks and tradenames, are intimately connected with economic development. Industrial property encourages investments in new ideas and inventions[,] and stimulates creative efforts for the satisfaction of human needs. They speed up transfer of technology and industrialization, and thereby bring about social and economic progress. These advantages have been acknowledged by the Philippine government itself.⁵²

In general, the protection extended under the IP Code is the grant or recognition of IP ownership, giving rise to the exclusive right to produce, use, and sell, and the availability of taking action against infringement and other forms of IP violations. The value in IP does not come with the mere grant of ownership. It arises from the exercise of the right to exclude. It has long been recognized that the exclusionary prerogative enjoyed by an IPR

Commission to the [Regional Trial Courts] pursuant to Republic Act No. 8799, otherwise known as [t]he Securities Regulation Code, expressly provides that the court may issue an order to protect trade secrets or other confidential research, development, or commercial information belonging to the debtor. Moreover, the Securities Regulation Code is explicit that the Securities and Exchange Commission is not required or authorized to require the revelation of trade secrets or processes in any application, report[,] or document filed with the Commission. This confidentiality is made paramount as a limitation to the right of any member of the general public, upon request, to have access to all information filed with the Commission.

Air Philippines Corporation v. Pennswell, Inc., 540 SCRA 215, 228-30 & 235 (2007) (citing BLACK'S LAW DICTIONARY 1494 (6th ed. 1991); AM. JUR. § 178; 9 A.L.R. 3d, 665; Reorganization of the Securities and Exchange Commission with Additional Powers and Placing the Said Agency Under the Administrative Supervision of the Office of the President [SEC Reorganization Act], Presidential Decree No. 902-A (1976); INTERIM RULES OF PROCEDURE ON GOVERNMENT REHABILITATION, A.M. No. 00-8-10-SC, rule 3, § 4 (Nov. 1, 2000); & Securities Regulation Code [SECURITIES REG. CODE], Republic Act No. 8799, § 66.2 (2003)).

51. *Mirpuri v. Court of Appeals*, 318 SCRA 516 (1999).

52. *Id.* at 553-54 (citing 1 STEPHEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION, at 13 (1975)).

holder has an impact upon the incentive to innovate or create, as it operates as the reward for taking the risk and investing in research, development, and creative work.⁵³

IP law offers a balance between the means to exclude, on one hand, and the dissemination of knowledge and information upon which further innovation may be developed, on the other. The appropriate calibration of these two allows for the following analytical approaches that ultimately ensure consumer welfare: (a) the price of supplying relevant IP, and (b) at a level that will still avoid free riding so that innovation is consistently fostered.⁵⁴ The right to patent, for example, belongs to the inventor, his or her heirs, or assigns.⁵⁵ The patent confers upon its owner, for a term of 20 years from application,⁵⁶ the exclusive right to “restrain, prohibit[,] and prevent any unauthorized person [] from making, using, offering for sale, selling[,] or importing the patented product[.]”⁵⁷

The IP Code defines “marks” as any visible sign capable of distinguishing the goods (trademark) or services (service mark) of an enterprise and includes a stamped or marked container of goods.⁵⁸ The rights are acquired through registration pursuant to the provisions of the IP Code.⁵⁹ “A certificate of registration of a mark is *prima facie* evidence of the

53. GUNNAR NIELS, ET AL., *ECONOMICS FOR COMPETITION LAWYERS* 172 (1st ed. 2011). Gunnar Niels, Helen Jenkins, and James Kavanagh, explained —

Where there is significant risk of failure, high returns are necessary to reward those willing to take such risks. The award of IP rights for innovation recognizes this [—] because it is costly and risky to research and develop a new product, an innovator is given monopoly rights over the commercialization of the idea for a period of time.

Id.

54. See Christian Ahlborn, et al., *The Logic & Limits of the Exceptional Circumstances Test in Magill and IMS Health*, 28 *FORDHAM INT’L L.J.* 1109, 1132 (2004).

55. *INTELL. PROP. CODE*, § 28.

56. *Id.* § 54.

57. *Id.* § 71.1. Section 71.1 of the IP Code further provides that for process patents, the owner has the exclusive right to manufacture, deal in, use, sell, offer for sale, or import any product obtained directly or indirectly from the patented process.
Id.

58. *Id.* § 121.1.

59. *Id.* § 122. With the passage of the IP Code, the Philippines shifted to the first to register regime, from the prior adoption and use regime under former Trademark Law or Republic Act No. 166.

validity of the registration, the registrant's ownership of the mark, and [] the registrant's exclusive right to use the same in connection with the goods or services and those that are related thereto specified in the certificate."⁶⁰ The owner of a registered trademark may recover damages from any person who, without the owner's consent, uses a reproduction, counterfeit, or colorable imitation of a registered mark for the sale of goods or services, which use is likely to cause confusion or deceive.⁶¹

Copyright, which generally belongs to the author or artist, extends to works or original creations in the literary and artistic domain and are, by provision of law, protected from the moment of their creation.⁶² Copyright or economic rights consist of the exclusive right to carry out, authorize, or prevent the:

- 171.1. Reproduction of the work or substantial portion [thereof];
- 171.2. Dramatization, translation, adaptation, abridgment, arrangement[,] or other transformation of the work;
- 171.3. The first public distribution of the original[,] and each copy of the work by sale or other forms of transfer or ownership;
- 171.4. Rental of the original or a copy of an audiovisual or cinematographic work[;]
- 171.5. Public display of the original or a copy of the work;
- 171.6. Public performance of the work; and
- 171.7. Other communication to the public of the work.⁶³

While copyright protection is not dependent upon prior registration, the author or creator of the work may apply for a certificate of copyright registration and deposit.⁶⁴

The grant or recognition of IPR comes with all attributes of ownership, including the prerogative of the IP holder to make a strategic determination

60. INTELL. PROP. CODE, § 138.

61. *Id.* § 155.

62. *Id.* § 172. Section 172.2 of the IP Code specifically states that “[w]orks are protected by the sole fact of their creation, irrespective of their mode or form of expression, as well as of their content, quality[,] and purpose.” *Id.* § 172.2.

63. *Id.* § 177.

64. *Id.* § 191 & Intellectual Property Office of the Philippines, Rules and Regulations on Copyright Registration and Deposit, Order No. 13-171 (Sep. 19, 2013).

of directly exploiting the IP or of authorizing a third party to manufacture or sell the product. A robust IP regime makes room for this by a system of licensing, compulsory and voluntary. Licensing offers a mechanism for putting an invention or creative work to market, by allowing the IP holder to authorize a third party to use, manufacture, or sell the product. It allows for diffusion of IP without harming the innovator and extends the exploitation of the IP to suppliers and even competitors.⁶⁵ The IP Code provides for both compulsory and voluntary licensing systems.

Compulsory licensing prevents the IP holder from withholding the product, process, or service from the market or its potential users. Section 93 of the IP Code provides —

The [Intellectual Property Office of the Philippines (IPOPHL)] Director of Legal Affairs may grant a compulsory license to exploit an invention, even without the agreement of the patent owner, in favor of any person who has shown his [or her] capability to exploit the invention, under any of the following circumstances:

- 93.1. National emergency or other circumstances of extreme urgency; [or]
- 93.2. Where the public interest, in particular, national security, nutrition, health[,] or the development of other vital sectors of the national economy as determined by the appropriate agency of the government, so requires; or
- 93.3. Where a judicial or administrative body has determined that the manner of exploitation by the owner of the patent or his [or her] licensee is anti-competitive; or
- 93.4. In case of public non-commercial use of the patent by the patentee, without satisfactory reason; [or]
- 93.5. If the patented invention is not being worked in the Philippines on a commercial scale, although capable of being worked, without satisfactory reason; provided, that the importation of the patented article shall constitute working or using the patent.⁶⁶

The basic terms and conditions under which the Director of Legal Affairs may grant a compulsory license are the following:

- 100.1. The scope and duration of such license shall be limited to the purpose for which it was authorized;

65. NIELS, ET AL., *supra* note 53, at 295.

66. INTELL. PROP. CODE, § 93.

- 100.2. The license shall be non-exclusive;
- 100.3. The license shall be non-assignable, except with that part of the enterprise or business with which the invention is being exploited;
- 100.4. Use of the subject matter of the license shall be devoted predominantly for the supply of the Philippine market: [p]rovided, [t]hat this limitation shall not apply where the grant of the license is based on the ground that the patentee's manner of exploiting the patent is determined by judicial or administrative process[] to be anti-competitive;
- 100.5. The license may be terminated upon proper showing that circumstances which led to its grant have ceased to exist and are unlikely to recur: [p]rovided, that adequate protection shall be afforded to the legitimate interest of the licensee; and
- 100.6. The patentee shall be paid adequate remuneration taking into account the economic value of the grant or authorization, except that in cases where the license was granted to remedy a practice which was determined after judicial or administrative process, to be anti-competitive, the need to correct the anti-competitive practice may be taken into account in fixing the amount of remuneration.⁶⁷

Voluntary licensing applies across all forms of IP and is treated under the IP Code provisions on TTA.⁶⁸ “Technology transfer arrangements” refer to

contracts or agreements involving the transfer of systematic knowledge for the manufacture of a product, the application of a process, or rendering of a service[,] including management contracts; and the transfer, assignment[,] or licensing of all forms of [IPR], including licensing of computer software[,] except computer software developed for mass market.⁶⁹

The value of TTA — as a way of encouraging the transfer and dissemination of technology and certain quality practices — is well recognized. To allow TTA to perform this vital function, the legislature, in enacting the IP Code, saw that certain conditions that may, in particular cases, constitute an abuse of IPR, have to be controlled or prohibited.⁷⁰

67. *Id.* § 100.

68. *See* INTELL. PROP. CODE, § 85.

69. INTELL. PROP. CODE, § 4.2.

70. *See* INTELL. PROP. CODE, § 85.

Consequently, part of the regulatory framework requires that contracts or agreements constituting TTA: (a) be free of prohibited clauses and (b) include mandatory provisions. The prohibited clauses under Section 87 are deemed *prima facie* to have an adverse effect on competition and trade.⁷¹ The prohibited clauses are:

- 87.1. Those which impose upon the licensee the obligation to acquire from a specific source capital goods, intermediate products, raw materials, and other technologies, or of permanently employing personnel indicated by the licensor;
- 87.2. Those pursuant to which the licensor reserves the right to fix the sale or resale prices of the products manufactured on the basis of the license;
- 87.3. Those that contain restrictions regarding the volume and structure of production;
- 87.4. Those that prohibit the use of competitive technologies in a non-exclusive [TTA];
- 87.5. Those that establish a full or partial purchase option in favor of the licensor;
- 87.6. Those that obligate the licensee to transfer for free to the licensor the inventions or improvements that may be obtained through the use of the licensed technology;
- 87.7. Those that require payment of royalties to the owners of patents for patents which are not used;
- 87.8. Those that prohibit the licensee to export the licensed product[,] unless justified for the protection of the legitimate interest of the licensor[,] such as exports to countries where exclusive licenses to manufacture and/or distribute the licensed product(s) have already been granted;
- 87.9. Those which restrict the use of the technology supplied after the expiration of [the TTA], except in cases of early termination of the [TTA] due to reason(s) attributable to the licensee;
- 87.10. Those which require payments for patents and other industrial property rights after their expiration or termination of the [TTA];

71. *Prima facie* connotes that it is possible for the franchisor or franchisee to demonstrate to the IPO-DITTB that the provisions covered by Section 87, but incorporated in the technology transfer agreements (TTA), are not inimical to competition and trade.

- 87.11. Those which require that the technology recipient shall not contest the validity of any patents of the technology supplier;
- 87.12. Those which restrict the [R&D] activities of the licensee designed to absorb and adapt the transferred technology to local conditions or to initiate [R&D] programs in connection with new products, processes[,] or equipment;
- 87.13. Those which prevent the licensee from adapting the imported technology to local conditions, or introducing innovation to it, as long as it does not impair the quality standards prescribed by the licensor;
- 87.14. Those which exempt the licensor from liability for non-fulfillment of his [or her] responsibilities under the [TTA] and/or liability arising from third party suits brought about by the use of the licensed product or the licensed technology; or
- 87.15. Other clauses with similar effect.⁷²

The mandatory provisions are:

- 88.1. That the laws of the Philippines shall govern the interpretation of the same and[,] in the event of litigation, the venue shall be the proper court in the place where the licensee has its principal office;
- 88.2. Continued access to improvements in techniques and processes related to technology shall be made available during the period of the [TTA];
- 88.3. In the event the [TTA] shall provide for arbitration, the Procedure of Arbitration of the Arbitration Law of the Philippines[,] or the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”) or Rules of Conciliation and Arbitration of the International Chamber of Commerce (“ICC”) shall apply[,] and the venue of arbitration shall be the Philippines or any neutral country; and
- 88.4. The Philippine taxes on all payments relating to the [TTA] shall be borne by the licensor.⁷³

The IP Code is explicit in that the purpose of specifying prohibited clauses is to prevent technology transfers that have adverse effects on

72. INTELL. PROP. CODE, § 87.

73. *Id.* § 88.

competition and trade.⁷⁴ The mandatory provisions extend further protection for the licensees. These provisions help place emphasis on the State policy that the use of IP bears a social function.⁷⁵ Thus, having been infused with public interest, TTA are regulated to the extent that the diffusion of knowledge and information is made for the promotion of national development and progress, and the common good.⁷⁶

Failure to comply with the requirements of Sections 87 and 88 shall automatically render the TTA unenforceable.⁷⁷ This means that, in the event of contractual breach, neither party has recourse before Philippine courts for any relief. There are, generally, three ways by which to avoid a TTA being rendered unenforceable: (a) adherence to the requirements of the IP Code, specifically Sections 87 and 88,⁷⁸ (b) approval and registration of the contract or agreement with the IPOPHL's Documentation, Information and Technology Transfer Bureau (DITTB) as an exceptional case,⁷⁹ or (c) obtaining a pre-clearance from the DITTB and reforming the contract on the basis of any advice received from the DITTB.⁸⁰

In two decisions rendered by the Director General of the IPOPHL on 21 April 2008, it was held that

[t]he issue of whether a TTA is compliant with the IP Code is determined when a party (or parties jointly) to a TTA or to a prospective TTA files a request for the DITTB Director to:

- (1) issue a certificate of clearance prior to recordal of a trademark licensing agreement under Part 3, Chapter 1, Rules 17 to 20 of the

74. *Id.* § 85. See *Insular Life Insurance Co. Ltd. v. Director of the DITTB*, Appeal No. 05-02-04, November 3, 2003 (Office of the President).

75. Section 6, Article XII, of the Philippine Constitution provides that the “use of property bears a social function, and all economic agents shall contribute to the common good.” PHIL. CONST. art. XII, § 6.

76. INTELL. PROP. CODE, § 2, para. 2.

77. *Id.* § 92.

78. *Id.*

79. *Id.* Exceptional cases are recognized under the IP Code, and these include (but are not limited to) “cases where substantial benefits will accrue to the economy, such as high technology content, increase in foreign exchange earnings, employment generation, regional dispersal of industries and/or substitution with[,] or use of[,] local raw materials.” Evaluation by the Documentation, Information and Technology Transfer Bureau (DITTB) is made on case by case basis. *Id.* § 91.

80. *Id.*

[Rules and Regulations on Voluntary Licensing (the 'Regulations')]; or

- (2) issue a certificate of compliance under Part 3, Chapter 2, Rules 21-22 of the Regulations; or
- (3) register an exempt TTA under Part 2, Rules 4 to 16 of the Regulations [also known as] 'Request for Exemption'; or
- (4) conduct a preliminary review or issue pre-clearance under Rule 3, Chapter 3, Rules 23 to 26 of the Regulations.⁸¹

Section 91 of the IP Code provides the legal basis for granting an exemption —

Exceptional Cases. — In exceptional or meritorious cases where substantial benefits will accrue to the economy, such as high technology content, increase in foreign exchange earnings, employment generation, regional dispersal of industries and/or substitution with or use of local raw materials, or[,] in the case of Board of Investments, registered companies with pioneer status, exemption from any of the above requirements may be allowed by the [DITTB] after evaluation thereof on a case[-]by[-]case basis.⁸²

81. Gucci Guccio S.P.A. v. Director of the Documentation, Information and Technology Bureau, Appeal No. 05-07-02, Apr. 21, 2008, at 4 (Office of the Director General of the Intellectual Property Office) & Bottega Veneta International, Sarl, v. Director of the Documentation, Information and Technology Bureau, Appeal No. 05-07-01, Apr. 21, 2008, at 3 (Office of the Director General of the Intellectual Property Office).

82. INTEL. PROP. CODE, § 91. Corollarily, Rule 9 of the Rules and Regulations on Voluntary Licensing provides —

Scope of evaluation. Requests for exemption shall be evaluated based on the adverse effects of the terms and conditions of the [TTA] on competition and trade. Exemption from the Prohibited Clauses and Mandatory Provisions of the IP Code will be granted in exceptional or meritorious cases where substantial benefits will accrue to the economy, such as:

- (1) high technology content;
- (2) increase in foreign exchange earnings of the country;
- (3) employment generation;
- (4) regional dispersal of industries;
- (5) substitution with or use of local raw materials; and
- (6) pioneer status registration with the Board of Investments.

Intellectual Property Office of the Philippines, Rules and Regulations on Voluntary Licensing, rule 9 (Oct. 2, 1998).

In construing the foregoing, the IPOPHL Director General previously determined that the applicant failed to show that the subject franchise agreement warranted exemption from Sections 87 and 88 of the IP Code —

[W]hile the App[licant] may have submitted data, statistics[,] or figures, mostly with respect to the business and financial status of Appellant, it did not even explain how the country will reap substantial economic benefits out of the [Franchise] Agreement. That the Agreement will bring in substantial benefits to the economy cannot be presumed. The Director and this Office cannot speculate nor make guesses out of the documents submitted by the App[licant], including the numbers and figures stated therein. The burden of proving that the criteria under [Section] 91 of the IP Code [have been] met is on the App[licant].⁸³

In the same cases, the IPOPHL emphasized that “[Sections] 87 and 88 of the IP Code are matters of public interest and policy intended as safety nets against acts considered to be in restraint of trade”⁸⁴ and that exemptions thereto should be construed strictly against the person or entity claiming such exemption.⁸⁵

The two common forms of TTA are franchise agreements and licensing agreements, which concern IP, such as patents, trademarks, and copyright. Unlike in other jurisdictions, there is no general franchising law or specific disclosure requirements for franchising agreements in the Philippines. Rather, the regulatory framework governing the offer and operation of a franchise system is fragmented, with a number of laws governing specific aspects of the relevant agreements. However, any agreement that involves the transfer of systematic knowledge for the rendering of a service, and the transfer, assignment, or licensing of the foregoing forms of IPR is considered a TTA.⁸⁶ Based on this definition, a franchising agreement may thus qualify as a TTA,⁸⁷ whether in the traditional or business format. In addition, the

83. *Gucci Guccio S.P.A.*, Appeal No. 05-07-02, at 5. See also *Bottega Veneta International, Sarl*, Appeal No. 05-07-01, at 5.

84. *Gucci Guccio S.P.A.*, Appeal No. 05-07-02, at 5 & *Bottega Veneta International, Sarl*, Appeal No. 05-07-01, at 5.

85. *Id.* The IPO further held that “a request for exemption partakes of the nature of an administrative proceeding wherein the standard of substantial evidence required is more than a mere [scintilla] but such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.*

86. Rules and Regulations on Voluntary Licensing Regulations, part 1 (n).

87. In published decisions of the IPOPHL Director General, it appears that any agreement containing a provision on transfer, assignment, or licensing of intellectual property rights will be considered a TTA. An inquiry placed with

IPOPHL has considered franchising agreements both as a form of TTA and, where it carries a provision on the licensing of the brand or mark, as a trademark license agreement (TLA).

A TLA is any license contract concerning the registration of a mark, or an application therefor. In case the franchising agreement also qualifies as a TLA, it must also provide for effective control by the licensor of the quality of the goods or services of the licensee in connection with which the mark is used, in addition to having none of the prohibited clauses and all of the mandatory provisions.⁸⁸ If such franchising agreement does not provide for such quality control, or if such quality control is not effectively carried out, it shall not be valid.⁸⁹

When franchising agreements qualify as TLA, they are required to be submitted to the DITTB for record-keeping purposes.⁹⁰ However, prior to recordal, a certificate of clearance must be obtained. The certificate of clearance shall be issued by the DITTB if the TLA complies with the IP Code.⁹¹ A TLA will have no effect between the parties and even against third parties until it is recorded with the DITTB.⁹² Among the functions of the IPOPHL are to register TTA, to settle disputes involving technology transfer payments covered by the provisions on voluntary licensing, and to develop strategies to promote and facilitate technology transfer.⁹³

IV. INTELLECTUAL PROPERTY AND COMPETITION

Yet, 30 years since the enactment of the IP Code, building domestic innovation or, at the very least, establishing adaptive strategies with regard to high technology content remains distant. In the Global Innovation Index Report of 2016, the Philippines ranked 74th among 128 economies in

the IPOPHL's DITTB further indicates that among those previously submitted to the DITTB for review are manufacturing, franchising, and computer software licensing agreements.

88. INTELL. PROP. CODE, § 150.1.

89. *Id.*

90. *Id.* § 150.2.

91. Rules and Regulations on Voluntary Licensing, part 3, ch. 1, rule 19.

92. INTELL. PROP. CODE, § 150.2.

93. *Id.* § 5.1 (c).

innovation and was ranked fifth out of seven Association of Southeast Asian Nations (ASEAN), behind Singapore, Malaysia, Thailand, and Vietnam.⁹⁴

The output of R&D is commonly measured in terms of patents applied and granted to Filipino residents.

...

From 2005–2015, there was an annual average of 209 patents, 599 utility models[,] and 598 industrial designs applications. In the same period, an annual average of 54 patents, 446 utility models, and 502 industrial designs were granted. In 2016, the World Economic Forum (WEF) ranked the Philippines 86th out of 128 economies in the number of patents filed under the Patent Cooperation Treaty per million population. Invention patents granted to local inventors represent the smallest share in the number of [IP] granted from 2001 to 2013.

...

The country also needs to catch up in research publications[,] since the number of scientific publications in peer-reviewed journals per million population stands at 55, substantially below that of [other] ASEAN member states Singapore (10,368), Malaysia (1,484), Thailand (478), and Vietnam (105).⁹⁵

Indeed, since the passage of the IP Code and amendatory statutes,⁹⁶ resident and non-resident inventors and authors have continued to seek

94. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PHILIPPINE DEVELOPMENT PLAN 2017–2022 215 (2017) [hereinafter NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PDP].

95. *Id.* at 217.

96. Republic Act No. 10372, among the amendments to the IP Code, provides for the following: establishment of the Bureau of Copyright and Other Related Rights within the IPO, grant of specific enforcement functions to the Director General (and deputies) of IPO, implementation of technological protection measures and rights management information for copyrighted works disseminated online, and fair use exceptions to copyrights. Republic Act No. 9502 amended the IP Code by excluding the following from the scope of patent in relation to drugs and medicines:

mere discovery of a new form or new property of a known substance which does not result in the enhancement of the known efficacy of that substance, or the mere discovery of any new property or new use for a known substance, or the mere use of a known process unless such known process results in a new product that employs at least one new reactant.

protection for their IP in the country. However, resident patent filings remained low, specifically under 300 annually between 2013 and 2017, with the highest registered at 299 in 2015, as can be seen in Figure 1.⁹⁷

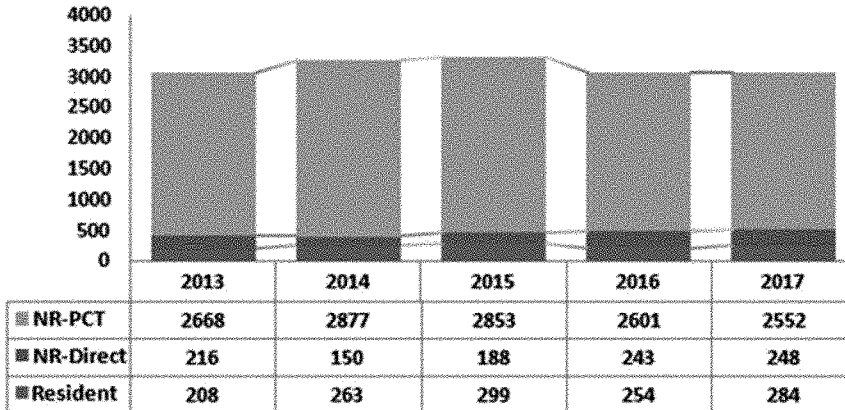


Figure 1. Patent Filings by Residence Type, 2013–2017

Registrations for residents have likewise remained low, dropping from 31 to 20 in 2017, as shown in Figure 2.⁹⁸

An Act Providing for Cheaper and Quality Medicines, Amending for the Purpose Republic Act No. 8293 or the Intellectual Property Code, Republic Act No. 6657 or the Generics Act of 1988, and Republic Act No. 5921 or the Pharmacy Law, and for Other Purposes [Universally Accessible Cheaper and Quality Medicine Act of 2008], Republic Act No. 9502, § 5 (2008).

There are also a number of intellectual property related laws, such as Republic Act No. 10175 or the Cybercrime Prevention Act, Republic Act No. 10088 or the Anti-Camcording Act, and Republic Act No. 10055 or the Philippine Technology Transfer Act.

97. Figure 1 is from the IP Statistics Office of the Intellectual Property Office. Intellectual Property Office of the Philippines, IP Statistics – Patent, *available at* <http://www.ipophil.gov.ph/transparency/statistics/patent> (last accessed May 4, 2018).

98. Figure 2 is from the IP Statistics Office of the Intellectual Property Office. *Id.*

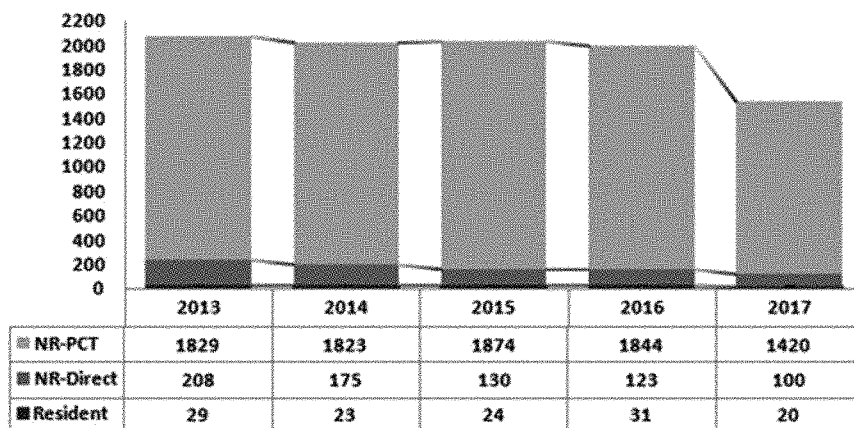


Figure 2. Patent Grants by Residence Type, 2013-2017

Figures for the period 2011 to 2015 indicate a steady increase at 1% in patent filings. For the same period, average increase in registration for non-resident filings stood at 9%. However, a decline of 2% was noted in the registration of resident patents for the same period.⁹⁹

In sharp contrast, the figures describing domestic applications for and registrations of utility models, industrial designs, and marks complete the picture of the Philippine IP landscape. Utility models are inventions that are new and industrially applicable. Unlike inventions entitled to patent protection, a utility model does not need to present an inventive step for purposes of securing registration.¹⁰⁰ An invention involves an inventive step if, having regard to prior art, it is not obvious to a person skilled in the art at the time of the filing date or priority date of the application claiming the invention. Resident filings significantly outnumber non-resident filings in this area, with applications seeing a dramatic increase from 2015 to 2017, as shown in Figure 3.

99. Intellectual Property Office of the Philippines, Annual Report 2015: Building Cooperation Across Borders at 23-24, available at <http://www.ipophil.gov.ph/images/TransparencySeal/AnnualReport2015.pdf> (last accessed May 4, 2018).

100. INTELL. PROP. CODE, § 109.1.b.

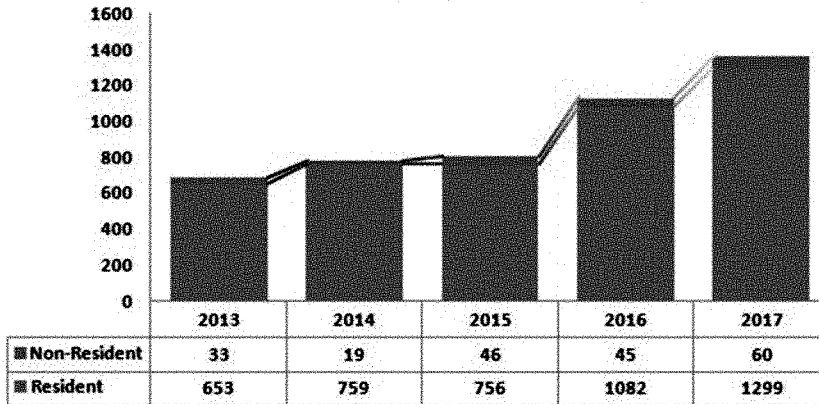


Figure 3. Utility Model Filings by Residence Type, 2013-2017

Registrations, however, disclose a conservative number at 555 and 466 in 2016 and 2017, respectively.¹⁰¹ There has also been a higher number of resident filings and registrations in the field of industrial design (“any composition of lines or colors[,] or any three-dimensional form, whether or not associated with lines or color[,] provided [] [t]hat such composition or form gives a special appearance to[,] and can serve as[,] a pattern for an industrial product or handicraft”),¹⁰² but the difference is not notable when compared to utility models. This can be seen in Figure 4. In addition, there was a decrease in filings for residents from 2016 to 2017, although more registrations were granted for residents in 2017.¹⁰³

101. Figure 3 is from the IP Statistics Office of the Intellectual Property Office. Intellectual Property Office of the Philippines, IP Statistics – Utility Model, available at <http://www.ipophil.gov.ph/transparency/statistics/utility-model> (last accessed May 4, 2018).

102. INTELL. PROP. CODE, § 112.

103. Figure 4 is from the IP Statistics Office of the Intellectual Property Office. Intellectual Property Office of the Philippines, IP Statistics – Industrial Design, available at <http://www.ipophil.gov.ph/transparency/statistics/industrial-design> (last accessed May 4, 2018).

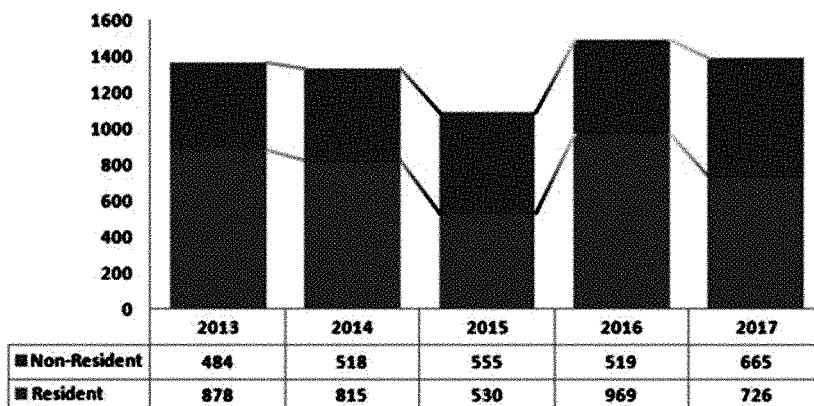


Figure 4. Industrial Design Filings by Residence Type, 2013-2017

As shown in Figure 5, trademark applications for both residents and non-residents have seen an increase year on year for the period 2013 to 2017.¹⁰⁴

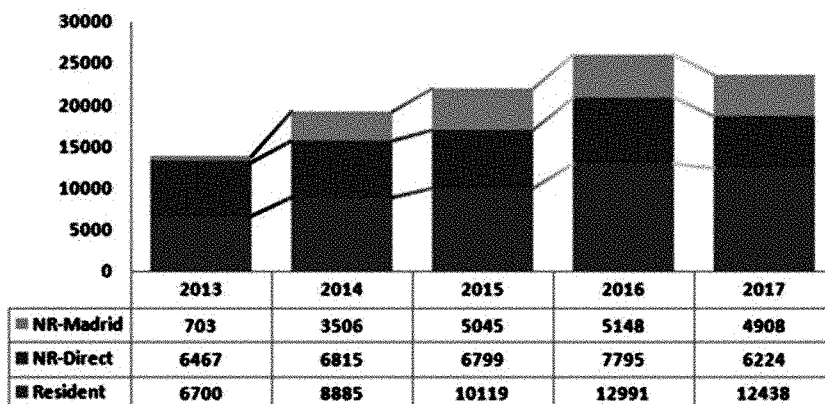


Figure 5. Trademark Registrations by Residence Type, 2013-2017

104. Figure 5 is from the IP Statistics Office of the Intellectual Property Office. Intellectual Property Office of the Philippines, IP Statistics – Trademark, available at <http://www.ipophil.gov.ph/transparency/statistics/trademark> (last accessed May 4, 2018).

Also, as shown in Figure 6, resident applications for trademark registration topped non-resident applications, even with the accession to the Madrid Protocol.¹⁰⁵

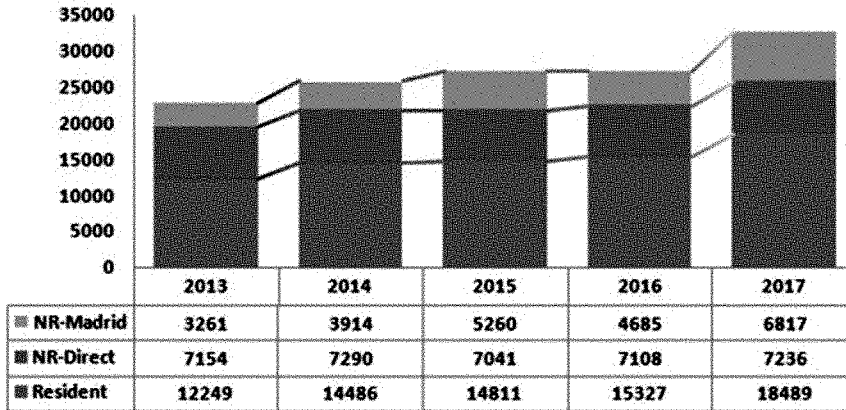


Figure 6. Trademark Filings by Residence Type, 2013-2017

The total volume of trademark applications filed in the IPOPHL grew by an average of 8% from 2011 to 2015.¹⁰⁶ Applications filed by residents posted an average growth of 7% from 2011 to 2015, with an average decrease of 3% for non-residents in the same period.¹⁰⁷ Trademark registration grew by an average of 10% from 2011 to 2015, at 9% for residents and 11% for non-residents.¹⁰⁸ It is worth noting that the top five countries of origin for trademark applications in the IPOPHL for 2015 were: the United States (US), Japan, China, Switzerland, and Germany.¹⁰⁹ For the period 2011-2015, pharmaceuticals, health, and cosmetics remained the top industry sectors for trademark applications.¹¹⁰

The steady increase in filings for non-residents in patents, as well as in marks, indicates that there continues to be confidence in the level of protection to be expected within the territory inducing non-resident IP

105. Figure 6 is from the IP Statistics Office of the Intellectual Property Office. *Id.*

106. Intellectual Property Office of the Philippines, *supra* note 99, at 35.

107. *Id.*

108. *Id.* at 36.

109. *Id.* at 37.

110. *Id.* at 39.

owners to bring their products and services to the market.¹¹¹ Consequently, IPR holders have recourse here to enforcement activities, which remained significant in 2017. Based on the publicly available data on the IPOPHL website, enforcement activities from January to June 2017, coordinated under the National Committee on Intellectual Property Rights, resulted in the seizure of various items with a total value of ₱1,441,782,729.00.¹¹² IPR statistics over the last five years also indicate the areas of enforcement, as follows:¹¹³

2017	Retail and fashion, pharmaceuticals, software, and liquefied petroleum gas (LPG)
2016	Retail and fashion, pharmaceuticals, software, LPG, and optical media
2015	Retail and fashion, food and drugs, software, LPG, mobile phones, and optical media (and related items)
2014	Retail and fashion, electronics, pharmaceutical and health products, and optical media (and related items)
2013	Retail and fashion, software, food and drugs, and electronics

111. See Delia S. Tantuico & Errol Wilfred Zshornack, Intellectual Property Rights: Talking Points for RP-US FTA Negotiations, *available at* <https://dirp4.pids.gov.ph/ris/dps/pidsdps0612.pdf> (last accessed May 4, 2018). As noted by Delia S. Tantuico and Errol Wilfred Zshornack,

[the Agreement on Trade-Related Aspects of Intellectual Property Rights' (TRIPS)] main reason for existence is to give competitive advantage to industrial and developed countries and to minimize patent and copyright infringements in foreign countries. While the benefits of the TRIPS [A]greement to the least developed and developing countries still have to be proven, suffice it to say that TRIPS [Agreement] has contributed to IP protection throughout the world by putting pressure on countries to provide IP protection.

Id. at 13.

112. See National Committee on Intellectual Property, Summary of IP Enforcement Data January - June 2017, *available at* http://www.ipophil.gov.ph/images/IPEnforcement/Statistics/Seizures/2017Data_Jan-June.pdf (last accessed May 4, 2018). The value is based on 231 search warrants enforced by the National Bureau of Investigation, 17 search warrants enforced by the Philippine National Police, and 1,283 inspections conducted by the Optical Media Board. *Id.*

113. See generally Intellectual Property Office, IP Enforcement – Statistics, *available at* <http://www.ipophil.gov.ph/ip-enforcement-menu/statistics> (last accessed May 4, 2018).

The comparatively higher figures for utility models, industrial designs, and marks may be attributable to replicative entrepreneurship, or borrowing technology from abroad through foreign direct investment, with “bottom-of-the-pyramid product and service innovations adapted to the unique circumstances of individual developing economies.”¹¹⁴ To underscore the strategic importance of growing the STI sector to the long-term growth of the economy, the Philippine Development Plan 2017–2022 aptly notes that “[t]echnology adoption allows the country’s firms and people to benefit from innovations created in other countries, and allows it to keep up and even leap frog obsolete technologies. This can lead to significant improvements in productivity of firms in agriculture, industry, and services.”¹¹⁵

Consequently, among the salient targets of this initiative is to see an improvement in Filipino patent, utility model, and industrial design registrations, as well as in the TTA figures (although a baseline figure on the number of TTA is not available). It is well worth noting that these areas implicate competition policy. The grant of patents is considered a form of government-authorized exclusivity that may pose a barrier to entry, while TTA as previously discussed are highly regulated under the IP Code to ensure that they are free of anti-competitive stipulations.

However, a poorly implemented IP framework, or an overreaching competition enforcement, could also lead to the grant of exclusive rights that may deter further innovation by preventing R&D on the existing innovation,¹¹⁶ or which may be too expensive for others to use under a

114. WILLIAM J. BAUMOL, ET AL., GOOD CAPITALISM, BAD CAPITALISM AND THE ECONOMIES OF GROWTH AND PROSPERITY 134 (2007). See also XAVIER CIRERA & WILLIAM F. MALONEY, THE INNOVATION PARADOX: DEVELOPING-COUNTRY CAPABILITIES AND THE UNREALIZED PROMISE OF TECHNOLOGICAL CATCH-UP 174 (2017).

115. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PDP, *supra* note 94, at 215.

116. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 253 (2005). Herbert Hovenkamp said that,

Jared Diamond has observed that historically most scientific progress has resulted from copying and producing variations on what already exists, and not from purely isolated acts of genius. The things [one] think[s] of as great inventions were actually cumulations of inventiveness that finally reached a level sufficient to meet market demand. James Watt’s 1768 steam engine was actually an improvement over Thomas Newcome’s engine, which in turn was an improvement of Thomas Savery’s, who had been working on an unbuilt engine

license or exploit, and, ultimately, consumer harm in the form of exorbitant prices, lack of supply, or inferior product quality will spell its downfall. As Professor Herbert Hovenkamp noted, the conflict between competition and IP laws is more apparent than real, as policy seeks to strike a balance between the incentive to innovate and the need for competition in the market, thus

So the antitrust laws and the IP laws are in conflict in the very general sense that when the two bodies of law behave myopically, antitrust always wants more competition and IP law wants more protection for the right to exclude. But[,] this conflict is largely illusory[.] [B]ecause when legal policy is not behaving myopically, then everyone should want the same thing, namely, the optimal balance between competition and protection for innovation.¹¹⁷

To provide a framework for a discussion of the intersection of IP law and competition, the typology of competition concerns arising from the grant and use of IPR, offered by Ashish Lall and R. Ian McEwin will be adopted in this Article,¹¹⁸ as it provides a simple generalization of the kinds of issues that are likely to arise from an IP law perspective, and in the context of a developing country.¹¹⁹ According to Lall and McEwin, the

from a design by Denis Papin. An optimal IP system must balance the inventors' rights to their rewards against the critical need each innovator has to build on the work of predecessors.

Id. at 253.

117. *Id.* at 255.

118. Ashish Lall & R. Ian McEwin, *Competition and Intellectual Property Laws in the ASEAN Single Market*, in *THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS* 246-47 (Sanchita Basu Das, et al. eds., 2013).

119. There are certainly other typologies, particularly those developed from the competition perspective. A few examples are those provided by Herbert Hovenkamp, and Richard Whish and David Bailey. Hovenkamp used horizontal agreements, vertical restraints (such as tying and resale price maintenance), and refusal to license, identifying license agreements between competitors as source of real conflict between IP and antitrust. Whish and Bailey looked at the relationship between intellectual property rights and competition law in licensing and technology transfer (as these are considered under the Treaty on the Functioning of the European Union (TFEU) Article 101) and under TFEU Article 102 on abuse of dominance. Lall and MacEwin's article has been selected here because the typology has been drawn based on IP perspective. It is also worth noting that these categories appear to be consistent with Hovenkamp's view that the conflict between IP and competition laws only arises with regard to conduct that exceeds what has been lawfully granted

following broadly categorizes conduct that may implicate competition concerns:

- (1) strategic conduct by firms in setting too wide a scope for [IPR] due to deficiencies in the procedures for examining and granting the IPR ... [;]
- (2) where the IPR grant is correct but used in a way that limits competition in either the product market, innovation (licensing) market or [an R&D] ... [;] and
- (3) where there is abusive enforcement of [IPR.]¹²⁰

Deficiencies in the procedure for the examination of IPR claims and the grant of IPR often occur in patents. Lack of human resources, whether in number or in technical competency, may prevent an IP regulatory agency from completing a thorough evaluation of a patent application, leading to the grant of patent on the basis of broad claims that may later be exploited by the patent holder.

The case of *Kirkbi AG v. Ritvik Holdings Inc.*¹²¹ is an interesting example of strategic conduct and an attempt to widen the scope of IPR in its enforcement. Kirkbi AG held the patents for plastic bricks popularly known under the LEGO brand.¹²² The patents expired in 1988, which led to the development of similar products by other companies, including Ritvik Holdings, Inc. (which was later called Mega Bloks Inc.).¹²³ Kirkbi AG sought to enjoin Ritvik Holdings Inc., one of its most vigorous competitors, from the production and marketing of its nanoblocks.¹²⁴ Since patent protection was no longer available to support that claim, Kirkbi AG resorted to trademark protection.¹²⁵

In a suit against Ritvik Holdings Inc., Kirkbi claimed that its unregistered trademark, the LEGO indicia, had been infringed by

under IP laws. See RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 810-52 (8th ed. 2015); HOVENKAMP, *supra* note 116, at 276; & Lall & McEwin, *supra* note 118, at 245-46.

120. Lall & McEwin, *supra* note 118, at 245-46.

121. *Kirkbi AG v. Ritvik Holdings, Inc.*, 3 S.C.R. 302 (2005) (Can.).

122. *Id.* at 308-09.

123. *Id.* at 309.

124. *Id.* at 309-10.

125. *Id.* at 310.

nanoblocks.¹²⁶ The LEGO indicia consist of the well-known geometrical pattern of raised studs on the tops of the bricks.¹²⁷ The Canadian Supreme Court ruled in favor of Ritvik Holdings Inc. based on the doctrine of functionality, placing emphasis on the root of the functionality principle in European law, as in Canadian IP law, in the “concern to avoid overextending monopoly rights on the products themselves and impeding competition, in respect of wares sharing the same technical characteristics.”¹²⁸

The Canadian Supreme Court noted that a purely functional design may not be the basis of a trademark, registered or unregistered, and that the “law of passing off and of [trademarks] may be used to perpetuate monopoly rights over now-expired patents.”¹²⁹ The Court added —

The market for these products is now open, free[,] and competitive.

...

In the end, the appellant [Kirkbi AG] seems to complain about the existence of competition based on a product, which is now in the public domain. As ‘LEGO’ and LEGO-style building blocks have come close to merging in the eyes of the public, it is not satisfied with distinctive packaging or names in the marketing operations of Ritvik [Holdings Inc.]. It seems that, in order to satisfy the appellant, the respondent would have to actively disclaim that it manufactures and sells LEGO bricks and that its wares are LEGO toys. The fact is, though, that the monopoly on bricks is over, and MEGA BLOKS and LEGO bricks may be interchangeable in the bins of the playrooms of the nation — dragons, castles[,] and knights may be designed with them, without any distinction. The marketing operations of Ritvik [Holdings Inc.] are legitimate and may not be challenged under [Section 7] (b) [of the Trade-marks Act, R.S.C. 1985, c. T-13].¹³⁰

In the Philippine context, the widening of IPR scope can occur not only in the situation that prevailed in *Kirkbi AG*, in which it is the IPR owner who formulates an untenably broad IP scope, but also in those instances where an IPR holder fails to provide himself or herself with adequate protection arising from a failure to understand the nature of IPR. The grant or enforcement of IPR on a wider basis than appropriate, whether in patents or trademarks, and even copyright, can occur not only because the

126. *Id.*

127. *Kirkbi AG*, 3 S.C.R. at 310.

128. *Id.* at 334.

129. *Id.* at 308.

130. *Id.* at 308 & 338–39.

IPR holder has decided on a strategic conduct to make use of such a scope but also as a result of low awareness with regard to IP and the scope of protection afforded under legal and regulatory instruments. This is demonstrated in the case of *Pearl & Dean (Phil.), Incorporated v. Shoemart, Incorporated*¹³¹ decided in 2003. Pearl & Dean (Phil.), Incorporated (P&D) was engaged in the manufacture of advertising display units that utilized specially printed posters sandwiched between plastic sheets and illuminated with backlights.¹³² P&D referred to these units as light boxes. It secured a Certificate of Copyright Registration over the light boxes under Class O or under Section 2 (O) of Presidential Decree No. 49 (the prevailing IP law at the time), pertaining to “prints, pictorial, illustrations, advertising copies, labels, tags, [and] box wraps[.]”¹³³ P&D also applied for trademark registration for the words “Poster Ads” in 1983, which was granted in 1988.¹³⁴ P&D approached Shoemart, Incorporated (Shoemart) for the supply of its light boxes at various Shoemart malls (SM malls).¹³⁵

Subsequently, Shoemart rescinded its contract with P&D.¹³⁶ Two years later, the company that P&D contracted for the manufacture of its light boxes offered to construct them for Shoemart’s chain of stores.¹³⁷ Shoemart subsequently also contracted with another company for more units (300 units), which were supplied in 1991 and installed in SM Megamall and SM City.¹³⁸ On receiving reports that copies of its light boxes were installed in various SM outlets, P&D first sent a demand letter for Shoemart to cease and desist in using the light boxes, as well as soliciting ads for use in the units.¹³⁹ P&D was subsequently constrained to litigate against Shoemart.¹⁴⁰ The latter denied liability, asserting that P&D’s advertising display units did not bear

131. *Pearl & Dean (Phil.), Incorporated v. Shoemart, Incorporated*, 409 SCRA 231 (2003).

132. *Id.* at 234.

133. *Id.* at 237. Section 2 (O) of Presidential Decree No. 49 provides that the rights it grants shall subsist to “[p]rints, pictorial, illustration, advertising copies, labels, tags, and box wraps[.]” Decree on the Protection of Intellectual Property [Decree on Intellectual Property], Presidential Decree No. 49, § 2 (O) (1972).

134. *Pearl & Dean (Phil.), Incorporated*, 409 SCRA at 238.

135. *Id.* at 234.

136. *Id.* at 234-35.

137. *Id.* at 235.

138. *Id.*

139. *Id.*

140. *Pearl & Dean (Phil.), Incorporated*, 409 SCRA at 235.

copyright notice and that the term Poster Ads was a generic term not amenable to trademark protection.¹⁴¹

The Supreme Court ruled in favor of Shoemart, having determined that (a) the copyright protection obtained by P&D under Class O “extended only to the technical drawings and not to the light box itself,”¹⁴² and (b) the trademark registration obtained for Poster Ads only covered letterheads, envelopes, calling cards, and newsletters.¹⁴³ It was further emphasized that if the light boxes themselves were to be protected as IP, a patent registration ought to have been secured.¹⁴⁴ The exclusivity sought by P&D cannot be recognized without a patent registration —

The patent law has a three-fold purpose: ‘first, patent law seeks to foster and reward invention; second, it promotes disclosures of inventions to stimulate further innovation and to permit the public to practice the invention once the patent expires; third, the stringent requirements for patent protection seek to ensure that ideas in the public domain remain there for the free use of the public.’

It is only after an exhaustive examination by the patent office that a patent is issued. Such an in-depth investigation is required because ‘in rewarding a useful invention, the rights and welfare of the community must be fairly dealt with and effectively guarded. To that end, the prerequisites to obtaining a patent are strictly observed and[,] when a patent is issued, the limitations on its exercise are equally strictly enforced. To begin with, a genuine invention or discovery must be demonstrated[,] lest in the constant demand for new appliances, the heavy hand of tribute be laid on each slight technological advance in art.’

There is no such scrutiny in the case of copyrights[,] nor any notice published before its grant to the effect that a person is claiming the creation of a work. The law confers the copyright from the moment of creation[,] and the copyright certificate is issued upon registration with the National Library of a sworn *ex parte* claim of creation.

Therefore, not having gone through the arduous examination for patents, the petitioner cannot exclude others from the manufacture, sale[,] or commercial use of the light boxes on the sole basis of its copyright certificate over the technical drawings.

141. *Id.* at 235–36.

142. *Id.* at 241.

143. *Id.* at 247.

144. *Id.* at 243.

Stated otherwise, what petitioner seeks is exclusivity without any opportunity for the patent office (IPO[PHL]) to scrutinize the light box's eligibility as a patentable invention. The irony here is that, had petitioner secured a patent instead, its exclusivity would have been for 17 years only. But[,] through the simplified procedure of copyright-registration with the National Library — without undergoing the rigor of defending the patentability of its invention before the [IPOP HL] and the public — the petitioner would be protected for 50 years. This situation could not have been the intention of the law.¹⁴⁵

A common example of the second type of competition concern, where the IPR grant is correct but used in a way that limits competition, is the conduct of tying under abuse of dominance. Where the grant of IPR allows a dominant firm to enjoy the benefits of exclusivity in a particular market, the firm may then, as a business strategy, consider extending the benefits of dominance in another product market by tying a lesser patronized product with one in which it enjoys exclusivity, even if the products are unrelated. Other conduct as described in Section 15 of the PCA may be utilized in conjunction with IPR grant for purposes of exploiting a position of dominance.

In the case of *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*,¹⁴⁶ the following points were stressed by the European Court of Justice: (a) “the exclusive right of reproduction forms part of the rights of the owner of an [IPR], so that refusal to grant a license, even if it is the act of an entity holding a dominant position, cannot in itself constitute abuse of dominant position[,]”¹⁴⁷ but (b) “exercise of an exclusive right by the owner

145. *Id.* at 244-45 (citing *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979); *Sears Roebuck v. Stiffel*, 376 U.S. 225, 229 (1964); & Decree on Intellectual Property, § 2.).

146. *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01, 2004, EU:C:2004:257 (CJEU Apr. 29, 2004). *See also* ANGUS MACCULLOCH & BARRY J. RODGER, *COMPETITION LAW AND POLICY IN THE EU AND UK* 123-25 (2015); MASSIMO MOTTA, *COMPETITION POLICY THEORY AND PRACTICE* (2004); & *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITD) v. Commission of the European Communities*, Cases C-241/91 P & C-242/91 P, EU:C:1995:98 (CJEU Apr. 6, 1995) (where examples of how firms might obtain intellectual property rights protection “over an input without having made any innovation which is worth being protected” were provided).

147. *IMS Health GmbH & Co. OHG*, EU:C:2004:257, ¶ 34 (citing *AB Volvo v. Erik Veng (UK) Ltd.*, Case C-238/87, EU:C:1988:477, ¶ 8 (CJEU Oct. 5, 1988) &

may, in exceptional cases, involve abusive conduct[.]”¹⁴⁸ An example of such exceptional circumstances was noted by the European Court in its previous judgment in *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITD) v. Commission*¹⁴⁹ (Magill), where

the conduct of the television channels in a dominant position[,] which gave rise to the complaint[,] consisted in their relying on the copyright conferred by national legislation on the weekly listings of their progra[ms] in order to prevent another undertaking from publishing information on those progra[ms,] together with commentaries, on weekly basis.¹⁵⁰

The European Court determined in Magill that the following constituted exceptional circumstances:

- (1) “[T]he refusal [of the channels] concerned a product ([referring to] information on the weekly schedules of certain television channels)[;]”¹⁵¹
- (2) “[T]he supply of which was indispensable for carrying on the business” of publishing a general television guide, in which a competitor sought entry;¹⁵²
- (3) “[I]n that, without the information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale[;]”¹⁵³
- (4) “[T]he fact that such refusal prevented the emergence of a new product[;]”¹⁵⁴ and

Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITD), EU:C:1995:98., ¶ 49).

148. *IMS Health GmbH & Co. OHG*, EU:C:2004:257, ¶ 35 (citing *AB Volvo*, EU:C:1988:477, ¶ 9 & *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITD)*, EU:C:1995:98, ¶ 50).

149. *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITD)*, EU:C:1995:98.

150. *IMS Health GmbH & Co. OHG*, EU:C:2004:257, ¶ 36 (citing *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITD)*, EU:C:1995:98).

151. *IMS Health GmbH & Co. OHG*, EU:C:2004:257, ¶ 37 (citing *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITD)*, EU:C:1995:98, ¶ 53).

152. *Id.*

153. *Id.*

- (5) “[T]he fact that it was not justified by objective considerations [] and was likely to exclude all competition in the secondary market[.]”¹⁵⁵

The European Court then abstracted its approach to the dispute presented in *IMS Health GmbH & Co. OHG*, stating that

[i]t is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely[,] that [the] refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.¹⁵⁶

These conditions were determined to exist in *IMS Health GmbH & Co. OHG*, as follows —

[T]he refusal by an undertaking [IMS Health GmbH & Co. OHG] which holds a dominant position and owns an [IPR] in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a license to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of dominant position within the meaning of Article 82 [of the Treaty Establishing the European Community] where the following conditions are fulfilled:

- (1) [T]he undertaking which requested the license intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the [IPR;] and for which there is a potential customer demand;
- (2) [T]he refusal is not justified by objective considerations; [and]
- (3) [T]he refusal is such as to reserve to the owner of the [IPR] the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market.¹⁵⁷

154. *IMS Health GmbH & Co. OHG*, EU:C:2004:257, ¶ 37 (citing *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITD)*, EU:C:1995:98, ¶ 54).

155. *IMS Health GmbH & Co. OHG*, EU:C:2004:257, ¶ 37 (citing *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITD)*, EU:C:1995:98, ¶¶ 55-56).

156. *IMS Health GmbH & Co. OHG*, EU:C:2004:257, ¶ 38.

157. *Id.* ¶ 52.

Within the Philippine context, competition concerns that may arise under this second type have received some attention under the IP Code's provisions on licensing. Consistent with the model provided under TRIPS Agreement, the IP Code makes room for IP diffusion through licensing, both compulsory and voluntary. On the one hand, compulsory licensing prevents the patent holder from withholding the benefits of the dissemination and use of the invention, while, on the other, the voluntary licensing regime under the IP Code attempts to control, if not prevent, the abuse of IPR, whether patent, trademark, or copyright.¹⁵⁸ Voluntary licensing is regulated under the IP Code's provisions on TTA and it is where the concern for anti-competitive conduct is most pronounced in the identification of those forms of agreements that are presumed, by their mere existence in a contract, to be anti-competitive.¹⁵⁹

The Supreme Court has yet to decide a dispute involving the TTA provisions of the IP Code. However, at least 150 TTA have been reviewed and registered by the IPOPHL DITTB between 2005 and 2017.¹⁶⁰ The figure is based on publicly available data on certificates of registration issued to cover TTA submitted for review or clearance of the IPOPHL DITTB.¹⁶¹ A number of the TTA come in the form of TLA, but there are a few in the power and management sectors, possibly because the agreements embody a form of licensing or use of IP.¹⁶² Based on the information made available by the IPOPHL, in instances where the IPOPHL DITTB has exempted contractual provisions from the application of Sections 87 and 88 of the IP Code, these are made in favor of permitting the use or inclusion of the following prohibited stipulations:

- 87.1. Those which impose upon the licensee the obligation to acquire from a specific source capital goods, intermediate products, raw materials, and other technologies, or of permanently employing personnel indicated by the licensor;¹⁶³

158. INTELL. PROP. CODE, § 85.

159. *Id.* ch. 9.

160. See generally Innovation and Technology Support Office, Number of Applications as of 31 December 2015, available at <http://info.ipophil.gov.ph/itso/index.php/2-uncategorised/14-as-of-26-mar-2015> (last accessed May 4, 2018).

161. *Id.*

162. *Id.*

163. INTELL. PROP. CODE, § 87.1.

- 87.6. Those that obligate the licensee to transfer for free to the licensor the inventions or improvements that may be obtained through the use of the licensed technology;¹⁶⁴ and
- 87.15. Other clauses with equivalent effects.¹⁶⁵

The mandatory inclusion of the following stipulations has likewise been exempted for certain contracts:

- 88.3. In the event the [TTA] shall provide for arbitration, the Procedure of Arbitration of the Arbitration Law of the Philippines or the Arbitration Rules of the United Nations Commission on International Trade Law [] or the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) shall apply[,] and the venue of arbitration shall be the Philippines or any neutral country;¹⁶⁶ and
- 88.4. The Philippine taxes on all payments relating to the [TTA] shall be borne by the licensor.¹⁶⁷

Save for the criteria provided under Section 91, the specific grounds for the exemptions previously granted are not readily available to inform how similar agreements may be evaluated using a competition lens.¹⁶⁸

The third category of competition concerns arising from grant of IPR is their abusive enforcement. An example provided by Lall and McEwin is a firm with considerable resources that prevents, improperly, another (less well-resourced) firm from exploiting a new idea by claiming an infringement by the smaller firm of IPR.¹⁶⁹ Frivolous suits are an example here and in the

164. *Id.* § 87.6.

165. *Id.* § 87.15.

166. *Id.* § 88.3.

167. *Id.* § 88.4.

168. In the European Union, the relationship that arises from a licensing agreement may come under TFEU Article 101 scrutiny. There are certain agreements, however, that may be exempted under the criteria recently updated in 2014 under the Technology Transfer Block Exemption Regulation (TTBER) and the accompanying guidelines. The basic principle under the TTBER is that IPRs may be freely exploited but that such should not distort competition. In addition, licensing is also generally considered as pro-competitive. Unlike the TTA provisions of the IP Code, which look to the presence of certain contractual stipulations, the analysis under TTBER considers whether or not the agreement concerns competitors. GUNNAR NIELS, ET AL., *ECONOMICS FOR COMPETITION LAWYERS* 258-59 (2d ed. 2016).

169. Lall & McEwin, *supra* note 118, at 247.

Philippine context demonstrated by the recently decided case of *E.I. Dupont de Nemours and Co. v. Francisco*.¹⁷⁰ Indeed, this case underscores the need to strike a balance between the substantive protection and procedural framework statutorily established for intellectual and industrial property rights, on one hand, and the ex post application of competition law, on the other. The case involves an action for the revival of a patent application 13 years after its abandonment for failure to respond to an office action released by the IPOPHL's Bureau of Patents.¹⁷¹ The Supreme Court considered a patent application forfeited to avoid an increase in the product price resulting from the potential elimination of a competitor upon registration and enforcement of the patent.¹⁷² The patent application was for Angiotensin II Receptor Blocking Imidazole (losartan), an invention related to the treatment of hypertension and congestive heart failure.¹⁷³ Therapharma, Inc. intervened at the Court of Appeals, following a decision denying the petition to revive rendered by the IPOPHL Director General.¹⁷⁴ Therapharma, Inc. had been threatened with litigation by Merck, Sharpe, and Dohme Corporation (MSD), E.I. Dupont de Nemours and Co.'s licensee in the Philippines in relation to the commercial availability of Therapharma's losartan product branded as Lifezar.¹⁷⁵ It is worthy of note that in an Amended Decision promulgated in 2006, nine years before the passage of the PCA, the Court of Appeals ruled that "the public interest would be prejudiced by the revival of E.I. Dupont Nemours [and Co.'s] application."¹⁷⁶ The Court of Appeals found that losartan was used to treat hypertension, "a chronic ailment affecting 12.6 million Filipinos."¹⁷⁷ It noted specifically that "the presence of competition lowered the price of losartan products."¹⁷⁸ It also determined that the renewal of the application "prejudiced Therapharma, Inc.'s interest in that it had already invested more than [₱]20,000,000.00 to develop its own losartan product and that it acted in good faith when it marketed its product."¹⁷⁹

170. *E.I. Dupont de Nemours and Co. v. Francisco*, 801 SCRA 629 (2016).

171. *Id.* at 635.

172. *Id.* at 682.

173. *Id.* at 633-34.

174. *Id.* at 638.

175. *Id.*.

176. *E.I. Dupont de Nemours and Co.*, 801 SCRA at 639.

177. *Id.*

178. *Id.* at 639-40.

179. *Id.* at 640.

The Supreme Court agreed with the Court of Appeals and, in its Decision, ruled —

According to respondent Therapharma, Inc., the retail price of petitioner's losartan product, Cozaar, decreased within one [] month of respondent Therapharma, Inc.'s entry into the market[.]

Respondent Therapharma, Inc. also presented figures showing that there was a 44% increase in the number of losartan units sold within five [] months of its entry into the market. More Filipinos are able to purchase losartan products when there are two [] different players providing competitive prices in the market.

Lifazar, and another of respondent Therapharma, Inc.'s products, Combizar, have also been recommended as cheaper alternative losartan medication, since they were priced '50[%] less than foreign brands.'

Public interest will be prejudiced if, despite petitioner's inexcusable negligence, its Petition for Revival is granted. Even without a pending patent application and the absence of any exception to extend the period for revival, petitioner was already threatening to pursue legal action against respondent Therapharma, Inc. if it continued to develop and market its losartan product, Lifazar. Once petitioner is granted a patent for its losartan products, Cozaar and Hyzaar, the loss of competition in the market for losartan products may result in higher prices. For the protection of public interest, Philippine Patent Application No. 35526 should be considered a forfeited patent application.¹⁸⁰

180. *Id.* at 681-82 (citing Willie T. Ong, *I Found Cheaper and Safer Drugs*, PHIL. STAR, Feb. 11, 2014, available at <https://www.philstar.com/lifestyle/health-and-family/2007/08/21/14356/i-found-cheaper-and-safer-drugs> (last accessed May 4, 2018)). Hovenkamp underscores the costs of fraudulent patent claims for both plaintiff and defendant and the particularly detrimental effect on a rival with a smaller output. He explains that

[i]f both firms were equally efficient bearers of litigation costs, then the fraudulent suit would not be a particularly useful exclusion strategy. But[,] actual or threatened litigation is an effective exclusion device when the rival has not yet begun to produce or is producing at such a low level that the costs and risks of litigation overwhelm it. Of course, even the monopolist has a right to enforce valid intellectual property (IP) claims. But[,] its invalid claim should not be excused simply because the litigation would not have been effective against an equally efficient rival.

HOVENKAMP, *supra* 116, at 153.

V. COORDINATION AND HARMONIZATION

On 11 October 2016, President Rodrigo R. Duterte signed Executive Order No. 5, Series of 2016,¹⁸¹ approving the 25-year long-term vision entitled AmBisyon Natin 2040. Under Executive Order No. 5, AmBisyon Natin 2040 serves as the anchor for the PDP 2017-2022 and succeeding PDPs until 2040. AmBisyon 2040 is the result of a long-term visioning exercise that was initiated in 2015. The vision under AmBisyon 2040 is a “prosperous, predominantly middle-class society” where there is equality of opportunities and poverty has been eradicated.¹⁸² The PDP 2017-2022 recognizes the need for putting the right policies in place to improve productivity and efficiency to triple the gross national income per capita in 25 years.¹⁸³ To realize the long-term vision under AmBisyon 2040, four strategic action areas have been identified, as follows:

- (1) “[C]reate conditions for the growth of enterprises that generate high-quality goods and services at competitive prices[.]” towards building a prosperous and predominantly middle-class society where no one is poor;¹⁸⁴
- (2) Establish programs toward promoting a long and healthy life;¹⁸⁵
- (3) “[E]xpand the [] skill set of Filipinos to adapt to rapidly changing technology and work requirements” toward becoming smarter and more innovative;¹⁸⁶ and
- (4) Foster people-centered and accountable government towards a high-trust society.¹⁸⁷

The PDP 2017-2022 recognizes that STI can lead to the creation of new public goods and services to address the needs of Filipinos.¹⁸⁸ But the development of local capacity for technology generation is a long-term

181. Office of the President, Approving and Adopting the Twenty-Five-Year Long Term Vision Entitled AmBisyon Natin 2040 as Guide for Development Planning, Executive Order No. 5, Series of 2016 [E.O. No. 5, s. 2016] (Oct. 11, 2016).

182. *Id.* § 1.

183. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PDP, *supra* note 94, at 8.

184. *Id.* at 10.

185. *Id.*

186. *Id.*

187. *Id.* at 11.

188. *Id.* at 215.

objective, the environment for which requires cultivation today.¹⁸⁹ Notwithstanding the incentives under the IP Code, the level of innovation remains low. This has been attributed to “weaknesses in STI human capital, low [R&D] expenditures[,] and weak linkages in the STI ecosystem.”¹⁹⁰ To improve the STI sector by 2022, strategies include developing a vibrant IPR culture, providing support for R&D, fostering STI culture, and strengthening collaborations (government, academe and private sector).¹⁹¹ Among the targets are increase in Filipino patent registrations from 31 in 2016 to 42 by 2022,¹⁹² utility model registrations from 555 to 833,¹⁹³ and industrial design registrations from 516 to 691.¹⁹⁴ It is worth noting that these targets are intended to be accomplished under the current IP system as the proposed legislative agenda to support the strategies under Chapter 14 of the PDP 2017-2022 do not include amendments to the IP Code.

It appears that the PDP 2017-2022 regards the regime under the IP Code as adequate, pointing to lack of awareness as the contributory factor to the weak STI sector —

Develop a vibrant Intellectual Property Rights (IPR) culture. The initiative to improve patent applications performance through the Patent Incentive Package will be strengthened. Likewise, the provision of the Philippine Technology Transfer Act of 2009[,] particularly on ownership and revenue sharing[,] will be institutionalized. Aggressive and sustained advocacy to increase the appreciation and understanding of IPR shall be undertaken in order to leverage [IP] protection as an essential component of the innovation ecosystem. The government will also conduct information campaigns on the importance of [IPR] to strengthen public awareness and create an [IP] culture among Filipinos.¹⁹⁵

Under PDP 2017-2022, Filipinos are expected to have a greater drive for innovation by 2022.¹⁹⁶ Using the Global Innovation Index, the target is to

189. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PDP, *supra* note 94, at 215.

190. *Id.*

191. *Id.* at 219.

192. *Id.* at 220.

193. *Id.*

194. *Id.*

195. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PDP, *supra* note 94, at 222.

196. *Id.* at 48.

rank among the top one-third from being in the top 60%.¹⁹⁷ To increase potential growth, however, requires that “[p]olicies and programs to facilitate knowledge flows and protect [IPR]” are enhanced or established.¹⁹⁸ In addition, “[i]nnovation hubs will be established as a way of providing venues to nurture creativity and innovation.”¹⁹⁹

IP and competition each play an important part in achieving the long-term vision under AmBisyon 2040. A strong IPR framework is considered to “encourage Filipinos to generate innovative products and ideas[,]” along with a “mature [R&D] program[.]”²⁰⁰ Among the factors identified for the country’s weak performance in STI is the “absence of a vibrant [IP] culture.”²⁰¹ A heavy hand in the implementation of competition policy may deaden that initiative. Consider, for example, that, on the one hand, a PDP 2017-2022 target is an increase in patent numbers; but, on the other hand, lack of competition in the industry sector is attributed in part to monopolies created by patent protection — “[i]n the industry sector, lack of competition may be due to limited market, limited access to raw materials, high cost of [R&D], monopolies created by patent protection, and the tendency to perceive price as a sign of quality.”²⁰²

While the grant of patent includes the right to exclude, the patent owner does not thereby come upon a monopoly. It bears stressing that the PCA itself considers legal rights, such as IPR, as exemptions from abuse of dominance — conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit may not necessarily be considered abuse of dominant position.²⁰³ A useful starting point for considering coordination and harmonization is that there are policy matters within the domain of IP law, such as the grant of IP ownership, duration of IP protection, and the conditions upon which it will be granted. Competition policy becomes

197. *Id.*

198. *Id.* at 51.

199. *Id.*

200. *Id.* at 10.

201. See NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PDP, *supra* note 94, at 217.

202. *Id.* at 252.

203. Philippine Competition Act, § 15 (i).

relevant in the exercise of IPR.²⁰⁴ With the centrality of innovation to development and growth, coherence in policy and implementation becomes critical. Indeed, increasing the country's growth potential through, among others, vigorously advancing STI and ensuring sound macroeconomic policy by leveling the playing field through a NCP go hand in hand.

Coordination is a critical step towards achieving policy coherence and, later, harmonization of separate but related IP regime and competition law. The development of a NCP is expected to provide the framework for harmonization across sectors, as it involves the review of anti-competitive legislations and policies that may substantially prevent, restrict, or lessen competition.²⁰⁵ The PCC is also expected to analyze competition issues in priority sectors.²⁰⁶ Among the priority areas for the conduct of market study is the industry sector, where competition may be impeded as a result, among others, of "high cost of [R&D], monopolies created by patent protection, and tendency to perceive price as a sign of quality."²⁰⁷ Market studies are intended to be conducted in this sector to identify the most significant competition issues and recommend measures to encourage market competition.²⁰⁸ The research output may also be utilized to inform legislation and policymaking, and support advocacy initiatives.

The IP Code declares that "an effective intellectual and industrial property system is vital to the development of domestic and creative activity[; it also] facilitates transfer of technology, attracts foreign investments, and ensures market access for [Filipino] products."²⁰⁹ But IP protection, as

204. See RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 840 (8th ed. 2015). Richard Whish and David Bailey said,

The law of intellectual property confers exclusive rights; Article 102 prohibits the abuse of dominant position. The question arises whether Article 102 can be applied in such a way as to limit the exclusive rights given by intellectual property law. The [European] Court of Justice has made clear that mere ownership of intellectual property rights cannot be attached under Article 102; however Article 102 may apply to an improper exercise of such rights.

Id.

205. NATIONAL ECONOMIC DEVELOPMENT AUTHORITY, PDP, *supra* note 94, at 251.

206. *Id.* at 252.

207. *Id.*

208. *Id.*

209. INTELL. PROP. CODE, § 2.

well as the formulation of related guidelines, does not belong to the IPOPHL alone, as such —

There is no encroachment upon the powers of the IPO[PHL] granted under [Republic Act] No. 8293, otherwise known as the [IP Code]. Section 5 thereof enumerates the functions of the IPO[PHL]. Nowhere in [the] said provision does it state nor can it be inferred that the law intended the IPO[PHL] to have the exclusive authority to protect or promote [IPR] in the Philippines. On the contrary, paragraph (g) of said Section even provides that the IPO[PHL] shall ‘[c]oordinate with other government agencies and the private sector efforts to formulate and implement plans and policies to strengthen the protection of [IPR] in the country.’ Clearly, [Republic Act] No. 8293 recognizes that efforts to fully protect [IPR] cannot be undertaken by the IPO[PHL] alone. Other agencies dealing with [IPR] are, therefore, not precluded from issuing policies, guidelines[,] and regulations to give protection to such rights.²¹⁰

Similarly, the intention of creating a single and central law on competition, with only one competition authority to implement it, is not expressed in the PCA. On the contrary, the law repeatedly refers to “other existing competition laws” and “other competition laws,” an acknowledgment of the existence of competition provisions in other statutes across various sectors.²¹¹ With regard to competition concerns arising from the creation and use of IP, it is worth noting that there is no reference to any provision under the IP Code in the PCA’s repealing clause. The PCA also refers to the PCC as having primary — but not exclusive — jurisdiction over competition issues and recognizes that sector regulators may also have been statutorily granted a distinct competition mandate.²¹² The existence of other competition-related laws makes coordination and harmonization a further imperative to provide consistency and stability in the enforcement of both IP and competition laws across industries and policy concerns.

This requires knowledge of scope and extent of valid IPR enforcement, so that competition law operates only upon conduct and agreements that have occurred outside of what is validly permissible under IP laws. Successful coordination requires cooperation between the PCC and the IPOPHL, and an immediate step in this direction is the development of a memorandum of agreement (MOA) mapping out areas in which collaboration is of some urgency. A PCC-IPOPHL MOA may cover knowledge sharing and

210. *Pest Management Association of the Philippines (PMAP) v. Fertilizer and Pesticide Authority (FPA)*, 516 SCRA 360, 368–69 (2007).

211. *Philippine Competition Act*, §§ 12 (a) & 37.

212. *Id.* § 32.

capacity development, case referral process (particularly in relation to review of TTA and the grant of compulsory licenses), and joint advocacy programs.

Competition law and policy, like IP, is a highly technical field requiring the continuing availability of training programs for legal practitioners, economists, businesses, and consumers. Even prior to the passage of the PCA in July 2015, the IPOPHL and the World Intellectual Property Office (WIPO) offered a seminar workshop on the interface of IP and competition.²¹³ Then considered a pioneering effort, the seminar explored competition aspects of IP law and licensing and covered wide-ranging topics — territorial exclusivity, exhaustion rights, excessive royalties, and regulation of anti-competitive practices in trade.²¹⁴ Similar opportunities should be developed in the future not only for the IPOPHL, IP practitioners, and IPR owners, but also for the PCC and competition stakeholders. These programs should also be made available to support the institutional framework common to both — the judicial department, at various levels of which disputes may soon involve a complex mix of IPR and competition law issues.

An area of immediate concern, however, is the evaluation, clearance, and registration of TTA. TTA, as mentioned earlier, include agreements involving the assignment or authority to use IP and the corresponding IPRs.²¹⁵ As such, TTA may be implicated as (a) a form of anti-competitive agreement under Section 14 of the PCA, particularly where competitors are parties, and the TTA involves a stipulation pertaining to price and its components; (b) a form of abusive of dominance, where the licensor enjoys a dominant position and imposes terms upon the licensee that are suspect

213. Intellectual Property Office of the Philippines, *supra* note 99, at 63. The seminar workshop was held on 13–14 April 2015 in SEDA Hotel, Bonifacio Global City. WIPO intellectual property and competition expert Giovanni Napolitano moderated the workshop, which brought together government intellectual property lawyers and practitioners and prosecutors handling intellectual property cases. *Id.*

214. *Id.*

215. INTELL. PROP. CODE, § 4.2.

under Section 15 of the PCA;²¹⁶ or (c) a transaction related to a merger or acquisition.

216. Below is a table presenting an example of the forms of abusive conduct proscribed under Section 15 and the corresponding stipulation prohibited under Section 87 of the IP Code:

PCA, Section 15	IP Code, Section 87
Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction.	Those which impose upon the licensee the obligation to acquire from a specific source capital goods, intermediate products, raw materials, and other technologies, or of permanently employing personnel indicated by the licensor.
Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially.	Those pursuant to which the licensor reserves the right to fix the sale or resale prices of the products manufactured on the basis of the license.
Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially	Those which impose upon the licensee the obligation to acquire from a specific source capital goods, intermediate products, raw materials, and other technologies, or of permanently employing personnel indicated by the licensor.
Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or service to be supplied.	Those which impose upon the licensee the obligation to acquire from a specific source capital goods, intermediate products, raw materials, and other technologies, or of permanently employing personnel indicated by the licensor.

The assignment of marks, for example, is considered as an outright transfer and requires that it be made along with the goodwill of the business. Agreements pertaining exclusively to the assignment of IP may come under review pursuant to the PCA, whether under the PCC's mandatory notification authority or upon its *motu proprio* review.²¹⁷ If not, such agreements may be among the ancillary transactions within the scope of the review. Under the prevailing rules for mandatory notification, the transacting parties, through their respective ultimate parent entities, are required to submit a notification form with supporting documents within 30 days after execution and wait for a period of at most 90 days from filing before consummating the same.²¹⁸ In the conduct of its review, the PCC is effectively ascertaining that the deal will not lead to a substantial lessening of competition in the relevant market. The same agreement, however, may have previously been reviewed and cleared, with or without need of

Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers or consumers.	Those pursuant to which the licensor reserves the right to fix the sale or resale prices of the products manufactured on the basis of the license.
Limiting production, markets or technical developments to the prejudice of consumers.	<p>Those that contain restrictions regarding the volume and structure of production.</p> <p>Those that prohibit the licensee to export the licensed product unless justified for the protection of the legitimate interest of the licensor such as exports to countries where exclusive licenses to manufacture and/or distribute the licensed product(s) have already been granted.</p> <p>Those which restrict the use of the technology supplied after the expiration of the TTA, except in cases of early termination of the TTA due to reason(s) attributable to the licensee.</p>

Philippine Competition Act, § 15 & INTELL. PROP. CODE, § 87.

217. Philippine Competition Act, §§ 12 & 31.

218. *Id.* § 31.

providing exemptions, by the IPOPHL-DITTB, as the process for the purpose may take place on the basis of a submission of a draft.²¹⁹

Even if the process is initiated only upon execution, since the IPOPHL-DITTB's review appears to be formal in nature, it may clear the transaction on the basis of having determined that it does not contain any prohibited stipulation and makes use of the mandatory clauses. Notwithstanding the distinctions between the nature and standard of review by the IPOPHL-DITTB and the PCC,²²⁰ the transacting parties may still plead the findings of one agency in seeking an approval from the other.

It should be further emphasized that compulsory licensing as a remedy in competition cases or related disputes appears to require prior application for the grant of authorization by the IPOPHL's Director of Legal Affairs. The IP Code provides that the Director of Legal Affairs may grant a license to exploit a patented invention even without the agreement of the patent owner and in favor of any person who has shown his or her capability to do so where a judicial or administrative body has determined that the manner of exploitation by the owner of the patent or his or her licensee is anti-

219. In effect, the nature of the Request for Exemption is to seek authority from the DITTB Director to clear or allow the inclusion or retention in the TTA of any of the prohibited stipulations and/or to omit any of the mandatory provisions. Thus, if a party requests the Director to conduct a preliminary review or preclearance of a draft TTA which results in a finding that the draft or some portions thereof are not in accord with Sections 87 and 88 of the IP Code, that party may file a Request for Exemption and Registration under Rules 4 to 16 of the Regulations. The Regulations, in Rule 4, provide for two kinds of Request for Exemption. The first one pertains to an executed TTA, in which case, under Rule 6, the request must be submitted within 30 days from its execution or effectivity, whichever is earlier. The other refers to an instance when a party or parties intending to enter into a TTA submits a draft TTA to the Director. It is not clear from the Regulations, however, when this request should be filed.

220. Analysis under the IP Code TTA provisions requires an examination of the agreement or contract to determine the presence of prohibited provisions. The burden is upon the applicant to secure an exemption if a prohibited provision is intended to be retained. Under the PCA, if the stipulation pertains to price and is one made among competitors the standard is per se, otherwise, the standard under Section 14 is object or effect. Conduct will not be considered an abuse of dominance under Section 15 unless it is shown that it substantially prevents, restricts or lessens competition (SLC). SLC is also the standard applied in the review of mergers and acquisitions.

competitive.²²¹ Indeed, an application made on this specific ground does not require the applicant to establish previous efforts to obtain authorization from the patent owner on reasonable commercial terms and conditions but such efforts have not been successful within a reasonable period of time.²²² The basic terms and conditions, including the rate of royalties of a compulsory license, shall be fixed by the Director of Legal Affairs.²²³

The PCC may also consider the promulgation of guidelines pertaining to its analysis of transactions and business practices involving IP and IPR, similar to the Antitrust Guidelines for the Licensing of Intellectual Property²²⁴ issued jointly by the US Department of Justice and the Federal Trade Commission on 12 January 2017, the technology transfer guidelines of the European Union, and the Competition and Consumer Commission of Singapore's CCCS Guidelines on the Treatment of Intellectual Property Rights in Competition Cases.²²⁵

As the framework for coordination is shaped, guidance may be drawn from the very provisions of the PCA. In this regard, the PCA offers three basic principles in relation to IP.²²⁶ Firstly, the law generally considers the

221. INTELL. PROP. CODE, §§ 93 & 93.3.

222. *Id.* § 95.2.

223. *Id.* § 100.

224. U.S. Department of Justice and the Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property at 1, *available at* <https://www.justice.gov/atr/IPguidelines/download> (last accessed May 4, 2018). The Guidelines state the antitrust enforcement policy of the United States (US) Department of Justice and Federal Trade Commission, with respect to the licensing of intellectual property protected by patent, copyright, and trade secret law, and of knowhow. *Id.*

225. *See* Competition and Consumer Commission Singapore, The Competition Commission of Singapore Guidelines on the Treatment of Intellectual Property Rights in Competition Cases, *available at* <https://www.ccs.gov.sg/legislation/cccs-guidelines> (last accessed May 4, 2018). It explains how the Competition and Consumer Commission of Singapore (CCCS) expects the Competition Act to operate in relation to agreements and conduct which concern intellectual property rights and indicates some of the factors and circumstances that the CCCS may consider when assessing agreements and conduct which concern IPRs. *Id.*

226. It is useful to note here that in the US, the agencies entrusted with the mandate to undertake antitrust enforcement, the US Department of Justice and the Federal Trade Commission, set out three general principles in their joint Antitrust Guidelines for the Licensing of Intellectual Property:

possession of IP and the enforcement of IPR as legitimate conduct. To be sure, ownership of IP and use of IPR are not, by statute, considered a source or indication of market power or dominant position. The possession of the statutory prerogative to exclude does not mean that the IP holder also has the ability and incentive to exclude rivals in an economic sense.

Secondly, under the PCA, the grant of IPR is not considered as basis for extending immediate immunity from its scope and enforcement. With regard to anti-competitive conduct, for example, an agreement which contributes to improving the production or distribution of goods and services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation.

Lastly, the statutory grant of authority to the PCC allows it sufficient flexibility to design an approach to the analysis of competition concerns arising under the IP regime of the IP Code and related laws. Worth emphasizing in this regard is the basic analytical framework under Chapter V of the PCA, which provides for the following steps in the determination of whether anti-competitive agreement or conduct has been committed:

- (a) Define the relevant market[;]
- (b) Determine if there is actual or potential adverse impact on competition in the relevant market caused by the alleged agreement or conduct, and if such impact is substantial and outweighs the actual or potential efficiency gains that result from the agreement or conduct;
- (c) Adopt a broad and forward-looking perspective, recognizing future market developments, any overriding need to make the goods and services available to consumers, the requirements of large investments in infrastructure, the requirements of law, and the need of [the] economy to respond to international

(a) for the purpose of antitrust analysis, the [a]gencies apply the same analysis to conduct involving intellectual property as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right; (b) the [a]gencies do not presume that intellectual property creates market power in the antitrust context; and (c) the [a]gencies recognize that intellectual property license allows firms to combine complementary factors of production and is generally procompetitive.

U.S. Department of Justice and the Federal Trade Commission, *supra* note 224, at 2.

competition, but also taking account of past behavior of the parties involved and prevailing market conditions;

- (d) Balance the need to ensure that competition is not prevented or substantially restricted[,] and the risk that competition efficiency, productivity, innovation, or development or priority areas or industries in the general interest of the country may be deterred by overzealous or undue intervention; and
- (e) Assess the totality of evidence on whether it is more likely than not that the entity has engaged in anti-competitive agreement or conduct[,] including whether the entity's conduct was done with a reasonable commercial purpose[,] such as[,] but not limited to[,] phasing out of a product or closure of a business, or as a reasonable commercial response to the market entry or conduct of a competitor.²²⁷

Apart from setting out the factors for determining the existence of a market dominant position, the PCA frames the analytical approach for abuse of dominance by reiterating that the PCC shall not consider the acquiring, maintaining, and increasing of market share — through legitimate means not substantially preventing, restricting, or lessening competition in the market such as, but not limited to, having superior skills, rendering superior service, producing or distributing quality products, having business acumen, and the enjoyment and use of protected IPR — as violative of the law. The broad declaration of policy under the PCA lends further support for coordination, and later harmonization, as it stresses the benefit of unencumbered market competition in (a) providing equal opportunities to all, towards the promotion of entrepreneurship, private investment, and technology development and transfer, and (b) allowing consumers to exercise their right of choice over goods and services offered in the market. In enhancing economic efficiency, preventing economic concentration that unduly stifles competition or constricts the discipline of free markets, and penalizing all forms of anti-competitive agreements and conduct, competition policy and law impacts IP, but only for the purpose ultimately realizing efficiency of market competition as a mechanism for the allocation of goods and services and the preservation of consumer welfare and economic development.

227. Philippine Competition Act, § 26.