THE PUBLIC WELFARE DIMENSION OF THE COMPETITION CLAUSES: AN EXPOSITION AND APPLICATION OF THE PROPER CONSTITUTIONAL TREATMENT FOR INDUSTRIES WITH ADVERSE PUBLIC HEALTH IMPACTS*

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ABSTRACT

This Article presents a systematic exposition of the competition clauses under Section 19, Article XII of the 1987 Philippine Constitution, as well as adjunct antitrust provisions under paragraph 2, Section 1, Article XII and Section 11(1), Article XVI. The analysis ultimately reframes the competition clauses as a cognate of (1) pro-competition policy as commonly articulated in restraint of trade jurisprudence and (2) the public welfare. This Article, however,

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properly situates and highlights public welfare or the "common good" as a discrete element—a construction hitherto unpronounced in Philippine legal literature. With this normative background, this Article then demonstrates how an imposition of a two-tier taxation structure for tobacco products or similar excise tax regimes results in a violation of the competition clauses. In particular, the Article argues that the enactment of H. No. 4144, a highly popular measure, which passed in the House of Representatives in December 2016, would establish and institutionalize an unreasonable restraint of trade from the perspective of both elements. In addition, this Article examines extensive domestic jurisprudence on restraint of trade, synthesizing these to propound anti-competition controversies under the following typology: contractual, statutory, and constitutional. In this manner, too, the public welfare dimension of the competition clauses is made more explicit for the purposes of future litigation.

"No legislature can bargain away the public health."
—The Supreme Court of the Philippines (1915/2000)[1]

I. INTRODUCTION

Efforts to revise certain provisions of Republic Act (R.A.) No. 10351 or the Sin Tax Reform Act of 2012[2] have pushed through with remarkable ease in the House of Representatives.[3] Just one week after it was first heard in the Committee of Ways and Means in December 2016, House Bill No. 4144[4] was unanimously accepted with little regard for the strong opposition of the Department of Finance (DOF), the Bureau of Internal Revenue (BIR), the Department of Health (DOH), public health advocates from civil society, and

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[1] United States v. Gomez Jesus [hereinafter "Gomez Jesus"], G.R. No. 9651, 31 Phil. 218, 225, Aug. 4, 1915. *See also* Del Mar v. Phil. Amusement & Gaming Corp., G.R. No. 138298, 346 SCRA 485, 527, Nov. 29, 2000.

[2] (2012). An Act Restructuring the Excise Tax on Alcohol and Tobacco Products [hereinafter "Sin Tax Reform Act of 2012"].

[3] Ben O. de Vera, *Lawmakers rush to defend fresh two-tier tax on cigarettes*, PHIL. DAILY INQUIRER, Dec. 5, 2016, *available at* https://business.inquirer.net/220743/lawmakers-rush-defend-fresh-two-tier-tax-cigarettes; RG Cruz, *Sin tax law amendment breezes through House panel*, ABS-CBN NEWS, Dec. 6, 2016, *at* http://news.abs-cbn.com/business/12/06/16/sin-tax-law-amendment-breezes-through-house-panel.

[4] H. No. 4144, 17th Cong., 1st Sess. (2016). An Act Amending Section 145(C) of the National Internal Revenue Code of 1997, As Amended. This was filed by Representative Eugene Michael B. De Vera of the ABS Partylist.

even national associations of tobacco farmers.[5] In another week, the Lower House approved the bill by an overwhelming majority.[6]

In contrast, it took more than three months for H. No. 5727, which eventually became the Sin Tax Reform Act of 2012, to see plenary interpellation after the committee deliberations in the 15th Congress.[7] Even with the certification of the President for immediate enactment, it took more than a month before it was approved on its third reading.[8]

This unprecedented haste and support, made by bypassing consultations with industry stakeholders[9] and consumer groups who will be directly affected by the measure, broadly demonstrates the contentious and peculiar political context of tobacco taxation laws in the Philippines.[10]

The development is certainly disconcerting. The passage of the Sin Tax Reform Act in 2012 was, after all, at once a landmark for sound taxation reform, revenue generation for public health, tobacco control, and subsidization of alternatives to tobacco farming, as it was an abrupt and heavily-resisted disruption to the relatively stable market forces that tobacco manufacturers have been relying on in their industry for the past 15 years.[11]

It is with this history of the law in mind that the DOF—the government's steward of sound fiscal policy—strongly opposed the measure, which, apart from refuting the rationale of the bill,[12] also highlighted the

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[5] *Don't mess with sin tax*, PHIL. DAILY INQUIRER, Dec. 19, 2016, *available at* http://opinion.inquirer.net/100130/dont-mess-sin-tax; Chino S. Leyco, *DOF 'strongly' opposes House bid on two-tiered sin tax regime*, MANILA BULL., Dec. 6, 2016, *available at* http://business.mb.com.ph/2016/12/05/dof-strongly-opposes-house-bid-on-two-tiered-sin-tax-regime.

[6] Mara Cepeda, *House approves bill that removes uniform cigarette tax*, RAPPLER, Dec. 13, 2016, *at* http://www.rappler.com/nation/155411-house-approves-two-tier-tax-cigarettes-3rd-reading.

[7] The first committee hearing for the Sin Tax Reform Act of 2012 was set on February 6, 2012, with committee approval on May 9, 2016.

[8] The certification of the President was made on May 15, 2016, the same day the Committee Report was filed.

[9] James Konstantin Galvez, *Farmers, stakeholders oppose tobacco sin tax*, THE MANILA TIMES, Dec. 3, 2016, *available at* http://www.manilatimes.net/farmers-stakeholders-oppose-tobacco-sin-tax/299709.

[10] Rey Gamboa, *The legacy of RA 8240*, THE PHIL. STAR, Mar. 19, 2012, *available at* http://www.philstar.com/business/788273/legacy-ra-8240.

[11] The precursor of R.A. 10351 was Rep. Act No. 8240 (1996).

[12] "If indeed farmers are at risk, the Department of Agriculture, National Tobacco Administration, and host local government units should have used the earmarked funds intended for tobacco farmers as provided in the law. [...] [T]obacco farmers should have benefitted from the Sin Tax Reform, contrary to claims." Mara Cepeda, *DOF: Bill imposing 2-tier*

financial[13] and public health implications[14] of the proposal. It is with the same history in mind that authors of the bills that became R.A. 10351 rejected the principles behind the bill now before the Lower House.[15] The body of evidence that goes against the measure trumps the weak arguments of supporters of H. No. 4144 that Filipino tobacco farmers and growers were suffering because of increased excise tax rates on tobacco products.[16]

Put in this light, it is, therefore, not unexpected that the measure, which now seeks to undermine the progress and gains made by R.A. 10351 with its goal of "maintaining the current excise tax system on the cigarette packed by machine"[17] would again meet staunch opposition from the tobacco industry, which has now fiscally and operationally adapted to the new excise

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tax on cigarettes won't benefit farmers, RAPPLER, Dec. 6, 2016, *at* http://www.rappler.com/nation/154690-dof-house-bill-two-tier-tax-cigarettes-farmers.

[13] "The DOF added that H. No. 1444 would give tobacco companies incentives to 'employ pricing strategies in order to stay within the lower band, resulting in the continued access to low-priced cigarettes.'" *Id.*

[14] "*Cigarettes are all harmful regardless of their price and form.* The principle behind unitary taxation for cigarette products is that the ills that these products cause to the general public, whether through first-hand or second-hand or third-hand smoking, are no way different between a low-priced and a high-priced brand. [...] A two-tiered structure only promotes downshifting and therefore does not fully discourage tobacco consumption." *Id.* (Emphasis supplied.)

[15] The manifestations and interpellations of Representatives Pia Cayetano and Edcel Lagman were recorded. Rep. Lagman voted against H. No. 4144 for several reasons, among them: 1) all government agencies invited during the public hearings, except the National Tobacco Administration, opposed it; 2) the Sin Tax Reform Law was hailed as a health measure such that any amendment thereto should prioritize health concerns; 3) the unitary system is considered the best practice globally; 4) all principal players in the cigarette manufacturing industry, except Mighty Corporation, were against the measure; and 5) the latter principally favored Mighty Corporation that produced low-grade and low-priced cigarettes. 55 H. JOURNAL 18, 17th Cong., 1st Sess. (Dec. 13, 2016).

Deputy Speaker Pia S. Cayetano said that H. No. 4144 intended to derail R.A. 10351 by institutionalizing a two-tier tax system for cigarettes. Her negative vote was explained in part because it was totally against the advice of the Dep't of Health (DOH) as a health measure as well as the Dep't of Fin. (DOF) which wanted to give R.A. 10351 a chance to be implemented. She explained that a unitary system will make revenue collection easier and there was no reason to go into a two-tier system that would make cigarettes cheaper and more accessible to the youth. *Id.* at 18-9.

Voting in the negative, Rep. Jocelyn Sy Limkaichong explained that the Bill undermined the health gains of the Sin Tax Reform Law, which was still to be implemented by 2017. She said that any effort to change said law would have an impact on its original configuration to address health. She stressed that in maintaining the unitary tax system, the government would achieve a simple balance with regard to health, taxes, and the protection of tobacco farmers. *Id.* at 19.

[16] The consistent position of the proponents of the bill is that the unitary taxation scheme is disadvantageous to local tobacco farmers. *See* 52 H. JOURNAL 11, 17th Cong., 1st Sess. (Dec. 6, 2016).

[17] H. No. 4144, 17th Cong., 1st Sess., Explanatory Note (2016).

taxation regime. And after all, the proposed measure introduces rates that are higher than the one prescribed in the revised Section 145(C) of the National Internal Revenue Code of 1997 ("Tax Code").[18] This naturally translates to greater tax burdens among tobacco manufacturers.

What is surprising, however, is that this time, the increase in excise tax found unconditional support in a seemingly unlikely ally—Mighty Corporation, a tobacco manufacturer. It holds the second highest local market share for machine-made cigarettes after Philip Morris Fortune Tobacco Corporation ("PMFTC").[19]

Through a self-described "consultant" and a former chief of the National Economic and Development Authority, Mighty Corporation argued that "when the unitary excise tax is imposed [in 2017], this would displace more local farmers."[20] The framing of this discussion as an issue of tobacco farmers' economic rights drew challenge not only from the fact that tobacco farmers' groups oppose the measure, but from the fact that H. No. 4144 obviated the need to amend Section 288 of the Tax Code, as amended by R.A. 10351, pertaining to subsidization of alternatives to tobacco farming.

Much like similar earlier proposed amendments to the Sin Tax Reform Act of 2012, the contest arising from H. No. 4144 leads "to questions about the dynamics of local cigarette marketing,"[21] the very reason why the measure has been criticized as being "pushed" mainly by the corporation itself, since the enactment of such structure would particularly benefit it.[22]

This "benefit" prima facie raises questions regarding the proposed statute's validity under Section 19, Article XII of the 1987 Constitution, which prohibits unfair competition, restraints of trade, or combinations in restraint of trade, whether as a result of public or private machinations. This was, in fact, raised by the DOH in a paper sent to Congress in relation to a possible international trade investment dispute. The Secretary of Health warned:

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[18] H. No. 4144, 17th Cong., 1st Sess., §1 (2016), *compare with* TAX CODE, art. 145(C).

[19] *See Panelo: Duterte orders arrest of Mighty Corp. owner*, MANILA BULL., Mar. 7, 2017, *available at* http://news.mb.com.ph/2017/03/07/panelo-duterte-orders-arrest-of-mighty-corp-owner/.

[20] Ben O. de Vera, *Solons back Mighty on tax bill*, PHIL. DAILY INQUIRER, Dec. 6, 2016, *available at* https://business.inquirer.net/220809/solons-back-mighty-tax-bill.

[21] Rey Gamboa, *Insidious attempt to subvert tobacco tax*, THE PHIL. STAR, Sept. 8, 2015, *available at* http://www.philstar.com:8080/business/2015/09/08/1497085/insidious-attempt-subvert-tobacco-tax-law.

[22] Ben O. de Vera, *Railroaded cigarette tax bill slammed*, PHIL. DAILY INQUIRER, Dec. 8, 2016, *available at* https://business.inquirer.net/220951/railroaded-cigarette-tax-bill-slammed.

> The Philippines lost a WTO case in the case of distilled spirits because there was de facto discrimination when the excise taxes applied for locally manufactured distilled spirits were much lower than imported ones. It was determined by the WTO that the excise tax system discriminated against foreign manufacturers since most of the locally produced distilled spirits used alcohol that was fermented from locally produced sugar (and had a lower tax rate). The intention of this bill in proposing this two-tiered structured proposal is to protect local farmers – a lower excise tax for tobacco produced locally. This is not de facto discrimination ex post but de facto discrimination ex ante.[23]

Derived from an act of legislature, the advantage that Mighty Corporation gained from the imposition of the two-tier taxation system brings to fore the legislative intent that justified this apparent anti-competitive scheme. By reversing the fulfillment of the law's intent—that the 2013-2016 two-tax regime should be wholly transitory—the government freezes existing market forces and secures the advantage of one corporation. Publicly available evidence would suggest that this is an act that is plainly discriminatory and restrictive of trade.

To fully determine the scope of the constitutional violation, this Article first describes the constitutional prescriptions of the competition clauses, and articulates the elements of unfair competition or a constitutionally impermissible restraint of trade, or combination in restraint of trade. The work dissects the competition clauses and reveals the intent behind their articulation, as well as the intent behind constitutional provisions with special antitrust applications. It differentiates among three forms of competition law litigation *de novo*—contractual, statutory, and constitutional—and argues that their narrow frameworks could not apply to tobacco products, as the pro-competition policy alone that benefits no one but the tobacco industry must yield to the public welfare dimensions of the competition clauses.

The latter parts of the Article apply the jurisprudential standard in characterizing the two-tier taxation in H. No. 4144 as an impermissible (rather than just an "unreasonable") restraint of trade. It further lays down the evidentiary requirements in showing that a particular tobacco taxation measure is unconstitutional, discussing the role of examining public welfare considerations in a successful competition clause challenge and applying the same in the measure. This Article concludes by highlighting the role of tobacco taxation as primarily a public health measure in light of the regulatory nature of

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[23] Iris Gonzales, *Special Report: Derailing the Sin Tax Reform Law*, THE PHIL. STAR, Dec. 31, 2016, *available at* http://www.philstar.com/business/2016/12/31/1658200/special-report-derailing-sin-tax-reform-law.

this inherent and plenary State power. An Epilogue situates the state of things in relation to this possible controversy.

Put in other words, the tobacco industry and other industries with grave public welfare impacts are *sui generis*—not in the same manner that the antitrust norm in the press is *sui generis* by constitutional fiat, nor in the same way that telecommunication industries or other deregulated industries etched by respective statutory classification are. The tobacco industry is *sui generis* because it affects the fundamental human right to health.

II. THE LEGAL LANDSCAPE OF COMPETITION CLAUSES AND ADJUNCT PROVISIONS: CONSTITUTIONAL CONSTRUCTION

The competition clauses in Section 19, Article XII of the 1987 Constitution[24] do not stand as the exclusive constitutional norm or rule on antitrust, unfair competition, restraints of trade, or combinations in restraint of trade. This much is clear in the wording of the Constitution. Other provisions repeat the proscription against antitrust or anticompetitive arrangements, each having been deliberated by the Charter's framers with the clear intent to refer back to Section 19, Article XII. These "adjunct competition clauses," as they shall be referred to in this Article, cover two discrete provisions: Section 1, Article XII[25] refers to both local *and foreign* antitrust arrangements, and Section 11(1), Article XVI[26] further strengthens the rule in mass media.

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[24] "The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed." CONST. art. XII, § 19.

[25] "The goals of the national economy are a more equitable distribution of opportunities, income, and wealth a sustained increase in the amount of goods and services produced by the nation for the benefit of the people and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices." CONST. art. XII, § 1, ¶¶ 1-2.

[26] "The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly owned and managed by such citizens.

The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed." CONST. art. XVI, § 11(1).

This Article, in looking into *all* the pertinent discussions by the Constitutional Commission, reveals clear themes from the phrasing and expression of these clauses.[27]

Firstly, it is demonstrable that the definition of what are regulated or proscribed—monopoly, unfair competition, restraint of trade, and combinations in restraint of trade—ultimately referred back to American antitrust jurisprudence as their legal or normative foundations. Therefore, to understand what the competition clauses or the adjunct competition clauses mean, the distinctions under Anglo-American jurisdictions need to be elucidated. These distinctions, however, need to be indigenized considering the overarching Filipino-centered policy in Article XII.

Secondly and in relation to the above, these clauses were written in such a way that they cover to the greatest extent possible all commercial arrangements or transactions which may result or has the tendency to result in restraints of trade. *Thirdly*, by virtue of their references to then-contemporary statutes and case law, the competition clauses and their adjunct are a mix of self-executing and non-self-executing constructs, where the State, through Congress, is given a broad, but guided, discretion as to the definition and scope of the norm.

Finally, it is clear that beyond the "competitive spirit" of these provisions, the competition clauses and its adjunct put premium on the "common good," or the "public welfare." The framers were consistent in describing and defining these clauses as a product of two cognate elements: first, the public policy of competition, and second, the public welfare dimension.

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[27] This approach of constitutional construction finds application where the constitutional provision in question could not be interpreted or applied based exclusively on its plain meaning. Any equivocality of the provision, as to "the import and react of a constitutional provision" should be settled through resort to "extraneous aids of construction, such as debates and proceedings of the Constitutional Convention, to shed light on and ascertain the intent of the framers or the purpose of the provision being construed." Funa v. Villar, G.R. No. 192791, 670 SCRA 579, 604, Apr. 24, 2012; "It may also be safely assumed that the people in ratifying the Constitution were guided mainly by the explanation offered by the framers." Nitafan v. Comm'r of Internal Revenue, G.R. No. L-78780, 152 SCRA 284, 291-2, July 23, 1987.

For guidance from recent cases, *see* Poe-Llamanzares v. COMELEC, G.R. No. 221697, 786 SCRA 1, Mar. 18, 2016, examining the deliberations of the 1934 Constitutional Commission to show the framers intent to cover foundlings under the purview of Filipino citizenship.

The competition clauses had never been, and cannot be, interpreted and applied *verba legis* because of the disparate treatment that restraint of trade jurisprudence created throughout the history of the concept since the 1400s. *See* Part III, *infra*.

A. The Intent Behind the Competition Clauses: Definitions

Institutional arrangements among various industry players, as well as the limited capacity of government regulators, have, to a large extent, affected the number of trade-related disputes that appear to directly invoke the competition clauses.[28] This is also due to the fact that the Philippine Competition Act,[29] the country's most comprehensive statute on the subject, was only passed in June 2015 to "penalize *all forms* of unfair trade, anti-competitive conduct[,] and combinations in restraint of trade"[30] despite the Philippines' antitrust laws stretching back to the Spanish colonial period in the early 1990s.[31] The fact that the distinction among the concepts of monopolies, unfair competition, restraints of trade, and combinations in restraints of trade, as used in its constitutional law meaning, is also not as distinct as in other jurisdictions further demonstrates this paucity.[32]

In fact, constitutional deliberations of the 1987 Constitution as regards the competition clauses are particularly illustrative. They show the legal foundations of the terms as they were contemplated by the framers, and that these foundations were at most, muddled; *viz.*:

> MR. MAAMBONG: This is my next point: We have mentioned here in one of the provisions, words or phrases like "monopolies," "combinations in restraint of trade," and "unfair competition." My question is: Are they understood, as used in the provision, in relation to the definition of the same terms in the Revised Penal Code, because Article 186 thereof mentions "monopolies and combinations in restraint of trade"; Article 189 speaks of "unfair competition"; Article 187 speaks of "importation and disposition of falsely marked articles"? Or do these terms, as used in the provision of this Constitution now being formulated, have meanings more general than those indicated in the Revised Penal Code?

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[28] "[T]he enforcement of competition rules in regulated sectors until today is very limited. No competition cases have yet been brought to court by any of the bodies despite the fact that a number of these regulated markets appear to be highly concentrated and hence susceptible to restrictive practices." United Nations Conference on Trade and Development, Voluntary Peer Review of Competition Law and Policy: Philippines, at 10, TD/B/C.I/CLP/31 (May 1, 2014).

[29] Rep. Act No. 10667 (2015).

[30] § 2(c). (Emphasis supplied.)

[31] *See, generally*, Tristan A. Catindig, *The ASEAN Competition Law Project: The Philippines Report* (Mar. 31, 2001), *at* http://www.jftc.go.jp/eacpf/ 02/philippines_r.pdf.

[32] "The terms 'monopoly,' 'combination in restraint of trade' and 'unfair competition' appear to have a well-defined meaning *in other* jurisdictions." *Gokongwei, Jr.*, *infra* note 81, at 376. (Emphasis supplied.)

MR. VILLEGAS: No, we read them *in the context of the Revised Penal Code.*

MR. MAAMBONG: They are in the context of the Revised Penal Code. Thank you.[33]

This was reiterated by Commissioner Regalado E. Maambong in a subsequent exchange in the plenary.[34]

At the outset, therefore, the framers of the Constitution themselves relied on the definition of these related terms in the Revised Penal Code, where these activities are deemed criminal offenses, as compared to, for instance, the common law contemplation on restraint of trade.[35] Given this insight, any originalist construction[36] of the jurisprudential interpretation of these crimes at the time would point to the following results: none.[37]

This is because the statutory history on antitrust had to mirror American case law.[38] While the Philippines has had statutory rules dealing with monopolies and combinations in restraint of trade as early as the late 1800s, owing to the Spanish royal decree to enforce the Spanish Penal Code of 1870 in the country,[39] these provisions were later on supplemented by Act No. 3427,[40] which was mainly transplanted from the Sherman Act of the United States,[41] until its repeal by the Revised Penal Code when the latter took effect on January 1, 1932. Article 186 of the Revised Penal Code is a blend of the Old Penal Code and Act No. 3247.

Recognizing that jurisprudence on Article 186 of the Revised Penal Code is negligible, the Department of Justice even expressly recommended that courts resort to "decisions of United States courts interpreting provisions of the Sherman Antitrust Law."[42] And so these definitions would be beclouded

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[33] III REC. CONST. COMM'N 325 (Aug. 14, 1986). (Emphasis supplied.)

[34] III REC. CONST. COMM'N 650 (Aug. 23, 1986). The section was approved with 39 votes in favor and none against. *Id.*

[35] *See* discussion in Part V, *infra.*

[36] At least, in so far as original meaning or original intent is concerned. *See* Emil A. Kleinhaus, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121 (2000); *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279 (2007).

[37] Catindig, *supra* note 31, at 3, *citing* Dep't of Justice (DOJ) Opinion No. 19, s. 1962 (1962).

[38] *See id.* at 1.

[39] Found in Articles 543 to 545 of the said Code, which was in force in the Philippines from July 14, 1887 to Dec. 31, 1931. They were contained in Chapter V, on "*De las maquinaciones para alterar el precio de las cosas*" (Machinations to alter the prices of commodities).

[40] (1925). An Act to Prohibit Monopolies and Combinations in Restraint of Trade.

[41] Catindig, *supra* note 31, at 2.

[42] *See id.* at 3, *citing* Dep't of Justice (DOJ) Opinion No. 19, s. 1962 (1962).

when, at the same time, the framers refer to foreign jurisprudence, as compared to the Revised Penal Code, as the structure upon which the current competition clauses is founded. This is obvious from the exchange of Commissioners Napoleon G. Rama and Bernardo M. Villegas:

> MR. RAMA: [...] [A]lthough the statement has been made by the Chairman that this would not prohibit the State from setting up monopolies, the second sentence in Section 14 seems to contradict that statement because it states: "No combinations in restraint of trade or unfair competition shall be allowed." It is addressed to both the State and the private sector. So, does the Commissioner think that there should be some kind of a phrase here that would allow the government or the State to set up monopolies that would serve the common good?
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> MR. VILLEGAS: The second sentence is *interpreted in the context of the antitrust legislation or the jurisprudence on antitrust legislation, for example, in the United States*, to the extent that combinations in restraint of trade or unfair competition actually prejudice the consumers and the people. Then that is where the law comes in. But precisely, there are certain monopolies which actually favor the consumers because of the economies of scale since we do not have unnecessary duplication of resources. However, these types of monopolies have to be regulated.[43]

The records of the Constitutional Commission mean only one thing: to discern the scope and extent of the prescriptions and proscriptions in Section 19, Article XII, the "context of the antitrust legislation or the jurisprudence on antitrust legislation" has to first be articulated, especially insofar as they are applicable to the political, social, and cultural regimes that cover the Philippines.

This conclusion is supported by an analysis of the adjunct competition clauses. In any case, these foreign distinctions need to be indigenized considering the overarching economic protectionism or Filipino-centered policy in Article XII.

B. The Intent Behind Provisions Adjunct to Section 19, Article XII

The competition clauses in Section 19, Article XII are not the only provisions in the 1987 Constitution that pertain to proscriptions against anti-

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[43] III REC. CONST. COMM'N 258 (Aug. 13, 1986). (Emphasis supplied.)

competitive arrangements.[44] This has important implications in relation to constitutional construction. At the outset, the repetition of these expressed policies points to its strength as a constitutional norm. This policy is provided in Section 1, Article XII on national economy and patrimony:

> SECTION 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.
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> The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. *However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.*
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> In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership.[45]

Furthermore, Section 11(1) of Article XVI provides:

> SECTION 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly owned and managed by such citizens.
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> *The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.*[46]

These provisions highlight several points. As regards the *adjunct* competition clause in the second paragraph of Section I, Article XII, an extensive discussion by the Constitutional Commission shows that the whole gamut of restraint of trade had been contemplated. The modification of

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[44] As compared to the 1973 Constitution, which sets a norm on antitrust or anti-competitiveness only through art. IV § 2, or the 1935 Constitution which sets no similar norm.

[45] CONST. art. XII, § 1. (Emphasis supplied.)

[46] CONST. art. XVI, § 11(1). (Emphasis supplied.)

Section 19, Article XII from its precursor in the 1973 Constitution[47] would also confirm this.[48] This rationale was explicated more thoroughly by Commissioner Villegas and Commissioner and later Supreme Court Associate Justice Florenz D. Regalado:

> MR. REGALADO: I would like to seek clarification on this which, if satisfactorily answered, may avoid any further amendment. The progenitor of this is Section 2 of Article XIV of the 1973 Constitution which provided that: "The State shall regulate or prohibit private monopolies." May I know from the committee why the word "private" was deleted here, so that this now refers to all kinds of monopolies, public or private, as the case may be?
>
> MR. VILLEGAS: Madam President, it has been the experience that some government monopolies, like the National Power Corporation, should also be regulated by the equivalent regulatory body of the government. So, all monopolies, whether they be run by the private sector or by the government, should be subject to regulation for the good of consumers.[49]

Moreover, Commissioner and later Supreme Court Chief Justice Hilario G. Davide, Jr., introduced the provision to give plenary jurisdiction on all forms of restraints of trade—covering domestic and foreign restraints of trade, and combinations in restraint of trade. This is supported by the suggestion of by Commissioner and later Supreme Court Justice Adolfo S. Azcuna who added the words, "and trade practices":

> MR. DAVIDE: I would like to add something after "COMPETITION"—"OR COMBINATIONS IN RESTRAINT OF PHILIPPINE TRADE." IT WILL READ, "HOWEVER THE STATE SHALL PROTECT FILIPINO ENTERPRISES AGAINST UNFAIR FOREIGN COMPETITION OR COMBINATIONS IN RESTRAINT OF PHILIPPINE TRADE."

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[47] "The State shall regulate or prohibit private monopolies when the public interest so requires. No combination in restraint of trade or unfair competition shall be allowed." 1973 CONST. art. XIV, § 2.

[48] III REC. CONST. COMM'N 256 (Aug. 13, 1986). (Emphasis supplied.)

Commentators on this provision usually limit their discussion of the competition clauses on this development. "The provision is a statement of public policy on monopolies and on combinations in restraint of trade. It should be noted that, as the provision is worded, monopolies are not necessarily prohibited by the Constitution. The State must still decide whether public interest demands that monopolies be regulated or prohibited. On the other hand. Combination in restraint of trade and unfair competition are prohibited by the Constitution." *See, e.g.* JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1056 (1996 ed.).

[49] III REC. CONST. COMM'N 649-650 (Aug. 23, 1986).

MR. VILLEGAS: So the proponent would just repeat what is contained in another paragraph.

MR. DAVIDE: This is now against foreign competition.

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MR. OPLE: Yes, the principal frame of reference is cartelization right here in the country. Is Commissioner Davide now putting this in a different focus so that Philippine enterprises may be protected from combinations in restraint of trade by foreigners?

MR. DAVIDE: *That is the thrust against foreigners because we have another provision here for domestic restraints or combinations in restraint of trade.*

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MR. AZCUNA: Madam President.

THE CHAIRPERSON: Commissioner Azcuna is recognized.

MR. AZCUNA: Can we change that to "TRADE PRACTICES" so that it will just refer to "UNFAIR FOREIGN COMPETITION AND TRADE PRACTICES"?

MR. OPLE: It is wider.

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MR. DAVIDE: "Unfair foreign competition and unfair TRADE PRACTICES."

MR. OPLE: Will this include, let us say, Japanese cartel in Japan playing one timber country against another?

MR. VILLEGAS: Yes, definitely, the Japanese have been doing it systematically.

MR. RAMA: There are certain industries in the country which are foreign-owned or controlled and which have monopolized, in a sense, some basic needs of the country, like toothpaste, for instance. In other countries, they sell toothpaste or dental cream at very much cheaper prices. But I understand that here, it is controlled by certain Americans and that is why we are buying our toothpaste at a higher price.

MR. VILLEGAS: That will be covered by the section.

MR. RAMA: This will be covered by the section?

MR. VILLEGAS: *Yes, on local practices of unfair competition and restraint of trade.*[50]

The discussions on the second paragraph of Section 11(1) of Article XVI as an adjunct competition clause reflect the same sentiments as regards restraints of trade. The reiteration here, however, is more compelling because of media and the press's recognized importance in a functioning democracy.[51]

More importantly, the deliberations would indicate that the same ambiguity as regards the definitions of these key terms and the centrality of the "public interest" as the rationale behind the competition clauses and adjunct provisions existed:

> REV. RIGOS: Mr. Presiding Officer, may I go back to Section 11, the second paragraph: "No one individual, family or corporation can own more than one form of commercial mass media in a single market."
>
> Suppose in my hometown in Quezon Province, I decide to put up a newspaper business and there is no one else interested to put up a newspaper business in a community of around 80,000 people, will that be a monopoly under the definition of this paragraph?
>
> MS. BRAID: No, Mr. Presiding Officer. As a matter of fact, that will not be monopoly since it is in a single market. The intention of the provision is to call a spade a spade. Since the "single market" concept tended to confuse many, we will formulate it to say that "media monopolies will not be allowed." *We will let Congress stipulate what constitutes a monopoly.*

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[50] III REC. CONST. COMM'N 807. (Emphasis supplied.)

[51] In this regard, the comments made by Commissioner Vicente B. Foz are helpful:

> A media monopoly is an abuse or perversion of the freedom of the press by a single individual or a company or companies controlled by h[i]m. Its danger lies in placing in the hands of a man or a group of men a weapon for the widespread manipulation of vehicles of public opinion, to influence the public mind and advance his or its selfish economic or political influence to the prejudice of the larger public interest and welfare. We must regulate the right of an individual or group of individuals through corporations or associations to acquire or own mass media establishments which will result in monopolies with harmful effects to the public." V REC. CONST. COMM'N 191 (Sept. 29, 1986).

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> REV. RIGOS: [S]uppose the people in the community are not yet ready for any cooperative enterprise, would the Commissioner allow a single person to put up the business?
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> MS. ROSARIO BRAID: *I think this will be denied under the concept of public interest.* There are exceptions which will be defined under this concept.
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> MR. MONSOD: During lunch, we were discussing this issue and what we proposed to do is introduce an amendment to read: "*Congress shall prohibit or regulate monopolies and combinations in restraint of trade in mass media.*" So, in the Commissioner's particular example, there would be room for regulation, not necessarily prohibition.[52]

In this regard, this adjunct competition clause for mass media invoked local antitrust laws and jurisprudence in a discussion that similarly mirrored the exchanges in relation to Section 19, Article XII. And while there was recognition that the Congress may set a higher or different standard as regards antitrust or anti-competitive activities for mass media, it was made explicit that the "present safeguards of what appear to be [Philippine] antitrust laws" were suppletorily applicable:

> MR. REGALADO: [...] As the Commissioner knows, we have both in our criminal laws as well as in commercial laws definite concepts of monopolies and combinations in restraint of trade under Article 186 of the Penal Code. And we also have our own concept of unfair competition. Is it the understanding that because this provision will peculiarly apply only to mass media, Congress shall be completely free to provide for the *corresponding safeguards independent of or in addition to the present safeguards of what appear to be our antitrust laws?*
>
> MR. MONSOD: *Madam President, the jurisprudence, of course, on the interpretation of these phrases would be ruling.* However, we do not preclude the possibility since this proceeds from a constitutional provision that Congress will define or refine in more detailed safeguards that would be peculiar to or applicable to mass media.
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> MR. MONSOD: [...] [T]here may be areas where nobody wants to get involved in mass media, where there is only one entity or one

[52] V REC. CONST. COMM'N 125 (Sept. 26, 1986). (Emphasis supplied.)

> proprietorship that is willing to engage in mass media. In such cases, since mass media play a very important role in the life of areas that are not covered by mass media, it would be counterproductive to prohibit the establishment of mass media form there. And in those cases, perhaps the appropriate remedy would be to regulate such enterprises.
>
> MR. SUAREZ: In other words, that is a departure from the basic principle that there should be no monopolies in commercial media. That would practically constitute an exception.
>
> MR. MONSOD: Yes. And we will leave it up to Congress to define the terms of that exception and to balance the interests of the public to communication or information as against the dangers of monopoly.
>
> MS. ROSARIO BRAID: Yes. We understand, Madam President, that *this is equivalent to the antitrust laws* [...][53]

Another important take from the constitutional deliberations is that Section 11(1), Article XVI was articulated with Section 19, Article XII in mind. This means that construction of the adjunct provisions must necessarily consider the intent behind the competition clauses; which, since they effectively mean or look into the same things, only lend greater support to the conclusions forwarded. As expressed by Commissioner and later Commission on Elections Chairperson Christian S. Monsod:

> MR. MONSOD: [...] The purpose of the amendment is precisely to [...] to protect the public from such monopolies or combinations in restraint of trade or unfair competition. *I just wanted to mention that this harmonizes also with the Article on National Economy regarding monopolies, combinations in restraint of trade and unfair competition.*[54]

C. Competition Clauses as Competitiveness for the "Common Good"

It is crystal clear from the constitutional deliberations that beyond the "competitive spirit" of these provisions, the competition clauses and its adjunct put premium on the "common good," or the "public welfare." The framers were consistent in describing and defining these clauses as a product of two cognate elements: *first*, the public policy of competition, and *second*, the public welfare dimension.

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[53] *Id.* (Emphasis supplied.)

[54] V REC. CONST. COMM'N 193 (Sept. 29, 1986). (Emphasis supplied.)

Stated otherwise, the crux of the competition clauses and its adjunct provisions is "competitiveness for the common good." While this is the first distinct articulation of this principle in Philippine legal literature based on an originalist construction, Part III of this Article shows that this is not alien to Philippine jurisprudence. Local case law on antitrust builds on public welfare considerations, owing from the fact that the provisions as contemplated by the framers and Supreme Court decisions themselves stem from a common progenitor—an inevitable outcome of the nation's colonial past.

Thus when Commissioner Rama asked about the "common good" behind setting up state monopolies, Commissioner Villegas referred to "combinations in restraint of trade or unfair competition actually prejudic[ial] [to] the consumers and the people," which the competition clauses seek to preclude.[55] The same reason was prominent in the deliberations about the establishment and regulation of public monopolies:

> MR. DAVIDE: Finally on Section 14. There is no qualification anymore as to the nature of the monopoly, unlike that in the 1935 and 1973 Constitutions where private monopolies are the ones prohibited. But in Section 14, the word "private" no longer appears. May we know the justification of the Committee because I remember that the Committee, in answer to a question by Commissioner Rama, admitted that the government may still have a monopoly.
>
> MR. SUAREZ: That is right.
>
> ***
>
> MR. DAVIDE: When the Committee deleted the word "private," does it mean that government can be prohibited to [sic] engage in a monopoly?
>
> MR. VILLEGAS: Definitely yes, because there were so many cases under the Marcos regime where certain government monopolies *were completely against public interest* and, therefore, there should have been a prohibition against these kinds of government monopolies.
>
> MR. DAVIDE: If the idea is really to promote the private sector, may we not provide here that the government can, in no case, practice monopoly except in certain areas?
>
> MR. VILLEGAS: No, because in the economic field there are definitely areas where the State can intervene and can actually get involved in monopolies for the public good.

[55] III REC. CONST. COMM'N 258 (Aug. 13, 1986).

> MR. DAVIDE: Yes, we have provisions here allowing such a monopoly in times of national emergency.
>
> MR. VILLEGAS: Not even in emergency; *for the continuing welfare of consumers.*
>
> MR. MONSOD: May we just make a distinction? As we know, there are natural monopolies or what we call "structural monopolies." Structural monopolies not by the nature of their activities, like electric power, for example, but by the nature of the market. There may be instances where the market has not developed to such an extent that it will only allow, say, one steel company. Structural monopoly is not by the nature of the business itself. It is possible under these circumstances that the State may be the appropriate vehicle for such a monopoly.[56]

This is also clear from the insights given by Commissioner Rama as regards the tobacco industry itself:

> MR. RAMA: I was thinking, for instance, of the procedure or the system in Japan where tobacco is the monopoly of the State and serves substantially the *common good* and its revenues form a substantial part of the budget of the Japanese government.
>
> Therefore, the monopoly on tobacco is a desirable monopoly; *first, it is hazardous to health*; and second, the State converts this kind of industry into something that benefits the country.[57]

What this statement shows is that monopolization by the State may be done for industries that are "hazardous to health." The obvious implication is that private players may be totally eliminated in relation to industries that must be regulated for the purposes of the common good. While an extreme position, this thought was not rejected by both committee and plenary deliberations, but was in fact affirmed as shown in the exchanges among Commissioners Davide, Suarez, and Villegas. This implies it is not even a question of competition: the overriding intent of the competition clauses has always been public welfare.

This exegesis of the 1987 Philippine Constitution based on the intent of the framers would alone be sufficient from the standpoint of originalism, or even from a holistic reading of the basic law of the land. Furthermore, it would be adequate to provide for a different standard or treatment in relation to antitrust for industries, which have clear negative impact to the public welfare,

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[56] III REC. CONST. COMM'N 262-3 (Aug. 13, 1986). (Emphasis supplied.)

[57] III REC. CONST. COMM'N 258 (Aug. 13, 1986). (Emphasis supplied.)

in general, and to public health, in particular. To ignore this would also ignore the long line of jurisprudence that, while silent as to this constitutionally concrete policy, remains consistent with this principle and parallel to this articulation.

III. THE LEGAL LANDSCAPE OF THE COMPETITION CLAUSES: ANGLO-AMERICAN COMMON LAW

The need to examine jurisprudence on the competition clauses stems from two premises: *first*, the competition clauses must be interpreted contemporaneously with antitrust jurisprudence both locally and under Anglo-American case law (where the same was transplanted from as a result of American colonialism) existing at the time of drafting and ratification, and *second*, the crux behind the competition clauses of the Constitution and its adjunct provisions, i.e. "competition for the common good," is made more transparent when the body of jurisprudence is examined. Naturally, discussions of prior jurisprudence can only be properly understood if framed from their historical foundations.

A. Historical Contexts of Antitrust Jurisprudence: General

Despite the relative sparseness of local jurisprudence as regards these interrelated concepts, modern antitrust law is an advanced and developed field of law in jurisdictions like the United States.[58] Partly owing from the fact that "[a]ntitrust legislation and enforcement is always based on the specific economic foundation of each country, in accordance with the needs of its economic structure, foreign trade and size of its companies, and the level of economic development at a given moment in time,"[59] normative reforms that led to structural and institutional changes towards a more autochthonous antitrust regime had taken root only after extensive Philippine experience in local trade and commercial regulations. This is demonstrated in Part IV, which shows that at its inception, Philippine antitrust jurisprudence parallels restraint of trade as seen in case law under common law,[60] rather than the American

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[58] "For more than a hundred and ten years, the U.S. antitrust laws have stood at the center of what [...] could be called the industrial policy of the United States." Diane P. Wood, *The U.S. Antitrust Laws in a Global Context*, 2004 COLUM. BUS. L. REV. 265, 265 (2004); *See* Dina I. Waked, *Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges*, 12 J.L. ECON. & POL'Y 193 (2016), describing the relatively recent "massive spread of adoption of competition laws" worldwide.

[59] Shang Ming, *Antitrust in China – a constantly evolving subject*, COMPETITION L. INT'L (Feb. 2009), at 11.

[60] "The doctrine of restraint of trade is [...] an attempt by courts to reconcile the freedom to trade with the freedom to contract." Andrew Scott, The Evolution of Competition

standards applicable to interpretation and application of the Sherman Act (which will be discussed in the next section). Or, in the alternative, that the Philippine legal regime on antitrust copied the trend of the United States.

The Philippines is, of course, not alone in this experience. "The 21st century saw a rapid surge in competition law legislation and enforcement [...] by various governments [...] result[ing] in the normalization of competition law enforcement."[61] The increasing complexity of commercial relations and transactions as domestic, regional, and global economies converge highlights the need for norms on restraint of trade to be founded on statutes that afford stability and predictability in enforcement.[62] And, not surprisingly, this same trend has figured in both English and American law regimes.

In the United Kingdom, competition policy evolved relatively slowly prior to the Second World War, primarily due to "the commitment to the politics of *laissez-faire* when British enterprises enjoyed an international pre-eminence, and then to a growing perception of the apparent value of unrestrained monopoly, conglomerization[,] and cartelization in the face of changed conditions of international trade."[63] This is also despite the concept's origins in common law[64] as early as the 1400s, when English courts already had the concept of a "latent, embryonic antitrust law in the shape of the doctrine of the restraint of trade[.]"[65]

Andrew Scott, in *The Evolution of Competition Law Policy in the United Kingdom*, described the common law doctrine of restraint of trade, which seminally espoused the criterion of reasonableness and public policy considerations in the evaluation of restraints to trade, in this wise:

Law policy in the United Kingdom, at 4, London School of Econ. & Pol. Sci. L. Soc'y Econ. Working Paper No. 9/2009, (Feb. 16, 2009). (Citations omitted.)

[61] Daniel Lim, *State Interest as the Main Impetus for U.S. Antitrust Extraterritorial Jurisdiction: Restraint Through Prescriptive Comity*, 31 EMORY L. REV. 415, 415 (2017).

[62] This is especially in relation to such norms creating penal effects, or defining prosecution as being criminal in nature. *See* A. Menarini Diagnostics S.R.L. v. Italy, 43509 Eur. Ct. H.R. 08 (2011), holding that sanctionary procedures in relation to antitrust proceedings may be of a criminal nature, despite nomenclature or classification to the contrary, *compare with id.*, at ¶ 2 (Pinto du Albuquerque, *J.*, *dissenting*).

[63] Scott, *supra* note 60, at 3.

[64] "All contracts, combinations, or agreements which create or tend to create a monopoly are unlawful at common law as being in restraint of trade and against public policy[.] [...] At common law it is not necessary, in order to render a combination unlawful, that the combination result in complete monopoly, as long as its tendency is toward monopoly and injury to the public. Neither actual intent nor overt acts are necessary elements." 58 C.J.S. Monopolies § 14 (1948).

[65] *Id.* at 4.

> It has provided the base for an attempt by courts to reconcile the freedom to trade with the freedom to contract. The doctrine holds that contractual limitations on parties' wider behaviour are *prima facie* void unless justified as reasonable. A restraint is identified where the parties agree that one party will "restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses". *The concept of reasonableness introduces a public policy discretion, and is judged by reference to both the perceived interests of the parties concerned and the interests of the public.* In the former respect, factors such as inequality of bargaining power or perceived unfairness to the restrained party have proved relevant to the assessment.[66]

By the 20th century, however, the doctrine was deemed emasculated of its practical value as the courts gradually restricted common law rules to accommodate the primacy of the freedom to contract.[67] Moreover, legislative developments—both domestic and international—significantly shaped contemporary English antitrust or competition law, especially in relation to the United Kingdom's membership in the European Union.[68]

The same experience is apparent in American jurisprudence on antitrust law, which also veered away from early adoption of English common law principles towards a more established statutory application and interpretation.[69] The Sherman Act, the United States' first federal law on the matter, was passed in 1890 on the basis of "an abiding and widespread fear of the veils which flow from monopoly [...] the concentration of economic power in the hands of few."[70]

It is from the application and interpretation of the Sherman Act and subsequent analogous statutes that American antitrust jurisprudence had proceeded. Naturally, discussing the same informs Philippine jurisprudence.

B. Historical Contexts of Antitrust Jurisprudence: Sherman Antitrust Act

The Sherman Act was passed as "a response to the growth of 'trusts' and 'combinations' of business and capital that were organized to control the

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[66] *Id.* at 4-5. (Emphasis supplied.)

[67] *Id.* at 5.

[68] Scott, *supra* note 60, at 5.

[69] *See* Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUSTRIAL REL. L.J. 461 (1989), describing the history of American law on combinations and competitions from the common law regime.

[70] United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966), *quoting* United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 323 (1897).

market and suppress competition,"[71] and to supersede "the common-law concept of illegal restraints of trade or commerce, and to condemn such restraints whenever they occur in or affect interstate commerce."[72]

Its cornerstone section[73] provides:

> Every contract, combination in the form of trust or otherwise, conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared [herein] illegal shall be deemed guilty of a misdemeanor [...].[74]

But since "[e]very agreement concerning trade and every regulation of trade restrains trade, since their very essence is to bind or restraint trade,"[75] Section 1 of the Sherman Act "has been construed by the Supreme Court to make illegal only those contracts and combinations that constitute *unreasonable restraints of trade*."[76] What, therefore, constitutes an "unreasonable restraint of trade"? In gist:

> Under the analysis employed by the Supreme Court, a restraint of trade may be adjudged unreasonable and thus a violation of Section 1, either because it fits within a class of restraints that has been held to be "per se" unreasonable, or because it violates what has come to be known as the "rule of reason." With respect to such analysis, a presumption exists in favor of the rule-of-reason standard. In determining the legality of a restraint of trade that is challenged under Section 1, therefore, the rule-of-reason standard is traditionally applied, unless the restraint is within the category that has been judicially determined to be illegal per se.[77]

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[71] 54 Am. Jur. § 46, at 105.

[72] *Id.*, *citing* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

[73] 54 Am. Jur. § 31, at 92, *citing* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[74] 15 U.S.C. § 1. Sherman Act.

[75] 54 Am. Jur. § 47, at 106-107, *citing* Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

[76] *Id.* at 107, *citing* Bus. Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988); Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984).

[77] *Id.*, *citing* FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986); Bus. Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988); Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984); Phil. Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n (CA7 Wis) 672 F2d 1280 (1982); Martin B. Galuser Dodge Co. v. Chrysler Corp. (CA3 NJ) 570 F2d 72 (1977), at n.55-8.

C. The Inchoate Legal Transplantation of Sherman Act-Based Jurisprudence

While important in American antitrust jurisprudence, the aforementioned distinction is actually truly significant only now after the passing of the Philippine Competition Act,[78] because "[the *per se* and rule of reason tests] are two concepts [...] foreign to Philippine soil and are transplanted for the first time through the [said Act]."[79] Despite the lack of wholesale appropriation of these tests, Part IV shows that they have been implied in Philippine case law; the reason being that these tests themselves are not original concepts created from thin air, but stem from common law jurisprudence which preceded the Sherman Act[80] and from which early Philippine antitrust case law evolved.

Another inference made clear from the discussions so far is that while acts of industries may fall within the ambit of the Philippine Competition Act and would require either "per se" or "rule of reason" tests, the analysis of a regime, anticompetitive or otherwise, based on a Republic Act co-equal in its hierarchy of law, merits the application of the Constitution. The straightforward conclusion here is that the prohibition against combinations in restraint of trade or unfair competition is, in several cases, self-executing, and neither the Philippine Competition Act nor other special laws can preclude its application. If H. No. 4144 were to be passed, any controversy would not be so much a matter of conflicts of statutory mandates; the proper analysis is against the grain of the basic law.

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[78] Rep. Act No. 10667 (2015). The Philippine Competition Act. Particular reference should be made to § 14.

[79] Diane Jane Dolot, et al., *The Regulatory Impact of the Philippine Competition Act and Derivative Objections to a New Enforcement Regime*, 89 PHIL. L.J. 606 (2015). The Article provides for a brief critique on this adoption. *Id.* at 611-4.

[80] "The rule of reason, adopted from common law, prohibits those restraints of trade deemed undue under common law in existence at the time of the enactment of the Sherman Act[...]. The rule of reason also prohibits those acts which new times and economic conditions make unreasonable." 54 Am. Jur. § 48, at 108, *citing* United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956); Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1969).

"Certain restraint of trade are unreasonable per se and therefore illegal under Section 1 of the Sherman Act, without the necessity of an elaborate inquiry into the precise harm that they have caused or the business excuse for their use, because of their pernicious effect on competition and their lack of any redeeming value." *Id.*, § 50, at 112, *citing* Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977); White Motor Co. v. United States, 372 U.S. 253 (1963); N.P.R. Co. v. United States, 356 U.S. 1 (1958); Phil. Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n (CA7 Wis) 672 F2d 1280 (1982). "Under the principle of per se unreasonableness, the practice complained of must have such an inherently harmful effect on competition that it should be conclusively presumed to be unreasonable and therefore illegal." *Id.* n.2, *citing* Carlson Mach Tools v. American Tool (CA5 Tex) 678 F2d 1253.

One of the more comprehensive demonstrations of this thesis is the 1979 case of *Gokongwei, Jr. v. Securities and Exchange Commission*,[81] which arose out of an intra-corporate dispute among the shareholders of San Miguel Corporation.[82] In particular, the amended by-laws that the petitioner challenged in the controversy precluded him from being a director of the corporation because of his membership in the board of directors of a competitor.[83] To allow the contrary, the Securities and Exchange Commission posited, would be a "blatant disregard of no less than the Constitution and pertinent laws against combinations in restraint of trade."[84]

In siding with the respondents, the Court invoked the competition clauses in Section 2, Article XIV of the 1973 Philippine Constitution and Article 186 of the Revised Penal Code, as well as "other legislation in this jurisdiction, which prohibit monopolies and combinations in restraint of trade."[85] However, the said laws were not applied; instead, the Court upheld the position of the Securities and Exchange Commission based on the overall policy against anti-competitive arrangements as seen in the Constitution and statutes. The Court said:

> Basically, these anti-trust laws or laws against monopolies or combinations in restraint of trade are aimed at raising levels of competition by improving the consumers' effectiveness as the final arbiter in free markets. These laws are designed to preserve free and unfettered competition as the rule of trade. "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices and the highest quality [...]." they operate to forestall concentration of economic power. The law against monopolies and combinations in restraint of trade is aimed at contracts and combinations that, by reason of the inherent nature of the contemplated acts, prejudice the public interest by unduly restraining competition or unduly obstructing the course of trade.[86]

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[81] [Hereinafter "Gokongwei, Jr."], G.R. No. L-45911, 89 SCRA 336, Apr. 11, 1979.

[82] *Id.* at 344-5.

[83] The contested provision reads in Section 2: "Any stockholder having at least five thousand shares registered in his name may be elected Director, provided, however, that no person shall qualify or be eligible for nomination or election to the Board of Directors if he is engaged in any business which competes with or is antagonistic to that of the Corporation." *Id.* at 346, n.1.

[84] *Id.* at 356.

[85] "CIVIL CODE, art. 28; § 4, ¶ 5, of Rep. Act No. 5455; and § 7(g) of Rep. Act No. 6173. Cf. § 17, ¶ 2]] of the Judiciary Act" *Id.* at 375, n.33.

[86] *Id.* at 376. (Citations omitted.)

The Court's subsequent discussion of American antitrust laws such as the Clayton Act[87] to define the prohibition (which it attached to the constitutional proscription), as well as define the terms "monopoly," "combination in restraint of trade," and "unfair competition,"[88] illustrates that the domestic norm on the matter has yet to crystallize. It also establishes the status of American jurisprudence in interpreting and applying American antitrust laws as extraneous material that bears upon the background against which the domestic antitrust policy, as expressed in the Constitution, is set:

> The election of petitioner to the Board of respondent Corporation can bring about an illegal situation. This is because an express agreement is not necessary for the existence of a combination or conspiracy in restraint of trade. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangements, and what is to be considered is what the parties actually did and not the words they used. For instance, the Clayton Act prohibits a person from serving at the same time as a director in any two or more corporations, if such corporations are, by virtue of their business and location of operation, *competitors* so that the elimination of competition between them would constitute violation of any provision of the anti-trust laws. There is here a statutory recognition of the anti-competitive dangers which may arise when an individual simultaneously acts as a director of two or more competing corporations.
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> According to the Report of the House Judiciary Committee of the U. S. Congress on section 9 of the Clayton Act, it was established that: "By means of the interlocking directorates one man or group of men have been able to dominate and control a great number of corporations [...] to the detriment of the small ones dependent upon them and to the injury of the public."[89]

From this preliminary discussion, it is manifest that Philippine restraint of trade jurisprudence goes beyond the competition clauses. So, for the majority of domestic jurisprudence, antitrust case law has revolved around the interpretation of the competition clauses according to the adoption of a common law perspective on restraint of trade. In other words, rather than being a matter of statutory construction like cases based on the Sherman Act or

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[87] The Clayton Antitrust Act of 1914 amends and clarifies the Sherman Act on topics such as price discrimination, price fixing, and unfair business practices. 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53.

[88] *See Gokongwei, Jr.*, 89 SCRA at 376-7, nn.37-9.

[89] *Id.* at 378-9. (Citations omitted.)

Clayton Act, the determination of whether a restraint of trade or combination in restraint of trade is unreasonable has been elevated to a constitutional formula. And since the Constitution is "deemed written" in every law and contract,[90] the competition clauses remain and must remain under the purview of jurisprudence which interprets it.

Plainly, however, restraint of trade jurisprudence prior to the 1973 Philippine Constitution—where the first constitutional prohibition was enunciated—had to be founded on statute. Be that as it may, jurisprudence shows that the principle of "competition for the common good" or for the public welfare has long been the rule.

IV. ARTICULATING THE COMPETITION CLAUSES REGIME AS A TYPOLOGY: THE VALIDITY OF CERTAIN CONTRACTUAL ARRANGEMENTS

Our jurisprudence revolving around the competition clauses may be broadly classified as three distinct dispute and normative regimes: contractual, statutory, and constitutional. This typology is important in determining what test or principle of law applies in specific situations, and to differentiate which aspect of the competition clauses may be invoked, especially on the touchstone of reasonableness in cases involving restraints of trades.

The constitutional tests will be the focus of this Article. Of the three, the statutory regime will be the least discussed in this section because this merely interprets or applies the Philippine Competition Act, or the Revised Penal Code, or special antitrust laws for acts prior to the former's effectivity. The contractual regime, while limited due to the restricting effects of both laws and the Constitution, is still broad enough to merit extensive discussion. This is apart from the fact that the antitrust jurisprudence referred to the framers of the Constitution in interpreting what constituted monopolies, unfair competition, restraint of trade, or combinations in restraint of trade were founded primarily on contractual controversies (and it remains the case today).

A. Restraint of Trade through Contracts

By and large, the majority of Philippine cases involving competition clauses have involved arguments on the unconstitutionality of unfair competition and restraints of trade on contractual arrangements. In particular,

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[90] Manila Prince Hotel v. Gov't Service Ins. System, G.R. No. 122156, 267 SCRA 408, 430-31, Feb. 3, 1997. *See also* Resident Marine Mammals of the Protected Seascape Tañon Strait v. Reyes, G.R. No. 180771, 756 SCRA 513, Apr. 21, 2015, *and* Tawang Multi-Purpose Cooperative v. La Trinidad Water District, G.R. No. 166471, 646 SCRA 21, 36, Mar. 22, 2011.

the constitutional proscription has been invoked against various arrangements such as non-involvement clauses,[91] exclusivity clauses,[92] non-compete clauses,[93] and "goodwill clauses,"[94] each to varying degrees and each necessitating resort to a case-by-case analysis.

As early as 1916, in the case of *Ferrazzini v. Gsell*,[95] the Philippine Supreme Court was faced with a controversy against contractual restrictions to trade. Notably, however, *Ferrazzini* attaches the alleged restraint of trade to Article 1255 of the old Civil Code on public policy limitations of the freedom to contract[96] and Articles 542 to 544 of the old Penal Code.[97] And, at this juncture, the Court's treatment of restraint of trade in *Ferrazzini* as using the provisions of discrete positive laws as a benchmark of public policy is telling.[98] It meant an evaluation of the rationale of the prohibition based on an overall inchoate norm that "*orden público*" or public policy must not be contravened.[99]

The test laid down by the Court in *Ferrazzini* was reasonableness, such that "contracts in undue or unreasonable restraint of trade" could not be enforced "because they are repugnant to the established public policy in that country."[100] The adoption of the Court of civil legal commentaries, as well as Anglo-American case law, to support its conclusion also reflects the flexibility with which its standard of reasonableness may be determined around this general rule. This standard was qualified as meaning that if "the restraint upon

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[91] Ferrazzini v. Gsell [hereinafter "Ferrazzini"], G.R. No. L-10712, 34 Phil. 697, Aug. 10, 1916; G. Martini, Ltd. v. Glaiserman, G.R. No. L-13699, 39 Phil. 120, Nov. 12, 1918; Del Castillo v. Richmond, G.R. No. L-21127, 45 Phil. 679, Feb. 9, 1924; Consulta v. CA, G.R. No. 145443, 453 SCRA 732, Mar. 18, 2005; Tiu v. Platinum Plans Phil., Inc., G.R. No. 163512, 517 SCRA 101, Feb. 28, 2007.

[92] *Avon Cosmetics, Inc.*, *infra* note 120.

[93] Dai-Chi Electronics Manufacturing Corp. v. Villarama, Jr. [hereinafter "Dai-Chi Electronics"], G.R. No. 112940, 238 SCRA 267, Nov. 21, 1994; Portillo v. Rudolf Lietz, Inc., G.R. No. 196539, 683 SCRA 568, Oct. 10, 2012.

[94] *Dai-Chi Electronics*.

[95] In this case, the contract provided that an employee should not enter into "any enterprise in the Philippine Islands, whatever" except by special written permission of the employer, during the period of employment and for a term of five years from and after the termination of the employment "without regard to the cause of [such] termination." *Ferrazzini*, 34 Phil. 697, 706-707.

[96] *Ferrazzini*, 34 Phil. at 709.

[97] *Id.* at 713.

[98] Citing Fabacher v. Bryant & Mather, which held that a contract constituted an impermissible restraint of trade because it was plainly repugnant to public policy by applying articles 1893 and 1895 of the Revised Civil Code of Louisiana. The Code prescribes that contracts whose cause is contrary to public order is regarded as having no cause, and therefore can have no effect. *Ferrazzini*, 34 Phil. at 711.

[99] *See id.* at 709-712, discussing public policy as defined by both common law and civil law.

[100] *Id.* at 712.

one party is not greater than protection to the other party requires, the contract may be sustained."[101]

This test would be bolstered by two subsequent oft-cited cases. *Ollendorf v. Abrahamson*[102] and *Red Line Transportation Co., Inc. v. Bachrach Motor Co., Inc.*[103] used the same touchstone of reasonableness[104] to highlight the importance of "public welfare or public interest:"[105]

> The test of validity is whether under the particular circumstances of the case and considering the nature of the particular contract involved, public interest and welfare are not involved and the restraint is not only reasonably necessary for the protection of the contracting parties but will not affect public interest or service.[106]

Ollendorf, like *Ferrazzini*, relied on the old Civil Code provisions to articulate this rule. Thus:

> The rule in this jurisdiction is that the obligations created by contracts have the force of law between the contracting parties and must be enforce in accordance with their tenor. The only limitation upon the freedom of contractual agreement is that the pacts established shall not be contrary to "law, morals or public order."[107]

Unlike in *Ferrazzini*, restraint of trade jurisprudence in relation to corporate by-laws had followed a disparate strain of case law owing to the distinct common law tradition as regards corporation law. Early cases such as the 1925 cases of *Fleischer v. Botica Nolasco Co., Inc.*[108] used the following formulation: "[A]ny restriction of the nature of that imposed in the by-law now in question, is *ultra vires*, violative of the property rights of shareholders, and in restraint of trade." This treatment would continue to *Padgett v. Babcock & Templeton, Inc.*,[109] *Dela Rama v. Ma-ao Sugar Central Co., Inc.*,[110] and *Tan v. SEC*,[111]

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[101] *Id.* at 713.

[102] [Hereinafter "Ollendorf"], G.R. No. 13228, 38 Phil. 585, Sept. 13, 1918.

[103] [Hereinafter "Red Line Transportation"], G.R. No. L-45173, 67 Phil. 577, Apr. 27, 1939.

[104] "[T]he validity of restraints upon trade or employment is to be determined by the intrinsic reasonableness of restriction in each case, rather than by any fixed rule, and that such restrictions may be upheld when not contrary to afford a fair and reasonable protection to the party in whose favor it is imposed." *Ollendorf*, 38 Phil. at 592.

[105] "[P]ublic welfare or public interest is the primordial consideration [...]." *Red Line Transportation*, 67 Phil. at 589. (Citations omitted.)

[106] *Id.*

[107] *Ollendorf*, 38 Phil. 585, 590. (Citations omitted.)

[108] 47 Phil. 583 (1925).

[109] G.R. No. 38684, 59 Phil. 232 (1933).

[110] G.R. No. L-17504, 27 SCRA 247, Feb. 28, 1969.

but would be superseded by the Corporation Code and the Philippine Competition Act, and would now properly fall in the statutory regime of the abovementioned typology.

B. Consistent Application of Case Law and Inconsistent Theories

Ferrazzini, *Ollendorf*, and *Red Line Transporation* would all be invoked many years later in *Filipinas Compañia de Seguros v. Mandanas*,[112] when 39 non-life insurance companies and the Insurance Commissioner challenged the legality of Article 22[113] of the Constitution of the Philippine Rating Bureau, of which they were members.[114] The challenges rested on the allegation that Article 22 "constitutes an illegal or undue restraint of trade."[115]

In deciding the case the Court again proclaimed, "The test on whether a given agreement constitutes an unlawful machination or a combination in restraint of trade," which is, quoting *Ferrazzini*, "whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable." It echoed *Ollendorf* and *Red Line Transportation*, which "reiterated" this test.

But then, *Filipinas Compañia de Seguros* would start its own trend and analysis. Not stopping with domestic jurisprudence it deemed consistently applicable to the case, the Court went on to adopt several American cases based on the Sherman Act (rather than the Civil Code, upon which the *Ferrazzini* and *Ollendorf* decisions rested) to build on a different point. This was not to set a standard of reasonableness which the American cases meant to do, but to bolster its conclusion that "[t]he purpose of said Article 22 is *not* to eliminate competition, but to *promote ethical practices* among non-life insurance companies, although, incidentally, it may discourage, and, hence, eliminate *unfair* competition, through underrating, which, in itself is eventually injurious to the public."[116]

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[111] G.R. No. 95696, 206 SCRA 740, Mar. 3, 1992.

[112] [Hereinafter "Filipinas Compañia de Seguros"], G.R. No. L-19638, 17 SCRA 391, June 20, 1966.

[113] It read: "In respect to the classes of insurance specified in the Objects of the Bureau and for Philippine business only, the members of this Bureau agree not to represent nor to effect reinsurance with, nor to accept reinsurance from, any Company, Body, or Underwriter licensed to do business in the Philippines not a Member in good standing of this Bureau." *Filipinas Compañia de Seguros*, 17 SCRA at 393.

[114] *Filipinas Compañia de Seguros*, 17 SCRA 391, 392-3.

[115] *Id.* at 392.

[116] *Id.* at 396. (Emphasis in the original.)

To this end, it quoted *Chicago Board of Trade v. United States*,[117] an important American antitrust case (which shall be discussed later). But perhaps more crucially, it quoted *Sugar Institute, Inc. v. United States*,[118] to the following effect:

> Designed to frustrate unreasonable restraints, [the restrictions imposed by the Sherman Act] do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes.[119]

Since *Ferrazzini*, the test on the determination of the validity of these restrictive covenants has had little change, especially as regards the definitions of public order or welfare. But this adaptation of American jurisprudence in *Filipinas Compañia de Seguros* was ripe for confusion in later cases because the invocation of American tests founded on wholly disparate regimes would demonstrate the tension between legally transplanted norms and those that occurred within the Philippine economic, political, and cultural clime. This is best shown in the 2006 case of *Avon Cosmetics, Inc. v. Luna*.[120]

In *Avon Cosmetics, Inc.*, the respondent, Leticia H. Luna, and the petitioner entered into a Supervisor's Agreement, the pertinent provision of which reads in paragraph 5: "That the Supervisor shall sell or offer to sell, display or promote only and exclusively products sold by the Company."[121] Against this arrangement, Luna sold vitamins and other food supplements from Sandré Philippines, Inc., as its Group Franchise Director.[122]

Avon Cosmetics, Inc. thereafter cancelled the Supervisor's Agreement, citing a violation of the above provision. Luna filed a complaint before the Regional Trial Court, which decided in her favor.[123] The Court of Appeals affirmed this decision, which led Avon Cosmetics, Inc. to appeal. The issue pertinent to this Article is whether or not paragraph 5 of the Supervisor's Agreement is void for violating law and public policy.

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[117] [Hereinafter "Chicago Board of Trade"], 246 U.S. 231 (1918).

[118] 297 U.S. 553 (1936).

[119] *Id.* 597-8.

[120] [Hereinafter "Avon Cosmetics, Inc."], G.R. No. 153674, 511 SCRA 376, Dec. 20, 2006.

[121] *Id.* at 383.

[122] *Id.* at 384.

[123] *Id.* at 385-6.

In reversing the Court of Appeals' decision, the Supreme Court examined paragraph 5 of the Supervisor's Agreement, noting that "[i]n business parlance, this is commonly termed as the 'exclusivity clause' [...] which prohibit[s] the obligor from engaging in 'business' in competition with the obligee." In its determination of the validity of this agreement, the Court, referred to the competition clauses in the Constitution, *viz.*:

> This *exclusivity* clause is more often the subject of critical scrutiny when it is perceived to collide with the Constitutional proscription against "reasonable restraint of trade or occupation." The pertinent provision of the Constitution is quoted hereunder. Section 19 of Article XII of the 1987 Constitution on the National Economy and Patrimony states that:
>
> > SEC. 19. The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.
>
> First off, restraint of trade or occupation embraces acts, contracts, agreements or combinations which restrict competition or obstruct due course of trade.
>
> Now to the basics. From the wordings of the Constitution, truly then, what is brought about to lay the test on whether a given agreement constitutes an unlawful machination or combination in restraint of trade is whether under the particular circumstances of the case and the nature of the particular contract involved, such contract is, or is not, against public interest.
>
> Thus, restrictions upon trade may be upheld when not contrary to public welfare and not greater than is necessary to afford a fair and reasonable protection to the party in whose favor it is imposed. Even contracts which prohibit an employee from engaging in business in competition with the employer are not necessarily void for being in restraint of trade.
>
> In sum, contracts requiring exclusivity are not *per se* void. Each contract must be viewed vis-à-vis all the circumstances surrounding such agreement in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.[124]

The Court then invoked *Ferrazzini* to determine the test for an unreasonable restraint of trade and to conclude that "[a]uthorities are one in

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[124] *Id.* at 391-2.

declaring that a restraint in trade is unreasonable when it is contrary to public policy or public welfare."[125]

In determining what "public policy" is it resorted, as *Ferrazzini* did,[126] to Spanish commentators Manresa[127] and Scaevola.[128] It condensed these to formulate the following rule: "[P]ublic policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."[129] From this premise, however, the Court proceeded to focus on the "competition policy" as it is generally accepted in domestic jurisprudence. And while just "another perspective,"[130] the Court eventually resolved the issues through this lens and upheld the validity of the exclusivity clause.[131]

From here, the Supreme Court would align itself with American jurisprudence, using the rule of reason in interpreting the Sherman Act, as enunciated by *Chicago Board of Trade*.[132] The Court said:

> We quote with approval the determination of the U.S. Supreme Court in the case of [*Chicago Board of Trade*] that "the question to be determined is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition."[133]

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[125] *Id.* at 392.

[126] *Ferrazzini*, 34 Phil. 697, 709-710.

[127] "[P]ublic policy (*orden público*): Represents in the law of persons the public, social and legal interest, that which is permanent and essential of the institutions, that which, even if favoring an individual in whom the right lies, cannot be left to his own will. It is an idea which, in cases of the waiver of any right, is manifested with clearness and force." *Avon Cosmetics, Inc.*, 511 SCRA at 393.

[128] "'[P]ublic policy' has a more defined meaning: Agreements in violation of *orden público* must be considered as those which conflict with law, whether properly, strictly and wholly a public law (*derecho*) or whether a law of the person, but law which in certain respects affects the interest of society." *Avon Cosmetics, Inc.*, 511 SCRA 376, 393.

[129] *Id.* at 393-4. (Citation omitted.)

[130] "From another perspective, the main objection to exclusive dealing is its tendency to foreclose existing competitors or new entrants from competition in the covered portion of the relevant market during the term of the agreement. Only those arrangements whose probable effect is to foreclose competition in a substantial share of the line of commerce affected can be considered as void for being against public policy. The foreclosure effect, if any, depends on the market share involved. The relevant market for this purpose includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations." *Avon Cosmetics, Inc.*, 511 SCRA 376, 394. (Citations omitted.)

[131] *Id.*

[132] *Chicago Board of Trade*, 246 U.S. 231, 238.

[133] *Avon Cosmetics, Inc.*, 511 SCRA at 395.

Having elucidated this position, however, the Court would go back to the test of public policy or public welfare to determine whether the challenged contract could withstand constitutional scrutiny, only concluding that the "limitation [provided by paragraph 5 of the Supervisor's Agreement] does not affect the public at all."[134] The rationale behind this interpretation is innovative because the Court impliedly adopted the rule of reason. The rule, as used in American jurisprudence, merely looks into the "balancing [of] procompetitive and anticompetitive effects of an agreement"[135] and does not look into the intent for such agreement.

In fact, a few lines after the portion *Avon Cosmetic Inc.* quoted from *Chicago Board of Trade*, the eminent Justice Brandeis said this for the unanimous Court:

> The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. *This is not because a good intention will save an otherwise objectionable regulation or the reverse*; but because knowledge of intent may help the court to interpret facts and to predict consequences.[136]

And, so from the Court's suppositions, because paragraph 5 of the Supervisor's Agreement does not affect the public "at all," but it was merely done to "protect [the petitioner's] investment"[137] or protect one's property,[138] "it cannot be considered void for being against public policy."[139]

Despite the legal hermeneutics that adopted a misguided reading of American case law, the Court, in looking into the competition policy of the competition clauses, was correct insofar as constitutional intent was concerned (as shown in Part II, *supra*). This conclusion, however, stemmed not from

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[134] *Id.*

[135] "The test prescribed in *Standard Oil* is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. [...] In this respect, the Rule of Reason has remained faithful to its origins." Barry Wertheimer, *Rethinking the Rule of Reason: From* Professional Engineers *to* NCAA, 1984 DUKE L.J. 1297, 1297. *See also* Nat'l Soc'y of Prof. Engineers v. United States, 435 U.S. 679, 690-91 (1978).

[136] *Chicago Board of Trade*, 246 U.S. 231, 238. (Emphasis supplied.)

[137] *Avon Cosmetics, Inc.*, 511 SCRA 376, 394.

[138] *Id.* at 396.

[139] "How can the protection of one's property be violative of public policy? Sandré Philippines, Inc. is still very much free to distribute its products in the market but it must do so at its own expense. The *exclusivity clause* does not in any way limit its selling opportunities, just the undue use of the resources of petitioner Avon." *Avon Cosmetics, Inc.*, 511 SCRA 376, 396.

public welfare considerations as contemplated by the framers, but from the general competitive policy. Interestingly though, the Court applied it against respondent Luna:

> It was not by chance that Sandré Philippines, Inc. made respondent Luna one of its Group Franchise Directors. It doesn't take a genius to realize that by making her an important part of its distribution arm, Sandré Philippines, Inc., a newly formed direct-selling business, would be saving time, effort and money as it will no longer have to recruit, train and motivate supervisors and dealers. Respondent Luna, who learned the *tricks of the trade* from petitioner Avon, will do it for them. This is tantamount to unjust enrichment. Worse, the goodwill established by petitioner Avon among its loyal customers will be taken advantage of by Sandre Philippines, Inc. It is not so hard to imagine the scenario wherein the sale of Sandré products by Avon dealers will engender a belief in the minds of loyal Avon customers that the product that they are buying had been manufactured by Avon. In other words, they will be misled into thinking that the Sandré products are in fact Avon products. From the foregoing, it cannot be said that the purpose of the subject *exclusivity clause* is to foreclose the competition, that is, the entrance of Sandré products in to the market.[140]

But again, *Avon Cosmetics, Inc.* should be praised not for the profundity of its legal judgment, but for its demonstration that restraint of trade jurisprudence has been consistent. It is clear that insofar as contractual regimes are concerned, the Supreme Court has been constant, uniform, and loyal in invoking "public order" or the *orden publico* as a determinative element in the test of reasonableness; so steadfast in fact as to extensively cite and adopt a case promulgated 90 years prior.

What is made likewise clear by *Avon Cosmetics, Inc.* is that the test now hinges on the interpretation of the 1987 Constitution's competition clauses, despite its bases from jurisprudence having been pronounced prior to the 1973 Constitution, which is when these clauses were first articulated. Then again this is because, as seen from the Constitutional deliberations, Section 19, Article XII already contemplated this legal regime. This changes nothing from the fact that public welfare considerations formed a cornerstone of the competition clauses. In fact, the rule's articulation is also seen in *Rivera v. Solidbank Corp.*,[141] promulgated a few months earlier by the same Division—the centrality of public order in competition clause construction returns to *Ferrazzini*.[142]

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[140] *Avon Cosmetics, Inc.*, 511 SCRA at 395-6. (Emphasis in the original.)
[141] G.R. No. 163269, 487 SCRA 512, Apr. 19, 2006.
[142] *Id.* at 539-540.

V. THE INVOCATION OF THE COMPETITION CLAUSES AGAINST PUBLIC POSITIVE NORMS: STATUTES AND ADMINISTRATIVE ISSUANCES

The invocation of the competition clauses against regulatory regimes provided by statute, where restraint of trade can be facially gleaned, has been discussed in various Philippine Supreme Court cases. Their resolution hinges beyond the assessment of the reasonableness of the restraint of trade, but more prominently, on whether public interest or public welfare will be best served through the regime sought to be effected and institutionalized. Like contractual regimes, cases involving statutes or administrative issuances (the constitutional regime in this typology) have considered public welfare as a crucial dimension to the competition clauses.

A. Economic Rights: The Conventional Reading of the Competition Clauses

In *Tatad v. Secretary of Energy*,[143] the petitioners challenged the constitutionality of the regulation of the oil industry through Rep. Act No. 8180.[144] This issue continues to be reexamined in economic, legal, and political literature,[145] and "carr[ies] a surpassing importance on the life of every Filipino as [...] the upswing and downswing of [Philippine] economy materially depend on the oscillation of oil."[146]

One of the threshold issues in *Tatad I* delved directly on the petitioners' claim that "Section 15 of Rep. Act No. 8180 and Exec. Order No. 392 allow the formation of a *de facto* cartel among the three existing oil companies — Petron, Caltex and Shell — in violation of the constitutional prohibition against monopolies, combinations in restraint of trade and unfair

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[143] [Hereinafter "Tatad I"] G.R. No. 124360, 281 SCRA 330, Nov. 5, 1997, *affirmed* in 282 SCRA 337, Dec. 3, 1997 [hereinafter "Tatad II"].

[144] (1996). An Act Deregulating the Downstream Oil Industry and For Other Purposes.

[145] For a government-commissioned review, *see* Department of Energy, The Report of the Independent Committee Reviewing the Downstream Oil Industry Deregulation Act of 1998 (2005), *available at* https://www.doe.gov.ph/sites/default/files/pdf/downstream_ oil/irc-report-2005.pdf; For an academic review, *see* Peter Lee U, Competition Policy for the Philippine Downstream Oil Industry, Philippine APEC Student Center Network Discussion Paper No. 2000-14 (Apr. 2000), *available at* http://pascn.pids.gov.ph/files/Discussions%20Papers/2000/pascndp0014.pdf; For popular commentaries on the matter, *see* Rey Gamboa, *Oil deregulation still going well*, THE PHIL. STAR, June 25, 2013, *available at* http://www.philstar.com/business/2013/06/25/957778/oil-deregulation-still-going-well.

[146] *Tatad I*, 281 SCRA 330, 338.

competition."[147] In deciding for the petitioners, Justice Reynato Puno took a serious look at the competition clauses in his *ponencia*, stating that:

> The validity of the assailed provisions of Rep. Act No. 8180 has to be decided in light of the letter and spirit of our Constitution, especially Section 19, Article XII. Beyond doubt, the Constitution committed us to the free enterprise system but it is system impressed with its own distinctness. Thus, while the Constitution embraced free enterprise as an economic creed, it did not prohibit per se the operation of monopolies which can, however, be regulated in the public interest.[148]

It added:

> Section 19, Article XII of our Constitution is antitrust in history and in spirit. It espouses competition. The desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies. Competition is thus the underlying principle of section 19, Article XII of our Constitution which cannot be violated by Rep. Act No. 8180. [...]
>
> Again, we underline in scarlet that the fundamental principle espoused by Section 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market. But the competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players.[149]

The decision of the Supreme Court to nullify the statute, however, did not rely so much on the "antitrust in history and intent" of the competition clauses, but on what the Court referred to as the preservation of the "economic rights" of the people.[150] In strong language, the Court even remarked:

> *At a time when our economy is in a dangerous downspin, the perpetuation of Rep. Act No. 8180 threatens to multiply the number of our people with bent backs and begging bowls. Rep. Act No. 8180 with its anti-competition provisions cannot be allowed by this Court to stand even while Congress is working to remedy its defects.*[151]

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[147] *Id.* at 346.
[148] *Id.* at 357.
[149] *Id.* at 358.
[150] *Id.* at 370.
[151] *Id.* at 369. (Emphasis in the original.)

This position is made more cogent in the Court's denial of the private respondents' Motion for Reconsideration in *Tatad II*:

> In light of its loose characterization in Rep. Act No. 8180 and the law's anti-competitive provisions, we held that the provision on predatory pricing is constitutionally infirmed for it can be wielded more successfully by the oil oligopolists. Its cumulative effect is to add to the arsenal of power of the dominant oil companies. For as structured, it has no more than the strength of a spider web—it can catch the weak but cannot catch the strong; it can stop the small oil players but cannot stop the big oil players from engaging in predatory pricing.[152]

The extent to which public interest and public welfare are cherished in the competition clauses is best seen when contrasting *Tatad I* against other Supreme Court decisions allowing monopolistic arrangements. No better case than *Garcia v. Corona*[153] exists, where after R.A. 8180 was declared unconstitutional, Congress passed R.A. 8479 as a new oil deregulation law, without the provisions found offensive in the former.[154]

The challenge was to one provision of the law,[155] which according to the petitioner was "glaringly pro-oligopoly, anti-competition and anti-people, and is therefore patently unconstitutional for being in gross and cynical contravention of the constitutional policy and command embodied in" the competition clauses.[156] In denying the petition, the Court made a distinction as regards *Tatad I*, and elucidated:

> The evils arising from conspiratorial acts of monopoly are recognized as clear and present. But the enumeration of the evils by our [*Tatad I*] decision was not for the purpose of justifying continued government control, especially price control. The objective was, rather, the opposite. The evils were emphasized to show the need for free competition in a deregulated industry. And to be sure, the measures to address these evils are for Congress to determine, but they have to meet the test of constitutional validity.
>
> The Court respects the legislative finding that deregulation is the policy answer to the problems. It bears stressing that R.A. 8180 was declared invalid not because deregulation is unconstitutional.

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[152] *Tatad II*, 282 SCRA 337, 346.

[153] [Hereinafter "*Garcia I*"], G.R. No. 132451, 321 SCRA 218, Dec. 17, 1999.

[154] *Id.* at 222.

[155] Rep. Act No. 8479 (1998), § 19. An Act Deregulating the Downstream Oil Industry and for Other Purposes.

[156] *Garcia I*, 321 SCRA at 224, 257.

> The law was struck down because, as crafted, three key provisions plainly encouraged the continued existence if not the proliferation of the constitutionally proscribed evils of monopoly and restraint of trade.[157]

The centrality of public interest would be made even more transparent in *Garcia v. Executive Secretary*,[158] which repeats the challenge to R.A. 8479.[159]

B. The Recognition of Overriding Interests

Philippine case law also recognizes the existence of "overriding interests" which would justify the complete negation or abrogation of competition in favor of public welfare. This treatment can be gathered from *Philippine Ports Authority v. Mendoza*,[160] where the constitutionality of PPA's policy of integration[161] was challenged for allegedly being repugnant to Section 2, Article XIV of the 1973 Constitution on private monopolies and restraint of trade.[162]

In declaring the regulation constitutional, the Court invoked the "overriding and more significant consideration" of "public interest"[163] In particular:

> [...] "Competition can best regulate a free economy. Like all basic beliefs, however, that principle must accommodate hard practical experience. There are areas where for special reasons the force of competition, when left wholly free, might operate too destructively to safeguard the public interest. Public utilities are an instance of that consideration." By their very nature, certain public services or public utilities such as those which supply water, electricity, transportation, telegraph, etc. must be given exclusive franchises if public interest is to be served. Such exclusive franchises are not violative of the law against monopolies.

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[157] *Id.* at 229.

[158] [Hereinafter "*Garcia II*"], G.R. No. 157584, 583 SCRA 119, Apr. 2, 2009.

[159] "Read correctly, this constitutional provision does not declare an outright prohibition of monopolies. It simply allows the State to act '*when public interest so requires*'; even then, no outright prohibition is mandated, as the State may choose to regulate rather than to prohibit." *Garcia II*, 583 SCRA at 131. (Emphasis in the original.)

[160] [Hereinafter "Phil. Ports Authority"], G.R. No. L-48304, 138 SCRA 496, Sept. 11, 1985. In this case, several arrastre operators challenged the PPA's administrative rule-making authority to issue and implement an order for the compulsory merger or integration of arrastre and stevedoring service providers in the port of Cebu into one organization as a condition precedent to the grant of a permit.

[161] *Phil. Ports Authority*, 138 SCRA at 503.

[162] *Id.* at 500, 506.

[163] *Id.* at 510.

> In the case at bar, the area affected is maritime transportation in the port of Cebu. The operations there, particularly arrastre and stevedoring, affect not only the City of Cebu, the principal port in the South, but also the economy of the whole country as well. Any prolonged disjunction of the services being rendered there will prejudice not only inter-island and international trade and commerce. Operations in said port are therefore imbued with public interest and are subject to regulation and control for the public good and welfare. PPA's policy of integration through compulsory merger may not even be in this instance considered as promoting a monopoly because the fact of the matter is that while the sole operator permitted by PPA to engage in the arrastre and stevedoring operations in the port of Cebu is only [United Stock Dockhandlers, Inc. (USDI)], actually USDI is comprised of the eleven (11) port services contractors that previously used said ports but decided to merge and ultimately constituted themselves as USDI.
>
> *But over and above the matter of whether the monopoly has been created, the overriding and more significant consideration is public interest.* Accordingly, We hold that PPA's policy of integration is not violative of any constitutional and legal provision on monopolies.[164]

This doctrine would again be adopted in *Anglo-Fil Trading Corp. v. Lazaro*,[165] which goes as far as saying that "[b]y their very nature, certain public services or public utilities [...] must be given exclusive franchises if public interest is to be served[,]"[166] and *Pernito Arrastre Services, Inc. v. Mendoza*,[167] which categorically declared that "in industries affected with public interest, a regulated monopoly is not necessarily proscribed, if such is deemed necessary in order to protect and promote public interest."[168]

C. The Recognition of the Social Dimension of Property Rights

Another related concept established in Philippine case law is the recognition of the social dimension of property rights, which justify certain restraints of trade as effected by statute. This construction was articulated in

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[164] *Id.* at 510-11. (Citations omitted.) (Emphasis supplied.)

[165] [Hereinafter "Anglo-Fil Trading Corp."], G.R. No. L-54958, 124 SCRA 494, Sept. 2, 1983. The case also explains that "private monopolies are not necessarily prohibited by the Constitution. They may be allowed to exist but under State regulation. A determination must first be made whether public interest requires that the State should regulate or prohibit private monopolies." *Anglo-Fil Trading Corp.*, 124 SCRA at 522. (Citations omitted.)

[166] *Id.* at 522.

[167] G.R. No. L-53492, 146 SCRA 430, Dec. 29, 1986.

[168] *Id.* at at 444.

the case of *Mercury Drug Corp. v. Comm'r of Internal Revenue*,[169] in relation to analogous litigation,[170] where the petitioners claimed that Section 4(a) of R.A. 7432[171] was challenged on the ground that "forcing the petitioner to grant 20% discount on sale of medicine to senior citizens without fully reimbursing it for the amount of discount granted violates the due process clause for being [...] an undue restraint of trade."[172] The Court granted Mercury Drug Corporation's prayer for tax credit under the said law without, however, delving into the issue whether the same is an undue restraint of trade.[173]

But while it narrowed the issue to "whether the claim for tax credit should be based on the full amount of the 20% senior citizens' discount or the acquisition cost of the merchandise sold,"[174] the Court recalled the public policy rationale of the said law, noting that "Rep. Act No. 7432, as amended by Rep. Act No. 9257, is a piece of social legislation aimed to grant benefits and privileges to senior citizens[,] [including] the grant of sales discounts on the purchase of medicines to senior citizens."[175]

The degree to which this reading affected the decision would be apparent in the Court's En Banc decision of *Manila Memorial Park, Inc. v. Secretary of the DSWD*,[176] which echoed the 2007 cases of *Carlos Superdrug Corporation v. DSWD*.[177] The Court settled in *Manila Memorial Park* that the 20% senior citizen discount under Rep. Act No. 9257 is valid, and in so doing, brushed aside the petitioner's contention tangential to the law's alleged anti-competitive nature. The Court said that "[a] law, which has been in operation for many years and promotes the welfare of a group accorded special concern by the Constitution, cannot and should not be summarily invalidated on a mere allegation that it reduces the profits or income/gross sales of business establishments."[178] Quoting *Carlos Superdrug Corp.*, the Court remarked:

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169 [Hereinafter "Mercury Drug Corp."], G.R. No. 164050, 654 SCRA 124, July 20, 2011.

170 For other cases interpreting and applying the statute, *see* Bicolandia Drug Corp. (Formerly Elmas Drug Corp.) v. Comm'r of Internal Revenue, G.R. No. 142299, 492 SCRA 159, June 22, 2006; M.E. Holding Corp. v. CA, G.R. No. 160193, 547 SCRA 389, Mar. 3, 2008.

171 (1992). An Act to Maximize the Contribution of Senior Citizens to Nation Building, Grant Benefits and Special Privileges and For Other Purposes.

172 *Mercury Drug Corp.*, 654 SCRA 124, 135.

173 *Id.* at 139-141.

174 *Id.* at 136.

175 *Id.*

176 [Hereinafter "Manila Memorial Park"], G.R. 175356, 711 SCRA 302, Dec. 3, 2013.

177 [Hereinafter "Carlos Superdrug Corp."], G.R. No. 166494, 526 SCRA 130, June 29, 2007

178 *Manila Memorial Park*, 711 SCRA at 379.

> [...] [I]t is unfair for petitioners to criticize the law because they cannot raise the prices of their medicines given the cutthroat nature of the players in the industry. It is a business decision on the part of petitioners to peg the mark-up at 5%. Selling the medicines below acquisition cost, as alleged by petitioners, is merely a result of this decision. Inasmuch as pricing is a property right, petitioners cannot reproach the law for being oppressive, *simply because they cannot afford to raise their prices for fear of losing their customers to competition.*
>
> The Court is not oblivious of the retail side of the pharmaceutical industry and the competitive pricing component of the business. While the Constitution protects property rights, petitioners must accept the realities of business and the State, in the exercise of police power, can intervene in the operations of a business[,] which may result in an impairment of property rights in the process.
>
> Moreover, *the right to property has a social dimension.* While Article XIII of the Constitution provides the precept for the protection of property, various laws and jurisprudence, particularly on agrarian reform and the regulation of contracts and public utilities, continuously serve as [...] reminder[s] that the right to property can be relinquished upon the command of the State for the promotion of public good.[179]

This "social dimension" of property rights brings to fore the public policy and public welfare dimension of the constitutional regime of antitrust or competition clause jurisprudence. It modifies the interpretation of law to accommodate not just the competition "spirit" or policy behind the competition clauses, but, to a much greater degree, their public interest and social welfare aspect.

Therefore, in the same way that the framers of the Constitution contemplated public monopolies to protect, promote, respect, and realize the "common good," Philippine case law acknowledges that the common good remains overriding, paramount, and inviolable. More so, this reading does not merely attach to the competition policy, which is characteristic of American liberalized trade, and a mainstay in American antitrust jurisprudence[180] and American colonial decisions like *Ollendorf* and *Red Line Transportation.*[181]

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[179] *Id.* at 343-4, *citing Carlos Superdrug Corp.*, 526 SCRA at 132-5. (Emphasis supplied.)

[180] "Within the United States, the recognized role of the antitrust laws is to ensure that the market is free to allocate resources in response to demand. When the market performs the resource allocation function free from restraints imposed by private parties, then resources are allocated efficiently and aggregate national wealth is maximized." *See* Daniel J. Gifford, *Antitrust and Trade Issues: Similarities, Differences, and Relationships*, 44 DEPAUL L. REV. 1049 (1995).

[181] *Compare with* contractual cases in Part IV, *supra.*

D. Indigeninization of Antitrust Case Law: A Theory on Social Justice

Legal theorist Professor Gunther Teubner invariably describes this process of normative change as a reaction of a legally transplanted norm towards integration in the economic, cultural, social, and historical contexts in which it finds itself. The norms—in this case the competition policies commonly cited and lifted from Sherman Act-based jurisprudence—are "not transformed from something alien into something familiar; not adopted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change."[182]

Likewise it can be observed that the early colonial cases and the legal precepts have been indigenized and suited to the broad strokes and fine lines of a constitution,[183] which itself "bends over backward to accommodate"[184] not the producers or consumerist market, but rather, the down-trodden and "those with less privilege in life."[185] *Tatad I* emphasized that the less privileged must be safeguarded by the public welfare dimension of the competition clauses. The all-embracing post-colonial metanarrative of social justice in Philippine legal history fortifies the idea of public welfare as the essence of the competition clauses.[186]

What would account for the change in focus, therefore, are themselves the "evolutionary" changes in the regime of our post-colonial Constitutions, especially the abrogation of the parity rights and the inward expression of Philippine social development and economic policies. So in as much as Filipinos have eschewed the *laissez-faire* policies of *People v. Pomar*[187] or its

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[182] Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

[183] For instance, in a seminal analysis of the Phil. Competition Act, Dolot and colleagues cite the idea of "legal irritation" from Prof. Gunther Tuebner. Dolot, et al., *supra* note 79, at 608-609.

[184] *See* St. Mary's Academy of Dipolog City v. Palacio, G.R. No. 164913, Sept. 8, 2010; Central Bank Employees Ass'n, Inc. v. BSP, G.R. No. 148208, 487 Phil. 531, 599, Dec. 15, 2004; Uy v. COA, G.R. No. 130685, Mar. 21, 2000; Ditan v. POEA, G.R. No. 79560, Dec. 3, 1990.

[185] V REC. CONST. COMM'N 106 (Oct. 12, 1986). (Sponsorship speech of President Muñoz-Palma.)

[186] *See, e.g.* Alberto T. Muyot, *Social Justice and the 1987 Philippine Constitution: Aiming for Utopia?*, 70 PHIL. L.J. 311, 320-37 (1996), describing the idea and evolution of "social justice" in Philippine law.

[187] G.R. No. L-22008, 46 Phil. 440, Nov. 3, 1924.

progeny,[188] and adopted an "even more explicit recognition of social and economic rights,"[189] the nation's antitrust laws are now conceived as an expression of the supremacy of public welfare and the State's obligation to ensure that *salus populi est suprema lex*.[190]

This notion of the ascendancy of the public welfare as to modify existing economic policies has been forwarded as early as the deliberations of the Constitutional Convention of the 1935 Philippine Constitution. For instance, during the debates, Manuel A. Roxas, later the first President of the Republic, declared:

> [T]his constitution has definite and well defined philosophy not only political but social and economic. [...] If in this Constitution the gentlemen will find declarations of *economic policy they are there because they are necessary to safeguard the interests and welfare of the Filipino people* because we believe that the days have come when in self-defense, a nation may provide in its constitution those safeguards, the patrimony, the freedom to grow, the freedom to develop national aspirations and national interests, not to be hampered by the artificial boundaries which a constitutional provision automatically imposes.[191]

In his analysis of the 1973 Constitution, Justice Enrique M. Fernando, held the same view, but concluded that the then-charter's social justice provisions go further. He said:

> What is thus stressed is that a fundamental principle as social justice, identified as it is with the broad scope of the police power, has an even basic role to play in aiding those whose lives are spent in toil, with destitution an ever-present threat, to attain a certain degree of economic well-being. Precisely, through the social justice [...]

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[188] "It is to be admitted that there was a period when such a concept did influence American court decisions on constitutional law. As was explicitly stated by Justice Cardozo speaking of that era: '*Laissez-faire* was not only a counsel of caution which would do well to heed. It was a categorical imperative which statesmen as well as judges must obey.' For a long time legislation tending to reduce economic inequality foundered on the rock that was the due process clause, enshrining as it did the liberty of contract, based on such a basic assumption. [...] [T]he Constitutional Convention saw to it that the concept of *laissez-faire* was rejected." Edu v. Ericta, G.R. No. L-32096, 35 SCRA 481, 489-90, Oct. 24, 1970. (Citations omitted.)

[189] Phil. Virginia Tobacco v. Ct. of Indus. Rel., G.R. No. L-32052, 65 SCRA 416, 421, July 25, 1975. (Citation omitted.)

[190] "The welfare of the people is the supreme [or highest] law." *Compare* Cruz v. Pandacan Hiker's Club, Inc., G.R. No. 188213, 778 SCRA 385, 399, Jan. 11, 2016, *and* Fabie v. City of Manila, G.R. No. L-6583, 21 Phil. 486, 492, Feb. 16, 1912.

[191] III PROCEEDINGS OF THE 1935 PHILIPPINE CONSTITUTIONAL CONVENTION (Laurel ed.) 177-8. (1966). (Emphasis supplied.)

provisions, the government is enabled to pursue an active and militant policy to give reality and substance to the proclaimed aspiration of a better life[.][192]

This façade of "constitutional redemption"[193] in Philippine legal history, is especially ripe in the post-Marcos Constitution which saw "the reality of a Filipino nation that has been and still is struggling to come to terms with much social injustice that has been perpetrated over centuries against a majority of its people by foreign invaders and even by its own government."[194] The words of Cecilia Muñoz-Palma, the President of the 1986 Constitutional Commission and later Justice of the Supreme Court, lends clarity to the abstraction of the social welfare and social justice:

THE PRESIDENT: My distinguished colleagues in this Assembly:

***

For the first time in the history of constitution-making in our country, we set forth in clear and positive terms in the Preamble which is the beacon light of the new Charter, the noble goal to establish a just and humane society. This must be so because at present we have to admit that there are so few with so much and so many with so little. We uphold the Rule of Law where no man is above the law, and we adhere to the principles of truth, justice, freedom, equality, love and peace.

***

For the first time, and possibly this is the first and only Constitution which provides for the creation of a Commission on Human Rights entrusted with the grave responsibility of investigating violations of civil and political right by any party or groups and recommending remedies therefor. The new Charter also sets forth quite lengthily provisions on economic, social and cultural rights spread out in separate articles such as the Articles on Social Justice,

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[192] ENRIQUE M. FERNANDO, REFLECTIONS ON THE REVISED CONSTITUTION 40 (1974).

[193] *See* Allan Chester Nadate, *Constitutional Redemption and the Road to Recognizing Indigenous Filipinos in a Transplanted Charter*, 88 PHIL. L.J. 640 (2014), tracing a deliberate mode of social reforms as regards land rights of indigenous Filipino communities.

[194] Atong Paglaum, Inc. v. COMELEC [hereinafter "Atong Paglaum"], G.R. No. 203766, 694 SCRA 477, 575, Apr. 2, 2003 (Sereno, *J.*, *dissenting*.). "This injustice is the fertile ground for the seeds which, watered by the blood spilled during the Martial Law years, ripened to the revolution of 1986. It is from this ferment that the 1987 Constitution was born. Thus, any reading of the 1987 Constitution must be appropriately sensitive to the context from which it arose." *Atong Paglaum*, 694 SCRA at 575 (Sereno, *J.*, *dissenting*).

> Education and Declaration of Principles. It is a document which in clear and in unmistakable terms reaches out to the underprivileged, the paupers, the sick, the elderly, disabled, veterans and other sectors of society. It is a document which opens an expanded improved way of life for the farmers, the workers, fishermen, the rank and file of those in service in the government. And that is why I say that the Article on Social Justice is the heart of the new Charter.[195]

The famous expression in *Calalang v. Williams*[196] by the eminent Justice Jose P. Laurel rings as an apt precursor of this view, that more than "the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated,"[197] social justice means that since the "[p]ublic welfare, then, lies at the bottom"[198] of the State's continued existence, it may "interfere with personal liberty, with property, and with business and occupations"[199] for the purpose of "promot[ing] the general welfare,"[200]—so much so that as early as 1915, the Supreme Court has already that "[n]o legislature can bargain away the public health [or] public safety."[201] It remains true now as it was true more than a century ago.

VI. TOWARDS THE COMMON WELFARE AND PUBLIC INTEREST: THE PUBLIC HEALTH RATIONALE OF EXCISE TAXATION OF TOBACCO PRODUCTS

This work has provided a systematic exposition of what the competition clauses under Section 19, Article XII are in relation to its adjunct provisions in Section 1(2), Article XII and Section 11(1), Article XVI. Through an exhaustive review of constitutional deliberations, as well as an analysis of Supreme Court cases stretching for over a century, the Article rearticulates the competition clauses as a constitutional norm a cognate of (1) pro-competition policy as commonly articulated in restraint of trade jurisprudence and (2) the public welfare. This work now properly situates and highlights public welfare or the "common good" as a discrete element, one that is "overriding" by virtue of public interest.

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[195] *See* V REC. CONST. COMM'N 105 (Oct. 12, 1986), *quoted in Atong Paglaum*, 694 SCRA 477, 576-7 (Sereno, *J., dissenting*.).

[196] [Hereinafter "Calalang"], G.R. No. 47800, 70 Phil. 726, Dec. 2, 1940.

[197] *Id.* at 734.

[198] *Id.* at 733.

[199] *Id.*

[200] *Id.*

[201] *Gomez Jesus*, 31 Phil. at 225.

With this normative background, this Article proceeds to demonstrate how an imposition of a two-tier taxation structure for tobacco products such as that proposed by H. No. 4144, or similar excise tax regimes, results in a violation of the competition clauses. The rationale of the current excise taxation regime—which H. No. 4144 seeks to reverse—clarifies the public policy behind it as both a measure of public health in general, and one meant to unburden the State from the economic effects of smoking and tobacco use. To situate the same, the history of tobacco excise taxation in the Philippines must be summarized and the public health rationale of the Sin Tax Reform Act of 2012 made concrete.

A. Tobacco Use in the Philippines: A Public Health Burden

More than one in four Filipinos smoke. More specifically:

> [Twenty percent] or 17.3 million Filipino adults age 15 years and older are current tobacco smokers [...] and [a]lmost half (48% or 14.6 million) of adult males and 9 percent (2.8 million) of adult females are current smokers. Moreover, 23% of Filipino adults are daily tobacco smokers: 38% for males and 7% for females.[202]

In addition to those numbers, the prevalence of smoking among the Filipino youth is also "significant."[203]

These public health statistics put the country as among the largest consumers of cigarettes in the world,[204] confirming as well the tobacco industry's strong position in public health policy, as well as in domestic and

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[202] Carmelita N. Ericta, *17.3 Million Filipino Adults are Current Tobacco Smokers*, PHIL. STATISTICS AUTHORITY, *available at* https://psa.gov.ph/article/173-million-filipino-adults-are-current-tobacco-smokers (last accessed Apr. 27, 2017). "Among adults who smoked 12 months before the survey, 48% made a quit attempt, while only 5% made a quit attempt and successfully quit smoking. More than one-third (37%) of adults who worked indoors or outdoors with an enclosed area at their workplace were exposed to tobacco smoke. Among adults who used public transportation a month prior to the survey, more than half (55%) were exposed to second-hand smoke, while among those who visited government buildings or offices, more than one-third (37%) were exposed to second-hand smoke." *Id.*

[203] Felix Eduardo P. Punzalan, Paul Ferdinand M. Reganit, Eugene B. Reyes & The National Nutrition & Health Examination Survey Group, *Smoking Burden in the Philippines*, 47 ACTA MEDICA PHILIPPINA 28, 29 (2013), *citing* Department of Health, et al., 2009 Philippines' Global Adult Tobacco Survey (GATS) Country Report, at 8, (2010), *available at* http://www.who.int/tobacco/surveillance/2009_gats_report_philippines.pdf.

[204] *See, e.g. PH among top 20 'smoking' countries*, RAPPLER, June 26, 2012, *at* http://www.rappler.com/nation/7632-doh-philippines-among-top-20-nations-with-highest-smoking.

international trade, and politics.[205] Coupled with the fact that smoking kills two in three smokers,[206] the public health impact of tobacco use in the Philippines is astounding.

The analysis of the 2010 *Country Report* of the DOH is particularly damning:

> Annual productivity losses from premature deaths for four smoking-related diseases (lung cancer, cardiovascular, coronary artery disease, and chronic obstructive pulmonary diseases) investigated in "Tobacco and Poverty Study in the Philippines" ranged from USD 65.4 million to USD 1.08 billion using the conservative Peto-Lopez estimates. It could be as high as USD 2.93 billion using the Smoking Attributable Morbidity and Mortality and Economic Costs (SAMMEC) estimates. Overall productivity losses from the four diseases were estimated at USD 2.23 billion using Peto-Lopez figures to USD 5.00 billion using SAMMEC estimates. Productivity losses from work days lost, on the other hand, were estimated at about USD 120 million to as high as USD 185 million. Total costs of illness for the four smoking-related diseases studied were estimated at USD 6.05 billion using SAMMEC figures while Peto-Lopez estimates yield a more conservative but still substantial loss of USD 2.86 billion.[207]

These estimates come from four diseases alone.[208] Cigarette smoking, however, "harms nearly every organ of the body"[209] and causes more deaths

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[205] "The politically *laissez-faire* Philippines presented tobacco companies with an environment ripe for exploitation. The Philippines has seen some of the world's most extreme and controversial forms of tobacco promotion flourish. Against international standards of progress, the Philippines is among the world's slowest nations to take tobacco control seriously." K. Alechnowicz & S. Chapman, *The Philippine tobacco industry: "the strongest tobacco lobby in Asia"*, 13 (Suppl II) TOBACCO CONTROL ii71 (2004).

[206] Emily Banks, et al., *Tobacco smoking and all-cause mortality in a large Australian cohort study: findings from a mature epidemic with current low smoking prevalence*, 13 BMC MED. 1 (2015). *Compare with* World Health Org. Media Centre, *Tobacco*, WORLD HEALTH ORGANIZATION WEBSITE (June 2016), *available at* http://www.who.int/mediacentre/factsheets/fs339/en/ (last accessed Apr. 27, 2014).

[207] DOH, et al., 2009 Philippines' Global Adult Tobacco Survey (GATS) Country Report, at 11, (2010), *available at* http://www.who.int/tobacco/surveillance/2009_gats_report_philippines.pdf.

[208] Another estimate provides for higher figures. DOH, *Philippines' Department of Health says: PROTECT YOUR FAMILY, STOP SMOKING!*, DOH WEBSITE, Oct. 14, 2016, *at* http://www.doh.gov.ph/node/7806.

[209] U.S. Centers for Disease Control & Prevention (US CDC), *Health Effects of Cigarette Smoking*, US CDC WEBSITE, *at* https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking, *citing* U.S. Department of Health and Human Services, The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General (2014).

each year than human immunodeficiency virus or HIV, illegal drug use, alcohol use, motor vehicle injuries, and firearms-related incidents *combined*.[210]

In the last four decades, there is a steadily rising number of deaths from non-communicable diseases, in particular, diseases of the heart, cerebrovascular diseases and malignant neoplasms.[211] The recognition of this health hazard calls for the reduction of tobacco use through effective policies such as excise taxation, which is recognized by the World Health Organization (WHO) as "the most cost-effective way to reduce tobacco use, especially among young and poor people."[212] In addition, "[a] tax increase that increases tobacco prices by 10% decreases tobacco consumption by about 4% in high-income countries and about 5% in low- and middle-income countries."[213] Moreover, tobacco tax revenues derived from such measures "are on average 269 times higher than spending on tobacco control, based on available data,"[214] which bolster the viability of excise taxation of tobacco products as a revenue generating measure. The legislature has not been unaware of this evidence.

B. Tobacco Taxation Regimes in the Philippines: Historical Perspectives

The tobacco tax regimes in the country have shifted from a multi-tier system towards a unitary system. During the latter period of Martial Law, tobacco products were taxed under a multi-tier system.[215] Cigarettes were taxed based on price, with different applicable rates for cigarettes that were domestically manufactured and those that were imported. The tax also varied depending on the gross selling price of the manufacturer or importer, and the number of sticks per pack.

After the People's Revolution in 1986, President Corazon Aquino aimed to simplify the methods of computation and collection of tobacco taxes by rationalizing the imposition of excise taxes. During her term, cigarettes were taxed on different rates based on the whether the cigarettes were packed in 30s, packed in 20s, or whether they are sourced from foreign manufacturers.

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[210] *Id., citing* A.H. Mokdad, et al., *Actual Causes of Deaths in the United States*, 291 JAMA 1238 (2004).

[211] MARIO VILLAVERDE, ET AL., HEALTH PROMOTION AND NON-COMMUNICABLE DISEASES IN THE PHILIPPINES (2012).

[212] World Health Org. Media Centre, *Tobacco*, WORLD HEALTH ORGANIZATION WEBSITE (June 2016), *available at* http://www.who.int/mediacentre/factsheets/fs339/en/.

[213] *Id.*

[214] *Id.*

[215] Exec. Order No. 978 (1984). This imposes an *ad valorem* tax and revises the specific tax rates and maximum retail prices of cigarettes.

Cigarette packs containing 20 sticks where further classified into locally manufactured, or locally manufactured but having a foreign brand.[216]

In July 1996, R.A. 8240[217] amended the classification of cigarettes and the imposable excise taxes. The law provided a four-tiered system for taxing machine-packed cigarettes. The classification of cigarettes and hence the amount of tax to be imposed depended on net retail prices—higher specific taxes were imposed on more expensive cigarettes while lower taxes were imposed on cheaper ones.

In December 2004, the 13th Congress enacted a new law[218] which increased the excise taxes imposed on tobacco products but retained the classifications depending on their retail prices–low-priced, medium-priced, high-priced, and premium-priced. In particular, a complicated four-tier structure was utilized for machine-packed cigarettes.

The Sin Tax Reform Act of 2012 was a product of more than 15 years of advocacy work to reform the tobacco excise tax system.[219] Under this law, the aforementioned four-tiered system above was abolished and in its place, a two-tiered system, based on net retail price, was provided for the first four years of the law's implementation.[220] On its fifth year, it was replaced by a uniform tax for all cigarettes, adjusted annually at a rate of 4% to account for inflation.

Before the passage of R.A. 10351, the Philippines became a party to the WHO Framework Convention on Tobacco Control (FCTC).[221] Under Article 6 of the FCTC, "price and tax measures are [recognized as] an effective and important means of reducing tobacco consumption" and States Parties are obliged to implement "tax policies, and where appropriate, price policies on

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[216] Exec. Order No. 22 (1986). This further amended certain provisions of the National Internal Revenue Code, as amended.

[217] (1996). An act amending Sections 138, 140, & 142 Of the National Internal Revenue Code, as amended, and for other purposes.

[218] Rep. Act No. 9334 (2004). This amended the Tax Code provisions on excise taxes on alcohol and tobacco products.

[219] *See, e.g.* KAI KAISER, CARYN BREDENKAMP & ROBERTO IGLESIAS, SIN TAX REFORM IN THE PHILIPPINES: TRANSFORMING PUBLIC HEALTH FINANCES, HEALTH, AND GOVERNANCE FOR MORE INCLUSIVE DEVELOPMENT (2016); *Comprehensive Tax Reform in the Philippines: Principles, History and Recommendations*, Univ. Phil. School of Econ. Discussion Paper No. 2016-10 (Sept. 2016), at 23 (discussing the various motivations behind the reform).

[220] TAX CODE, art. 145(C), *as amended by* R.A. 10351, § 5.

[221] World Health Organization, WHO Framework Convention on Tobacco Control [hereinafter "FCTC"], Sept. 23, 2003, 2302 U.N.T.S. 166. The treaty was signed by the Philippines on September 23, 2003 and was concurred in by the Senate on April 25, 2005 with the instrument of ratification deposited on June 6, 2005.

tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption."[222]

C. Public Policy Dimension of the Sin Tax Laws

The public policy dimension of tobacco taxation reform is readily apparent from the rationale of adopting the Sin Tax Reform Act of 2012. According to the law's lead government agency proponent, it is "primarily a health measure with revenue implications, but more fundamentally, it is a good governance measure."[223]

The Sin Tax Reform Act of 2012 helps finance the Universal Health Care program of the government with financial allocations through incremental revenues.[224] This has particularly been fruitful in recent years. The DOH claims that:

> In [collection years] 2013 and 2014 the actual collection has exceeded the projected Sin tax incremental revenue included in the DOH budget, resulting to balances amounting to PHP 14.22 B from the 2013 collections, and PHP 8.81 B from the 2014 collections. In 2015, the actual collection was lower by PHP 6.72 B. The total balance from the Sin tax collections is PHP 16.32 B.[225]

At the time of the law's enactment, the administration's flagship health agenda, under the banner of Kalusugang Pangkalahatan, was projected to cost 682.1 billion pesos for the remainder of the term of then President Benigno Aquino III.[226] Of this amount, the national government's financing requirement was projected to be 224.8 billion pesos or 33% share of the total health agenda cost.[227] In this context, the government was hard pressed to find additional sources of revenues to finance its main health agenda.

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[222] FCTC, art. 6(2)(a).

[223] DOF, *Sin Tax Reform*, DOF WEBSITE, *at* http://www.dof.gov.ph/index.php/advocacies/sin-tax-reform/ (last accessed Apr. 27, 2017).

[224] TAX CODE, § 288, *as amended by* R.A. 10351, § 8.

[225] DOH, Sin Tax Law Incremental Revenue for Health Annual Report C.Y. 2016, *available at* http://www.doh.gov.ph/sites/default/files/publications/2016%20DOH%20Sin%20Tax%20Report.pdf; *See also Sin tax law boosts PH revenue 155%*, MANILA TIMES, July 18, 2016, *at* http://www.manilatimes.net/sin-tax-law-boosts-ph-revenue-155/274588/.

[226] *Sin Tax*, THE OFFICIAL GAZETTE WEBSITE, Sept. 19, 2012, *available at* http://www.gov.ph/sin-tax.

[227] *Id.*

The law similarly "simplified the current excise tax system on alcohol and tobacco products and fixed long standing structural weaknesses, and addresses public health issues relating to alcohol and tobacco consumption."[228]

As discussed in Part IV(A), *supra*, the steady rise of tobacco use is a risk factor in many illnesses and a leading cause of mortality and morbidity. And since studies have conclusively established that there is a direct link between the high consumption of tobacco products[229] and cheap cigarette price,[230] the tobacco tax reform, which increases the price of tobacco products was seen as a logical step to address the high smoking prevalence problem in the Philippines.

At the core of tobacco tax reform is attaining the highest imposable tax burden on tobacco products that is politically feasible to discourage smoking with the greatest impact possible. In a review of more than 100 studies from various countries, including low- and middle-income countries, Professors Frank Chaloupka, Ayda Yurekli, and Geoffrey T. Fong have categorically concluded that:

> Significant increases in tobacco taxes are a highly effective tobacco control strategy and lead to significant improvements in public health. The positive health impact is even greater when some of the revenues generated by tobacco tax increases are used to support tobacco control, health promotion and/or other health-related activities and programmes. In general, oppositional arguments that higher taxes will have harmful economic effects are false or overstated.[231]

To attain this goal, it is crucial to maintain the unitary mode of taxation in order to facilitate more efficient tax administration, and more importantly, to prevent downshifting behavior to lower-priced brands.

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[228] DOF, *supra* note 223.

[229] The DOH estimates that Filipinos on average consume 1,073 sticks annually. *The Official Gazette*, *supra* note 226.

[230] *See* SOUTHEAST ASIAN TOBACCO CONTROL ALLIANCE, ASEAN TOBACCO TAX REPORT CARD: REGIONAL COMPARISONS AND TRENDS *(2010)*, *available at* http://seatca.org/dmdocuments/ASEANTaxReportCardMay13forWEB.pdf.; Frank Chaloupka, Teh-wei Hu, Kenneth E. Warner, Rowena Jacobs & Ayda Yurekli, *The taxation of tobacco products*, *in* TOBACCO CONTROL IN DEVELOPING COUNTRIES 237, 244 & 267 (2000).

[231] Frank J. Chaloupka, Ayda Yurekli & Geoffrey T. Fong, *Tobacco taxes as a tobacco control strategy*, 21 TOBACCO CONTROL 172, 172 & 179 (2012).

VII. H. NO. 4144 AS SEEN FROM THE RE-ARTICULATED COMPETITION CLAUSES

At first glance, H. No. 4144 merely seeks to continue with the status quo when it was filed; it sought to reintroduce the two-tier system of taxation, albeit with a slightly higher tax rate.

In its simplicity, it hides the fact that it creates a market condition favorable to a particular set of players, which means that it espouses unfair competition or a restraint of trade that could warrant invalidation under the competition clauses of Section 19, Article XII. This should be rendered invalid in light of the public welfare considerations of the Constitution. The fact that its anti-competitive regime is coupled with incentives for tobacco products, in contrast to the overall goal of decreased tobacco consumption and smoking cessation,[232] means that, in this final analysis, the regime will not stand constitutional scrutiny.

A. Evidentiary Requirements based on Tobacco Industry Litigation

The characterization of tobacco taxation regimes as a case of restraint of trade is not without precedent. The argument was forwarded by British American Tobacco Corporation in *British American Tobacco v. Camacho*[233] in its Motion for Reconsideration before the Philippine Supreme Court in 2009.[234]

But because *British American Tobacco* assailed Section 145 of the Tax Code, as recodified by the precursor of R.A. 10351, R.A. 8240, based on "the equal protection and uniformity clauses of the Constitution,"[235] the Court

[232] *See* Laurence Anthony Go, Are Sin Taxes Sinful? A Policy Paper on Philippine Sin Taxes (Feb. 2012), *available at* http://www.aer.ph/tobaccotax/wp-content/pdf/Are_Sintax_Sinful.pdf

[233] [Hereinafter "British American Tobacco I"], G.R. No. 163583, 562 SCRA 511, Aug. 20, 2008. The conceptual treatment of *British American Tobacco* of both "unfair competition" and "restraint of trade," or "combination in restraint of trade," appears to be the same insofar as a law's validity is in question on the grounds of CONST. art. XII § 19.

[234] [Hereinafter "British American Tobacco II"], G.R. No. 163583, 585 SCRA 36, Apr. 15, 2009. This affirmed the Court's previous decision. For an incisive critique of the decision, *see* Roentgen F. Bronce & April Carmela B. Lacson, *When Some Sins are More Equal than Others: A Critique of* British American Tobacco v. Camacho *and the Rational Basis Test*, 87 PHIL. L.J. 183 (2013).

[235] "Th[e] petition for review assails the validity of: (1) Section 145 of the National Internal Revenue Code (NIRC), as recodified by Rep. Act No. 8424; (2) Rep. Act No. 9334, which further amended Section 145 of the NIRC on January 1, 2005; (3) Revenue Regulations Nos. 1-97, 9-2003, and 22-2003; and (4) Revenue Memorandum Order No. 6-2003. Petitioner

found that the petitioner's invocation "cannot be raised for the first time on appeal."[236] Nonetheless, the Court presented guidelines as to how an unfair competition challenged may successfully be invoked.

The standard laid down in *British American Tobacco* is that a constitutional challenge founded on Section 19, Article XII of the Constitution may lie only if the impediments in competition are "substantial"[237] or "significant."[238] This burden is discharged by the party impugning the law's constitutionality upon showing of adequate "factual foundations, as supported by verifiable documentary proof, which would establish, among others, the cigarette brands in competition with each other [...] a sufficient point of comparison [...], as well as the extent of the impact on the competition in the cigarette market[.]"[239] The body of evidence must demonstrate the party's substantially and significantly restricted ability to "produce cigarettes that can compete" against the allegedly favored manufacturers in the same segment of commerce or "bracket."[240]

While the effects of H. No. 4144 may be contrasted to *British American Tobacco* such that the unfair competition or restraint of trade challenge in the latter principally contended that the laws and regulations impugned constituted "a substantial barrier to the entry of prospective players,"[241] the decision has important implications on the present inquiry.

British American Tobacco adverted to Section 19, Article XII of the Constitution in saying that the "cumulative effect of the operation of the classification freeze provision is to perpetuate the oligopoly of intervenors Philip Morris and Fortune Tobacco in contravention of the constitutional edict for the State to regulate or prohibit monopolies, and to disallow combinations in restraint of trade and unfair competition."[242] This contention is pertinent as the unfair competition and restraint of trade that will probably result from the enactment of H. No. 4144 may create a similar effect of perpetuating market forces conducive to market capture, albeit for a different beneficiary and tobacco manufacturer. There are, however, some important caveats to this decision.

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argues that the said provisions are violative of the equal protection and uniformity clauses of the Constitution." *British American Tobacco I*, 562 SCRA at 521.

[236] *British American Tobacco II*, 585 SCRA at 47.

[237] *Id.*

[238] *Id.*, *citing Tatad I*, 282 SCRA 368.

[239] *Id.* at 48-9.

[240] *Id.* at 49.

[241] *Id.* at 46.

[242] *Id.*

While the Supreme Court in *British American Tobacco* required evidence to be significant to show that the competition clauses are breached, such pronouncements go against what jurisprudence has set. In *Tatad I*, for instance, the Supreme Court set a higher standard of scrutiny for oligopolistic arrangement. In that landmark unanimous en banc decision, the Court said: "Monopolistic or oligopolistic markets deserve our *careful scrutiny* and laws which barricade the entry points of new players in the market should be viewed with suspicion."[243] And in *Gokongwei, Jr.*, the Court merely looked into the "tendency" of certain acts to create unreasonable restraints of trade, and not a direct showing or evidence of the effects.[244] Notably, this reading is more in line with American antitrust construction of restraint of trade.[245]

B. Characterization of H. No. 4144 as a Restraint of Trade

The Sin Tax Reform Act of 2012 gradually phased out the tiered system before mandating that a unified system be implemented in 2017.[246] As

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[243] *Tatad I*, 281 SCRA 330, 359. "Again, we underline in scarlet that the fundamental principle espoused by section 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market. But the competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail." *Tatad I*, 281 SCRA at 358.

[244] *Gokongwei, Jr.*, 89 SCRA at 376-8.

[245] "What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." California Dental Ass'n. v. Fed. Trade Comm'n, 526 U.S. 756, 781 (1999). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (finding that agreement among competitors to buy spot-market oil as unlawful *per se* because of its tendency to restrict price competition).

This is in accord with the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a), which provides that: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce [...] *where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce*, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them[.]" (Emphasis supplied.) *See Gokongwei, Jr.*, 89 SCRA 378-79 (referring to the Clayton Act in constructing the competition clauses in the 1973 Constitution).

[246] "The bill approaches the reform in a more pragmatic manner by proposing to unify the excise tax rates in phases in aspects where a one-time unification proves to be abrupt. It is proposed that a three-year transition period be observed in unifying the excise tax rates on cigarettes." H. No. 5727, 15th Cong., 2nd Sess., Explanatory Note (2012).

mentioned, the unitary system was intended to address "problems attendant to [the then-prevailing] structure, such as [an] unfair tax treatment."[247]

But unintentionally, the two-tier system created an unintended consequence in consumer behavior called "downshifting"[248] This has historically benefited only tobacco manufacturers selling low-priced cigarettes when multi-tier taxation creates disparate retail pricing between brands.[249] As a direct and inevitable consequence, the market share of Mighty Corporation—and vocal supporter of the measure—has increased as a result of the enhanced marketability of their local non-premium cigarette products.[250] In contrast, it has drastically eroded the market shares of other players,[251] which are not covered by the lower tax rate under the two-tier structure of the 2013-2016 implementation of R.A. 10351.

The enactment of H. No. 4144 would transform the Tax Code into a law of preferential treatment for only a certain fraction of the industry, and to Mighty Corporation in particular; at the same time, it would remove the rationale legitimizing the distinction that R.A. 10351 in its pre-2017 implementation carried.[252]

Mighty Corporation itself has admitted and attributed the significant and abrupt increase in its market share to the implementation of the two-tier tax structure at the start of the effectivity of R.A. 10351 in 2013.[253] To quote

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[247] H. No. 5727, 15th Cong., 2nd Sess., Explanatory Note (2012).

[248] In the context of tobacco consumption, downshifting (also known as downtrading) is the practice of substituting a brand of cigarettes for a cheaper one because excise taxes have made the former too expensive. For documentation on how downshifting has affected the local tobacco trade due to the implementation of R.A. 10351, *see How a small but mighty player changes PH cigarette industry*, MANILA STANDARD, Dec. 29, 2013, *available at* http://manilastandard.net/business/136918/how-a-small-but-mighty-player-changes-ph-cigarette-industry.html.

[249] MARVIC M.V.F. LEONEN, DEBORAH K. SY, IRENE PATRICIA N. REYES & JO-ANN J. LATUJA, TAXING HEALTH RISKS 24 (University of the Philippines College of Law & HealthJustice Philippines, Quezon City, Philippines 2010).

[250] *See 'Low' price saves firm $28M*, MALAYA, Sept. 24, 2013, *available at* http://www.malaya.com.ph/business-news/business/mighty-corp-'low'-price-saves-firm-28m.

[251] Ian Sayson & Cecilia Yap, *Tobacco Giant Fights Philippine Market Share Decline*, BLOOMBERG, Feb. 12, 2014, *available at* https://www.bloomberg.com/news/articles/2014-02-12/tobacco-giant-fights-philippine-market-share-decline.

[252] "With a unitary rate, problems attendant to the current structure, such as unfair tax treatment between and among tobacco and alcohol products, will be addressed. A unitary rate will lend the tax structure more revenue-protective [sic] since it will avoid the shifting of demand to the least-taxed brand of tobacco and alcohol products." *See supra* note 246.

[253] *Cigarette maker Mighty Corp on positive outcome of its market share*, MIGHTY CORPORATION WEBSITE, *at* http://mightycorp.com.ph/cigarette-maker-mighty-corp-on-positive-outcome-of-its-market-share/ (last accessed Apr. 27, 2017).

the corporation: "The steep increase in excise taxes for tobacco products produced a dramatic reconfiguration of the market. Where once a multinational corporation enjoyed near-monopoly dominance of the market, [Mighty Corporation] has now eked out major market share."[254] They further added: "Philip Morris-Fortune Tobacco enjoyed almost complete dominance of the local cigarette market before the imposition of more punitive 'sin taxes.' In a matter of only a few years, local player Mighty Corp. has taken a significant market share by catering to lower-priced products."[255]

Mighty Corporation has also admitted that the current the unitary tax system is a threat to its emerging dominance, halting the windfall[256] unintentionally brought by the transitory two-tier system. In order to preserve the balancing of interests between the ultimate goal of unitary taxation—public health and revenue regulation—and relative market stability, the Sin Tax Reform Act of 2012 must remain.

C. Testing H. No. 4144 Against Public Welfare

The fact that tobacco consumption is itself discouraged by extant laws and regulations[257] means that there is nothing "reasonably necessary" to perpetuate restraint of trade through the two-tier system which H. No. 4144 seeks to reintroduce. In the same vein, there is nothing that can preclude the legislature from eliminating smoking altogether through taxation, in light of the supremacy of general welfare interests over the mere statutory privilege granted to tobacco manufacturers. But because the legislature chose not to, and instead recognized the economic interests of tobacco manufacturers, it is burdened by the constitutional limitation of trade neutrality and equal taxation treatment in

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[254] *Mighty Corp: Leader of local tobacco industry*, MIGHTY CORPORATION WEBSITE, *at* http://mightycorp.com.ph/mighty-corp-leader-of-local-tobacco-industry (last accessed Apr. 27, 2017).

[255] *Id. But see*, Jerry E. Esplanada, *Traders urge tight watch over maker of cheap cigarettes*, PHIL. DAILY INQUIRER, Jan. 28, 2014, *at* http://business.inquirer.net/161939/traders-urge-tight-watch-over-maker-of-cheap-cigarettes.

[256] "[D]espite the decline in smokers' population, Barriento [sic] said Mighty is still positioning for the forthcoming unitary excise tax rate of PHP 26 per cigarette packet by 2017. Barrientos said Mighty expects demand for low-premium cigarette brands will decline in 2017, while premium brands may regain their popularity in the next three years." *Mighty Corp continues to increase market share*, MIGHTY CORPORATION WEBSITE (Oct. 29, 2014), *at* http://mightycorp.com.ph/mighty-corp-continues-to-increase-market-share (last accessed Apr. 27, 2017).

[257] *See* Rep. Act No. 9211 (2003). The Tobacco Regulation Act of 2003; Rep. Act No. 10643 (2014). The Graphic Health Warnings Law; Civil Service Commission (CSC)-DOH Joint Memo. Circ. No. 2010-01 (2010). Protection of the Bureaucracy Against Tobacco Industry Interference.

terms of competition, which themselves looks into public welfare considerations.

More specifically, the enactment of H. No. 4144 would run afoul of public welfare as it renders inutile the barriers put in place by the Sin Tax Reform Act of 2012 to protect public health,[258] and especially the human right to health of the poor and marginalized, who are disproportionately affected by inordinate downshifting.[259] It also goes against the well-defined State policies on discouraging tobacco farming in line with the public health implications of tobacco trade and tobacco use.[260]

The imposition of the two-tier structure exaggerates the unfair and unequal treatment that favors certain tobacco manufacturers *over the public welfare of the Filipino people*, despite the State's constitutional duty to protect and promote the right to health.[261] The classification that it makes goes beyond the "reasonable and natural classifications" that taxation, as an inherent power of the State, permits.[262]

And despite the foundational precept that "it is as much the interest of the state that public health should be preserved as that life should be made secure,"[263] H. No. 4144 wholly and profoundly neglects its implications on the lives of millions of Filipinos who will be affected directly by smoking-related diseases and indirectly through second-hand smoke—a serious peril and clear danger that even the Supreme Court has acknowledged.[264] As this Article has shown, this could not be countenanced.

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[258] "[I]t internalizes the negative externalities of alcohol drinking and tobacco smoking." *See supra* note 246.

[259] "The system follows a multi-tiered tax structure that is prone to the *downshifting* of smokers to cheaper cigarette brands which does not discourage smoking." Official Gazette, *supra* note 226. (Emphasis in the original.)

[260] *See, e.g.* Rep. Act No. 9211 (2003), § 3(f) ("It is the main thrust of this Act to: [...] [a]ssist and encourage Filipino tobacco farmers to cultivate alternative agricultural crops to prevent economic dislocation."); Rep. Act No. 8240 (1996), § 8 (providing for funding for an "alternative farming system").

[261] CONST. art. II, § 15. CONST. art. XIII, §§ 11-13 further articulate the right to health as a social justice issue.

[262] Abakada Guro Party List v. Ermita, G.R. No. 168056, 469 SCRA 14, 139, Sept.1, 2005.

[263] *Gomez Jesus*, 31 Phil. at 228.

[264] *See, e.g.* Estate of Posedio Ortega v. CA, G.R. No. 175005, 553 SCRA 649, 657, Apr. 30, 2008, where the Court said:

> Lung cancer is a disease in which malignant (cancer) cells form in the tissues of the lung. Its main cause is tobacco use, including smoking cigarettes, cigars, or pipes, now or in the past. While there are indeed other risk factors for lung cancer, their effect on lung cancer, even if said factors are taken together, is very small compared to the effect of tobacco smoking.

VIII. CONCLUSION

The introduction of the unitary system of tobacco taxation was done to address the failures of the previous multi-tier tax structure, which include lower tobacco excise tax revenue collection, end-user downshifting, tax avoidance, and corruption. The unitary system's same rationale against downshifting saves lives[265] and, in the long-term, billions of pesos in government expenditures from disability compensation and healthcare costs, and lost productivity from premature deaths in the workforce. The Secretary elucidates the DOH's view:

> Tobacco is the single biggest cause of cancer in the world, and causes one of every three deaths from cardiovascular diseases; the health consequences of smoking a cheap cigarette and a more expensive premium cigarette are the same. That is the reason Rep. Act 10351 mandates a uniform excise tax for all cigarettes by 2017—whether hand rolled, machine made, premium or low cost cigarettes.
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> ***
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> Indeed, the global best practice in tobacco taxation policy is uniform specific taxation for the following reasons: First, a uniform tax structure is easier to administer compared to a tiered system. Second, uniform system enhances the public health impact of tobacco taxation as it eliminates the price gaps between premium and lower-priced cigarettes and therefore minimizes opportunities to switch to less-expensive cigarette brands.[266]

These are, in themselves, very compelling reasons for the continued full implementation of the Sin Tax Reform Act of 2012. But despite international acclaim, [267] H. No. 4144 now seeks to undo its most important innovation, undermining the successes of this important public health legislation, threatening to negate the law's impact in protecting the most

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[265] STELLA LUZ A. QUIMBO, ADELE A. CASORLA, MARINA MIGUEL-BAQUILOD, FELIPE M. MEDALLA, XIN XU & FRANK J. CHALOUPKA, THE ECONOMICS OF TOBACCO AND TOBACCO TAXATION IN THE PHILIPPINES 37 (International Union Against Tuberculosis and Lung Disease, Paris, France 2012).

[266] *See supra* note 23.

[267] World Health Organization, *"Sin Tax" expands health coverage in the Philippines*, WORLD HEALTH ORGANIZATION WEBSITE, May 2015, *at* http://www.who.int/features/2015/ncd-philippines/en; Department of Foreign Affairs, *WHO Director General lauds PH for passage of Sin Tax Law*, THE OFFICIAL GAZETTE WEBSITE (June 6, 2014), *at* http://www.gov.ph/2014/06/06/who-director-general-lauds-ph-for-passage-of-sin-tax-law; KAISER ET AL., *supra* note 219.

vulnerable members of society—the youth, the poor, and the sick[268]—because of the inevitable massive downshifting that will result from the increased market share for cheaper brands of cigarettes. The holiday rush seen in the House of Representatives to pass H. No. 4144 guarantees tobacco manufacturers hundreds of billions of pesos, but predisposes another generation of Filipinos to cardiovascular diseases, cancers, chronic respiratory disorders, diabetes, and other top causes of mortality and morbidity.

The imposition of a two-tier system goes against the very grain of the Constitution as regards the right to health, which the framers, saw as an intrinsic, cardinal, and fundamental element of social justice.[269] It would be unfortunate to allow this to happen, more so because the right to health is the bedrock of the public welfare. It is, after all, "a fundamental human right *indispensable* for the exercise of [all] other human rights."[270]

EPILOGUE

In March 2017, President Rodrigo R. Duterte ordered the arrest of the owner of Mighty Corporation for alleged economic sabotage.[271] The controversy stemmed from the alleged use of fake cigarette tax stamps that resulted to revenue loss of an estimated 15 billion pesos.[272] The government

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[268] The estimated impact of a uniform specific tax reduces "premature deaths by over 1.5 million" and averting "almost 2.3 million deaths among youth." QUIMBO ET AL., *supra* note 265, at 34-9.

[269] *See* IV REC. CONST. COMM'N 907-907 (Sept. 22, 1986).

[270] Office of the High Commissioner for Human Rights, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), ¶ 1. (Emphasis supplied.)

[271] Pia Ranada, *Duterte orders arrest of Mighty Corp owner*, RAPPLER, Mar. 7, 2017, *at* http://www.rappler.com/nation/163473-duterte-bribery-attempt-cigarette-company.

[272] Nestor Corrales, *Duterte orders arrest of Mighty Corp owner for 'economic sabotage'*, PHIL. DAILY INQUIRER, Mar. 7, 2017, *available at* http://newsinfo.inquirer.net/878333/ duterte-orders-arrest-of-mighty-corp-owner-for-economic-sabotage; Ben O. de Vera, *BIR files P9.5-billion tax evasion case vs. Mighty Corp.*, PHIL. DAILY INQUIRER, Mar. 22, 2017, *available at* http://newsinfo.inquirer.net/882779/bir-files-p9-5-billion-tax-evasion-case-vs-mighty-corp.

continues to build its case,[273] even mulling the closure of the local cigarette manufacturer.[274]

In the same month, the DOH reported that "one million Filipinos have quit smoking—the biggest decline we have seen in the Philippine history" primarily because of R.A. 10351,[275] which made tobacco products less affordable and accessible. This important public health milestone would evince to both the effectivity of tobacco taxation in curbing smoking and preventing smoking-related diseases, and the necessity of safeguarding the gains of increased tobacco excise taxation, more so considering that—in the words of the Health Secretary—"[t]here is still much to be done in our country's efforts to limit and curtail tobacco use, especially for our economically disadvantaged countrymen who are the most affected with diseases linked to long use of tobacco product."[276]

Indeed, even though these supervening events diminish the chances that H. No. 4144 will pass before the Senate—its principal supporter now partly discredited and its justifications repudiated by R.A. 10351's public health impact—the health, wellness, and quality of life of millions of Filipinos remain in peril.

While these supervening events diminish the chances that H. No. 4144 will pass before the Senate (its principal supporter now partly neutralized), this is not, however, *per se*, a victory for health.

The tobacco industry, now with Philip Morris Fortune Tobacco Corporation continuing with its virtual monopoly, will continue to kill, while

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[273] Kristine Joy V. Patag, Ian Nicolas P. Cigaral & Elijah Joseph P. Tubayan, *Government bears down on Mighty, building 'airtight case'*, BUSINESSWORLD, Mar. 8, 2017, *at* http://www.bworldonline.com/content.PHP?section=TopStory&title=government-bears-down-on-mighty-building-airtight-case&id=141846; Vivienne Gulla, *BIR to file more raps vs Mighty Corp*, ABS-CBN NEWS, Apr. 5, 2017, *at* http://news.abs-cbn.com/business/04/05/ 17/bir-to-file-more-raps-vs-mighty-corp.

[274] Chino Leyco, *BIR likely to order Mighty Corp. closure next month*, MANILA BULL., Apr. 17, 2017, *available at* http://news.mb.com.ph/2017/04/17/bir-likely-to-order-mighty-corp-closure-next-month/.

[275] Tina G. Santos, *Over 1M Pinoys have quit smoking – DOH*, PHIL. DAILY INQUIRER, Mar. 20, 2017, *available at* http://newsinfo.inquirer.net/882269/over-1m-pinoys-have-quit-smoking-doh; Macon Ramos-Araneta. "[The Health Secretary] said the increase in the prices of tobacco products due to the imposition of heavier taxes starting in 2013 caused the decline in tobacco use, which would likely reduce the P188 billion in losses annually from tobacco-related hospitalization and lower productivity." *1m quit smoking—DOH*, MANILA STANDARD, Mar. 21, 2017, *available at* http://manilastandard.net/news/top-stories/232276/ 1m-quit-smoking-doh.html.

[276] Jesse Pizarro Boga, *Despite DOH efforts, Filipinos still smoke*, MINDANAO TIMES, Apr. 8, 2017, *available at* http://mindanaotimes.net/despite-doh-efforts-filipinos-still-smoke/.

hoarding hundreds of billions of pesos in profit. Ten Filipinos will continue to die every hour because of smoking.[275] This freedom to destroy lives and create unimaginable human suffering is unparalleled in any form of trade or industry in the country, and in human history—and all in spite, too, of the fact that "smoking kills" and "secondhand smoke kills" are among of the most established, consistent, and incontrovertible scientific conclusions of the modern world.

With the competition clauses now rearticulated, the only remaining conclusion in law that may be gathered from these facts is that this monopoly must be removed entirely from private hands and put into full public regulation; that is, if the State were true to the very Charter which sought to establish its liberties.

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[275] Philip C. Tubeza, *Smoking kills 10 Filipinos every hour*, PHIL. DAILY INQUIRER, Sept. 19, 2011, *available at* http://newsinfo.inquirer.net/61111/smoking-kills-10-filipinos-every-hour.