MULTINATIONAL CORPORATIONS AND THE PHILIPPINE ANTITRUST POLICY: AN APPRAISAL

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INTRODUCTION

The basic assumption underlying an antitrust[1] policy is that the public interest is best safeguarded from evils of monopoly and predatory behavior by the maintenance of a competitive economy unfettered by limitations based upon corporate self-interest. Hence, the unrestrained interaction of market forces would dictate the best course of development of a nation's resources and would insure a prosperous economy.

But unlike the classical American[2] approach to antitrust problems, the formulation of a viable antitrust policy in the Philippines must take into serious consideration certain legitimate goals of a developing economy—that of promoting and obtaining economic growth and performance, channeling the use of natural resources, and encouraging the development of small business. These chosen goals must be viewed in the context of the Philippine investment and development policies and the legal framework

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1 The definition in Black's Law Dictionary of the term "antitrust" is hereby adopted for purposes of this study: "Antitrust— . . . statutes to protect trade and commerce from unlawful restraints, price discriminations, price-fixing and monopolies." BLACK'S LAW DICTIONARY 86 (5th Edition, 1979).

2 Domestic antitrust policy in the United States is based on both common law and on five U.S. statutes, namely: the Sherman Act of 1890, the Clayton and Federal Trade Commission Acts of 1914, the Robinson-Patman Act of 1936, and the Celler-Kefauver Act of 1950. Briefly, these statutes, separately or together, prohibit: a) contracts, combinations, and conspiracies in restraint of trade; b) monopolization, attempts to monopolize, and conspiracies to monopolize trade or commerce within the U.S. or between the U.S. and foreign countries; c) price discrimination or pricing that tends to create a monopoly; d) tying clauses and exclusive dealing agreements that adversely affect competition; e) mergers lessening competition substantially; f) interlocking directorates among competing firms.

Another relevant statute is the Webb-Pamerene Act, 15 U.S.C., Secs. 61-65, which excludes from the application of the Sherman Act associations entered solely for, and engaged solely in, export trade and agreements made by such associations in the course of export trade, as long as the associations do not restrain trade in the U.S. and do not restrain the trade of any domestic firm which competes with them. However, the associations may not affect the prices, in the U.S., of the commodities they export; nor may they substantially lessen competition or otherwise restrain trade in the U.S. The Act also excludes the applicability of the Clayton Act to acquisitions of corporations organized solely for, and engaged solely in export trade, as long as they do not substantially lessen competition or restrain trade in the U.S. On the other hand, the Federal Trade Commission Act's prohibition against unfair methods of competition is expressly made applicable to export trade, even if the acts involved were all done outside the territorial limits of the U.S.

within which the same are to operate. Rather than concentrating on limiting market power, enforcing standards of fair business conduct, and reducing the power of large business enterprises, an effective antitrust policy must consider the country's cultural tradition, political pressures, economic objectives and perceptions of what is practicable. Moreover, questions concerning restrictive practices legislation are inextricably intertwined with broader problems of foreign economic policy—for instance, balance of payments deficits, the need for access to foreign markets, tariffs, consumer protection, treaty obligations and commitments made to international organizations—which may affect the scope and reach of any antitrust legislation at a given time. In sum, the Philippine antitrust policy must be devised in the context of the country's economic, social and legal perspectives.

The Philippines subscribes to the enterprise type of economic organization with liberal rewards for enterpreneurial initiative. But unlike the American model[3]—where free competition was thought to be the best method of preserving the Jeffersonian ideal of an economy made up of many independent small businesses—in the Philippines, competition plays a subservient role in relation to entrepreneurial initiatives in organizing resources. As one economist stresses: "[T]he Philippines has maintained a broad spectrum of legislative controls ostensibly designed to regulate private economic activity. Understanding of Philippine public economy policy turns, however, on an awareness that regulation results primarily from manipulation by the State of the intensity of economic incentives to individual action."[4]

There is still much confusion about the relationship between the net benefits of direct foreign investment to the developing countries and the monopoly power of the investors. Rightly or wrongly, it is usually supposed that those industrial brontosauruses—called "global" or "transnational" or "international" or "multinational" corporations, depending on the semantical preferences of the writer—are able to extract even larger monopoly profits from developing countries via direct investment. While there are no solid propositions to support this observation, a closer scrutiny of the Philippine competitive scenario presents a potentially grotesque picture for smaller entrepreneurs.

The impact of foreign direct investment on the structure and performance of local enterprises and the competitive climate in the Philippines has been largely ignored, perhaps because the issue is subtle and complex, involving as it does a certain degree of technical refinement in the area of antitrust analysis. Fortunately, this task is made easier by the fact that a basic knowledge of the rudiments of industrial organization economics would

[3] Some economists have questioned whether, in principle, the American competition model is always the best instrument for bringing about economic integration. The most detailed argument on this score has been advanced by Professors Vito, Marchal, Wessels Woitrin and Tinbergen. *See* D. L. MCLACHLAN & D. SWANN, COMPETITION POLICY IN THE EUROPEAN ECONOMIC COMMUNITY 82-87 (1967).

[4] F. H. GOLAY, THE PHILIPPINES: PUBLIC POLICY AND NATIONAL ECONOMIC DEVELOPMENT, vii-viii (1961)

suffice in understanding issues where antitrust and economics interface (e.g., predatory pricing). However, this paper is not intended as a comprehensive treatment of the complex subject of Philippine antitrust policy vis-a-vis multinationals. Instead, it is merely an overview of the subject, designed to alert the readers to some problem areas facing our policy makers in today's domestic antitrust climate.

This paper attempts to synthesize the antitrust policy in the Philippines by identifying and analyzing Philippine laws which are in the nature of antitrust legislation, situate and assess the proper role of antitrust policy within the legal framework in relation to the current investment policy vis-a-vis multinational corporations, and evaluate the antitrust policy's viability in the market structure thus created by said investment policy.

The study begins with an analysis of the antitrust policy in the Philippines and then proceeds with a discussion of the competition profile, with emphasis on a cross-sectional analysis of representative industrial sectors in the Philippines and the competitive role of the multinational corporations in their respective groups. The next section then makes an assessment of the Philippine antitrust policy regarding foreign investment and relates this to the present investment policy. The study concludes with a policy assessment of certain aspects of Philippine antitrust and an evaluation of its viability within the market structure.

PHILIPPINE ANTITRUST LEGISLATION[5]

The Philippine antitrust policy is embodied in several laws scattered in the statute books.[6] These laws, separately or together, prohibit: 1) entering into any contract or agreement or any conspiracy or combination in the form of trust that affects by artificial means free competition in the market; 2) monopolizing any merchandise or object of trade or commerce, or combining with any other person to monopolize said merchandise or object in order to alter the price thereof by spreading false rumors or making use of other artifice to restrain free competition in the market; 3) or if a manufacturer, producer or processor of any merchandise of commerce from any foreign country either as principal or agent, wholesaler or retailer, combines, conspires or agrees in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other person not so similarly engaged for the purpose of increasing the market price in any part of the

[5] An in-depth study of Philippine antitrust policy is seriously hampered by the dearth of materials which can shed light into the legislative history of the pertinent laws. Congressional deliberations and committee reports are often no more precise than the statutes themselves. Hence, the so-called legislative wisdom, energy and consensus which serve a guiding light in the proper analysis of legislation are not available.

[6] The term "antitrust" is rarely used in Philippine judicial parlance. This term is used synonymously with "laws against monopolies or combinations in restraint of trade" which "are aimed at raising levels of competition by improving the consumers' effectiveness as the final arbiter in free markets." *See* J. Gokongwei, Jr. v.. Securities and Exchange Commission, et al., G.R. No. L-45911, April 11, 1979, 89 SCRA 336.

Philippines of any such merchandise or object of commerce manufactured, produced, processed, assembled in or if any articles in the manufacture of which such imported articles are used;[7] 4) certain mergers and acquisitions; and 5) interlocking directorates among competing corporations. This section of the paper will review the existing antitrust policy in the Philippines with particular emphasis on its application to direct foreign investment.

Price-fixing

Article 186(1) of the Revised Penal Code of the Philippines penalizes the act of "entering into any contract or agreement or any conspiracy or combination in the form of trust that affect by artificial means free competition in the market." For reason to be discussed in another section of this paper,[8] this provision has not been given much application and construction by Philippine courts. Consequently, there is a dearth of materials on this particular aspect of antitrust policy in the Philippines.

However, in *J. Gokongwei, Jr. v. Securities and Exchange Commission, et al.*[9] the Supreme Court of the Philippines had occasion to discuss the nature and scope of other laws in the Philippines which prohibit monopolies and combinations in restraint of trade. Thus, in sustaining the validity and reasonablesness of certain by-laws of respondent San Miguel Corporation disqualifying a competitor (petitioner in this case) from nomination or election to the Board of Directors of San Miguel, the Supreme Court, quoting several American precedents,[10] said:

> There are other legislations in this jurisdiction which prohibit monopolies and combinations in restraint of trade. Basically, these anti-trust laws or laws against monopilies 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.[10a]

The Philippine courts have not adopted a *per se* rule[11] in the area of price-fixing primarily and largely because there is no common law on

[7] Article 186, Revised Penal Code of the Philippines, Public Act No 3815 (1930). *See* A. PADILLA, CRIMINAL LAW, REVISED PENAL CODE ANNOTATED 324. Article 186 was taken from Articles 543, 544 and Act 3247. *See also* APPENDIX A.

[8] *See* discussion, *infra* at 149.

[9] *Gokongwei*, 89 SCRA 336.

[10] Standard Oil Co. v. United States, 55 L. Ed. 619; Blake & Jones, "Contracts in Antitrust Theory," 65 COL. L. REV. 377, 383 (1965).

[10a] *Gokongwei* 89 SCRA at 375-376.

[11] In a series of decisions culminating in *U.S. v. Socony-Vacuum Oil Co., et al.*, 310 U.S. 150, 218-221 (1940), the American courts decided that price-fixing and similar

antitrust in the Philippines. Aside from the criminal sanctions provided by Article 186 of the Revised Penal Code, administrative measures designed to counteract anticompetitive practices, such as price-fixing, were formulated via legislative and executive fiats. For instance, Republic Act No. 6124, otherwise known as the Price Fixing Law, prescribed "fair, just and reasonable" maximum prices of essential commodities and established a Price Control Council for that purpose. Executive Order No. 273 (creating the Presidential Oil Commission) and Republic Act No. 6173 (establishing the Oil Industry Commission) were given power to set the prices of petroleum products and take adequate steps to prevent monopolies and combinations in restraint of trade within the petroleum industry. The Consumer Complaints Center is charged with the duty to "receive and evaluate complaints and inquiries from the general public and immediately take action thereon or refer the complaint/inquiry to the government agency concerned for appropriate action," and "recommend measures to make the implementation of consumer protection, price stabilization, fair trade and related laws more effective and meaningful."[12]

A U.S. Federal Trade Commission probe in 1960 of the activities of General Foods Corporation and four other U.S.-controlled enterprises has an interesting link with the Philippines and is particularly instructive for purposes of the present discussion. *In the Matter of General Foods Corporation, et al.*[13] involves a series of agreements among respondents to: fix, stabilize and maintain uniformly identical F.O.B. port of entry base price and price schedules for all types or cuts of Philippine dessicated coconut imported, sold and distributed by respondents in the U.S.; adopt, maintain and use and revise from time to time a system of established price differentials composed of freight, handling and storage charges, etc.; fix, stabilize and maintain uniformly identical base prices and price schedules for all types or cuts of sweetened coconut processed, sold and delivered by respondents anywhere in the U.S.; eliminate and refuse to grant free delivery, cartage or drayage, or any allowances for such services, on sales of Philippine dessicated coconut or sweetened coconut to any buyer from any port of entry, etc.; and adopt a price leadership plan whereby respondent General Foods generally leads in the announcement of Philippine dessicated coconut and sweatened coconut price increases and decreases, etc. A consent decree[14] was subsequently entered and the Federal Trade

conspiracies are illegal *per se;* that is, the prosecutor or civil plaintiff need only prove the existence of such an agreement for the consequent harmful effect to be presumed. Included under the *per se* violations are not only price-fixing agreements but also agreements to restrict output, to assign areas or specific customers to individual sellers, to adhere to standard pricing formulae, and to punish competitors who do not abide by the norms. The only important exception to this *per se* rule derives from the rights to impose price, output, and market restrictions on a valid patent license, although these exemptions are far from absolute.

12 *See* APPENDIX A. *Infra* at 143 *et seq.*

13 FTC docket no. 8198, filed 1960, 59 FTC 706 (1961).

14 A *consent decree* is a negotiated compromise to which the U.S. Justice Department and the defendants agree. If accepted by the courts, it binds the future activities of

Commission issued a cease and desist order whereby the respondents were prohibited from doing or performing acts and practices deemed anticompetitive in relation to the importation, offering for sale, sale or distribution of Philippine dessicated coconut or sweatened coconut in U.S. commerce. Interestingly enough, the subsidiary of respondent multinational in the Philippines was not impleaded in the FTC charge sheet notwithstanding evidence that the multinational produced, processed and exported from the Philippines approximately 75% of all Philippine dessicated coconut imported, sold and distributed commercially in the United States through this subsidiary in the Philippines. Nor was there an attempt to prosecute the foreign enterprises involved in this collusion before Philippine courts. This sad state of affairs only dramatizes the utter helplessness of the Philippine government in controlling the operations of foreign multinationals within and without the Philippine territory.

Monopolization

Article 186(2) of the Revised Penal Code punishes any person who shall monopolize any merchandize or object of trade or commerce, or shall combine with any other person or persons to monopolize said merchandise or object to alter the price thereof by spreading false rumors or making use of any other artifice to restrain free competition in the market. As in price-fixing, Philippine courts have hardly applied this provision due to serious deficiencies in antitrust policy implementation.

Perhaps the earliest case to reach the Philippine Supreme Court involving the construction of this provision on monopolization is *U.S. v. Fulgueras.*[15] This case involved the use of deceit and machinations for the purpose of manipulating prices of staple commodities in a remote province during the American regime. So far, this is the only case reported involving the direct application of said provision. It is obvious that the ruling herein has no relevance nor application to foreign investment in the Philippines.

In *Gokongwei,* the Philippine Supreme Court, citing numerous American cases,[16] adopted the following definition of the term "monopoly," thus:

> The terms 'monopoly', 'combination in restraint of trade' and 'unfair competition' appear to have a well defined meaning in other jurisdictions. A 'monopoly' embraces any combination the tendency of which is to

the defendants but protects them from further prosecution by the government. Whether consent decrees remedy the original evil must be judged on a case to case basis. Since a consent decree negotiated before a trial does not constitute an admission of guilt by the defendant, it cannot be used as precedent or a *prima facie* evidence in subsequent litigation (such as private suits for treble damages).

15 4 Phil. 432 (1905).

16 Love v. Kozy Theater Co., 236 SW 243, 26 ALR 364; Aldea-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, D.D.N.Y., 80 F. Supp. 888, 893; National Cotton Oil Co. v. State of Texas, 25 S.T. 379, 383, 49 L. Ed. 689.

> prevent competition in the broad and general sense, or to control prices to the detriment of the public. In short, it is the concentration of business in the hands of a few. The material consideration in determining its existence is not that prices are raised and competition actually excluded, but that power exists to raise prices or exclude competition when desired. Further, it must be considered that the idea of monopoly is now understood to include a condition produced by the mere act of individuals. Its dominant thought is the notion of exclusiveness or unity, or the suppression of competition by the unification of interest or management, or it may be thru agreement and concert of action. It is, in brief, unified tactics with regard to prices.[17]

In American jurisdiction, price-fixing violations are considerably easier to detect, prosecute and prevent than monopolization, largely because the first falls under the *per se* rule while the latter is subject to the "rule of reason." In two early cases,[18] the U.S. Supreme Court ruled that monopolization consists of two elements—*viz.*, the actual acquisition of monopoly position, and the intent to acquire that position and to exclude rivals. Parties attempting to prove these two elements face a formidable burden of proof and must contend with the difficult problems on how large a market share constitutes a monopoly position and, more important, how narrowly or broadly "market" should be defined.

Philippine courts have not evolved a "rule of reason" for much the same reason as adduced earlier in their adjudication of monopoly cases, and little case law has been established in the almost four decades after the Philippines attained its political independence from the United States. Of the extremely few cases that have reached the Philippine Supreme Court, successful prosecution involved illegalities (i.e., violation of statutory laws) other than monopolization.

Mergers and Acquisitions

Act 3518, section 20 is almost a verbatim reproduction of section 7 of the American Clayton Act of 1941, as amended by the Celler-Kefauver Act of 1950. It provides that:

> No corporation engaged in commerce may acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation or corporations engaged also in commece, where the effect of such acquisition may be to substantially lessen competition between

[17] *Gokongwei*, 89 SCRA at 376.

[18] U.S. v. Standard Oil Co. of New Jersey, et al., 173 Fed. 177 (1909) and 221 U.S. 1 (1911).

The "Rule of Reason" was launched by Chief Justice White in the *Standard Oil Co.* case: because the statute is "broad enough to embrace every conceivable contract or combination . . . anywhere in the whole field of human activity. . . , it inevitably. . . called for the exercise of judgment. . . . [T]he standard of reason which had been applied at the common law and in this country in dealing with subjects for the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided. . . ." *See* P. AREEDA, ANTITRUST ANALYSIS, PROBLEMS, TEXT AND CASES 266 (1974).

the corporation making the acquisition, or between any of them, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.[18a]

Curiously, Act 3518 was hardly applied or construed by Philippine courts; hence, there is no case legacy which one could look into to understand and analyze the scope of the above law. However, there are special laws which set maximum limits to stockholdings in certain corporations for the purpose of preventing illegal monopolies or combinations in restraint of trade.[19]

Hence, Section 140 of the present Corporation Code pertinently provides that:

> . . . [M]aximum limits may be set by the Batasang Pambansa for stockholdings in corporations declared by it to be vested with a public interest pursuant to the provisions of this section, belonging to individuals related to each other by consanguinity or affinity or by close business interest or whenever it is necessary to achieve national objectives, prevent illegal monopolies or combinations in restraint of trade, or to implement national economic policies declared in laws, rules and regulations designed to promote the general welfare and foster economic development . . . .

The old Corporation Law likewise provides quantitative restrictions in equity participation to forestall combinations among corporations engaged in mining and agriculture.[20] Republic Act No. 337, also known as the General Banking Act, provides limitations on equity participation of certain classes of stockholders in the banking business.[21]

Proposed Antitrust Law of the Philippines

Sometime in 1980, 13 members of the defunct Interim Batasan Pambansa introduced Parliamentary Bill No. 989 entitled "The Antitrust Law of the Philippines"[22] which seeks to prohibit and penalize all contracts or agreements or conspiracies—such as price-fixing, market divisions, group boycotts, etc.—that would unreasonably restrain trade or commerce. The Bill also prohibits and penalizes monopolizations or attempts to monopolize, and the unjustified discriminatory practice (usually resorted to and availed

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[18a] 38 Stat. 730, 731 (1914).

[19] Section 140 of the Corporation Code (Batas Pambansa Blg. 68); Secs. 12-B, 12-D, 12-E of Rep. Act No. 337 (General Banking Act) as amended by Batas Pambansa Blg. 61. Section 12-E authorizes the Monetary Board to further limit the equity investments, direct or indirect, in banks and non-bank financial intermediaries performing quasi-banking functions "to promote competitive conditions in financial markets."

[20] Corporation Law, Secs. 13, 5-A. The Explanatory Note to this law is instructive: "Some mining companies have surplus capital but they do not possess good mines. Other mining companies have promising prospects but have no available capital. There are foreign companies that are decided to invest multi-million dollars in the development of our mines, provided that the law allows them to own and hold up to 40% of the capital stock of a domestic mining corporation. . . ." Hence, Section 5-A was inserted by Rep. Act No. 5167 to strike a balance between the policy against monopolies and combinations in restraint of trade and the need for a fuller and faster development of our mineral resources.

of by those who are dominant in a particular market) of certain unscrupulous persons in entering into contracts with different persons similarly situated but under different contractual conditions. Section 6 of the proposed Bill prevents the undue concentration of economic power in one corporation. It includes a section on unfair competition and false advertisement and a provision on prevention of undue concentration of economic power through interlocking directorates.

The proposed Bill applies to all persons, natural or juridical, who are engaged in commerce. It has an extraterritorial reach being applicable to both domestic and foreign corporations where their contract has substantial effect on Philippine trade and commerce.[23]

MULTINATIONAL CORPORATIONS AND THEIR COMPETITIVE POSITIONS IN DIFFERENT INDUSTRIAL SECTORS IN THE PHILIPPINES

It is axiomatic that effectively far-reaching statutes which are in the nature of antitrust legislations are rooted in the notions of "competition." Hence, to understand economic competition more concretely, a study of the Philippine antitrust policy vis-a-vis foreign investment requires an appreciation of the structure of the Philippine economy.

In the traditional analytic sense, the Philippine economy is divided into six sectors, *viz.*, manufacturing, commercial, mining, services, utilities and agriculture. The manufacturing sector is further subdivided into the following groups: food processing; textile and garments; petroleum; vegetable and animal oils; chemical and chemical-based products; wood and wood products; paper and paper products; rubber and plastic products; basic metals; non-metallic mineral products; alcoholic drinks; transportation and heavy equipment; electrical machinery, appliances and supplies; and miscellaneous manufacturing. For the commercial sector: principal commodities; general merchandise; primary industrial products; general retail; automotive vehicles and supplies; petroleum products chemical-based products; real estate and construction supplies; home and office appliances and supplies; agricultural and industrial machineries; and miscellaneous commercial activities. The services sector components are: management service; education; construction; medical services; hotels; restaurants; printing and publishing; brokerage; games and amusement; and miscellaneous services. The utilities sector—power; communication; broadcasting; air transport; land transport; sea transport. Lastly, the subdivisions of the agriculture sector include: fishing; sugar; fruits and vegetables; logging; poultry and livestock.

A brief cross-sectional analysis of the six economic sectors, with emphasis laid on the performance and competitive positions of multinationals

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[22] Parliamentary Bill No. 989. *See* APPENDIX B for full text thereof.
[23] *See Id.* Explanatory Note of Parliamentary Bill No. 989.

in their respective industrial sectors or groups, is presented below for a proper perspective on the competitive situation in the Philippines. In assessing the following figures, however, it must be borne in mind that in the compilation of industry totals, only firms in the so-called SEC-Business Day Top 1000 companies, measured by 1982 sales, have been taken into consideration. This is so because although some industries are crowded with small firms, in most cases their aggregate contribution to the industry activity is quite small.

The following examples illustrate the competitive positions of multinational corporations in the different industrial sectors of the economy.

The manufacturing sector represented by 404 firms reported a combined revenue of ₱105,216.19 million for a 41.74% share of the total. The multinationals-dominated soap and synthetic detergents group registered a combined net sales of ₱2,809.38 million from ₱2,559.88 million the previous year. In the petroleum products group, the two government-owned oil giants (both under the Philippine National Oil Co. [PNOC] umbrella), Bataan Refining Co. (BRC) and Pilipinas Shell Petroleum Corp., registered net sales of ₱12,327.75 million and ₱7,581.48 million respectively. Following closely were Caltex (Phils.), Inc. (a subsidiary of Caltex Petroleum Co.) with net sales of ₱7,067.03 million and Philippine Petroleum Corp. with ₱1,526.73 million. Mobil Oil Phils., Inc. bowed out of the scenario with the recent finalization of the sale of its local operations to Caltex and its 40% interests to BRC and PNOC. Significantly, Mobil is the third oil multinational to pull out its investments and operations from the Philippines. Esso (Phils.), Inc. and Getty Oil Phils., Inc. were sold out by their parent companies in 1974 and 1979 respectively.

Pilipinas Kao, Inc., a Japanese subsidiary, led the perfumes, cosmetics and toilet preparations group with a turnover of ₱233.54 million. Philippine Refining Co., Inc. (PRC), a subsidiary of the Dutch Maribel N.V., led the soap and synthetic detergents group with sales of ₱947.83 million in 1982. The other American subsidiaries producing soap and other home products locally are: Procter and Gamble Philippines Manufacturing Co., Inc., with ₱866.70 million in 1982 sales and Colgate-Palmolive Philippines, ₱870.347 million.

With the exception of Metro Drug Corp. (₱817.39 million) and United Laboratories, Inc. (₱732.76 million) which are currently at the helm of the local drug industry, the Philippine drug industry is composed mostly of foreign firms operating either as branches or subsidiaries of their parent companies. This is due mainly to the technical factor which is of crucial importance to said industry. Most notable of these multinational firms are Johnson & Johnson (Phils.) (American, ₱334.52 million), Wyeth-Suaco Laboratories, Inc. (American, ₱252.12 million), Abbott Laboratories (American, ₱181.20 million), Warner-Lambert Philippines, Inc. (American,

₱175.98 million), Bayer Philippines, Inc. (German, ₱172.45 million), Pfizer, Inc. (American, ₱145.58 million), Ciba-Geigy (Phils.), Inc. (Swiss, ₱116.16 million), AHS/Phils., Inc. (American, ₱108.16 million), Mead Johnson (Phils.), Inc. (American, ₱96.79 million), Roche (Phils.), Inc. (Swiss, ₱94.12 million), Winthrop-Stearns, Inc. (American, ₱93.49 million), E. R. Squibb & Sons Phils. Corp. (American, ₱83.64 million), Boehringer Ingelheim (Phils.), Inc. (German, ₱77.22 million), Smith Kline & French Overseas Co. (American, ₱70.56 million), Richardson-Vicks Corp. (American, ₱62.59 million), Eli Lilly (Phils.), Inc. (Swiss, ₱62.52 million), Astra Pharmaceuticals (Phils.), Inc. (Swedish, ₱57.80 million), Schering Corp. (Phils.), Inc. (American, ₱47.80 million), Upjohn, Inc. (American, ₱47.61 million), Bristol Laboratories (Phils.), Inc. (American, ₱46.02 million), Hoechst Philippines, Inc. (German, ₱45.84 million), and Sandoz (Phils.), Inc. (Swiss, ₱38.22 million).

The tires and tubes group which is dominated by U.S. tire companies reported net sales of ₱826.03 million. However, stiff competition for the consumers' money was clearly evident as the top three firms—i.e., The Goodyear Tire and Rubber Co. (Phils.), Ltd. (₱398.61 million), Firestone Tire and Rubber Company of the Philippines (₱353.06 million) and Sime Darby Int'l. Tire Co., Inc. (₱174.35)—once again dominated the market.

A somewhat similar situation obtains in the fertilizer group were Planters Products, Inc. recorded sales of ₱1,345.59 million or about 71% of the group's total. Phimco Industries, Inc., a subsidiary of Sveską Taenstick of Sweden, virtually monopolized the match manufacturing with sales of ₱223.798 million, or roughly 66% of the aggregate sales of its group.

In the aluminum and aluminum base alloy casting group of the metal industry, two multinationals, Hooven Comalco Industries, Inc. and Reynolds Philippines Co., dominated the aluminum market by capturing a combined sales of ₱380.52 million. The iron and steel products industry group is likewise dominated by a foreign-owned firm, the Philippine Sinter Corporation (a subsidiary of Kawasaki Steel Corporation of Japan).

In the commercial sector, leading the household-type appliances group was Singer Sewing Machine Company, Inc., the sister company and marketing arm of Singer Industries Corporation, both wholly-owned subsidiaries of the U.S.-based Singer Company. Singer Sewing registered a net sale of ₱194.01 million in 1982.

Multinationals likewise led the office machines and equipment group in sales. IBM Philippines, Inc., a subsidiary of IBM U.S.A., was the frontrunner with ₱288.77 million sales in 1982. A far second was another wholly-owned American subsidiary, 3M Philippines, Inc., with a turnover of ₱87.06 million. Other notable members of the group and their respective sales are: NCR Corp. (Phils.), a subsidiary of U.S.-based NCR Corp. (₱46.89 million); and Burroughs, Ltd. with sales of ₱44.44 million. Not surprisingly, the combined turnover of these four firms accounted for 83% of the group's aggregate sales of ₱561.90 million in 1982.

In the utilities sector, two multinationals, i.e., Pakistan International Airlines Corp. and China Airlines, Ltd., occupied second and third positions behind state-owned Philippine Airlines. The fruits and vegetable group of the agricultural sector was led by Dole Philippines, Inc., a multinational which is a subsidiary of Castle & Cooke.

In resumé, a cursory examination of Tables I and II (Appendix C hereof) reveals that multinationals have gained well-entrenched positions in the domestic markets. It is therefore not surprising that about 165 multinationals figured in the SEC-Business Day Top 1,000 Corporations. Multinationals dominated the following industry-groups: petroleum products; vegetable and animal oil industry; cosmetic and toilet preparations; soap and other home products; chemical and chemical-based products; rubber and plastic products; fertilizer; match manufacturing; iron and steel products and non-ferrous metals; car manufacturing; household industry; office equipment group; and the fruits and vegetable group. There are clear yet alarming indications that several multinationals are gradually assuming positions of dominance in other groups as entry barriers to manufacturing industries rise each year. This is particularly true in the manufacturing sector where the presence of multinationals continues to gain strogner footing in highly competitive fields such as drugs and pharmaceuticals, food processing, petroleum and tire manufacture. A rundown of these multinationals among the Top 1,000 reveals that U.S.-based firms still dominaate Philippine foreign investment in terms of capital distribution, technology dominance, market influence and similar factors in the country's economy.

PHILIPPINE ANTITRUST POLICY AND FOREIGN INVESTMENT: POLICY CONCLUSIONS AND EVALUATION

Against the backdrop of Philippine antitrust policy, the nature and content of the policy's application to foreign investment are more easily evaluated. With respect to foreign commerce and investment in general, the Philippine antitrust policy has two objectives: 1) to encourage foreign firms to enter the Philippine market; and 2) to eliminate unreasonable restraints on Philippine trade.

Foreign Investment Scenario

A Filipino scholar observes that "the present policy of the Philippine government towards foreign investment in general, and the multinational corporations in particular, is clearly one of 'attraction'."[24] As can be seen

[24] Maria Clara L. Campos, *Multinational Corporations and the Philippines As Host Country: A Legal Assessment,* 50 PHIL. L. J. 149, 156 (1975).

in the following discussion, this policy remains unchanged particularly in light of the current economic crisis.

The almost phenomenal growth of foreign investment in the Philippines during the last decade is a concrete proof that the policy of "attraction" has indeed attained a certain degree of success. In 1980, the Securities and Exchange Commission reported 4,537 domestic corporations with foreign equity and 2,116 partnerships with foreign participation licensed to do business in the Philippines. About 256 regional headquarters of foreign corporations engaged in international trade and 20 off-shore banking units were licensed by the Commission in the same year.

Central Bank of the Philippines figures show that from February 1970 to December 1980, $1,519.02 million had been committed in foreign investment, $1,280.88 million of which had been inwardly remitted, with $238.14 million outstanding as of December 31, 1980. Over half of the inward remittances were in manufacturing, mostly chemicals (14.7%), food (6.9%), basic metals (5.8%) and transport (4.3%). The next largest categories include banking (18.8%) and mining (17.57%), with petroleum and gas extraction (14.3%) consisting the largest component part of the latter.

The United States remained the largest investor with 54.6% of the investment inwardly remitted since 1970. Japan (16.7%) came second, with Hong Kong (4.3%), Canada (3.9%), and Switzerland (2.5%) following.

Laws and Policies Affecting Multinational Corporations

The official Philippine policy — largely echoing traditional analysis[25] — promotes foreign direct investment in all economic sectors in the country.[26] The govenment's most straightforward tool is in the form of incentive legislations, the most important of which is the Omnibus Investments Code (Presidential Decree No. 1789).[27] The Omnibus Investments Code expressly

[25] Traditional theory advances the view that foreign direct investment contributes positively to development. For a comprehensive treatment of this theory, *See* G. L. REUBER, PRIVATE FOREIGN INVESTMENT IN DEVELOPMENT (1974).

[26] Some areas of economic activities are expressly reserved for indigenous companies. *Cf.* Campos, *supra* note 24, at 160-165. Certain special laws impose restrictions on foreign equity participation in certain ventures. It is completely barred from rural banking, operation of mass media, and retail trade. Foreign equity in coastal shipping companies is limited to 25% and, in bay and river shipping, to 30%. Some limitations (e.g., the 40% foreign equity limit in public utilities and in utilization of natural resources) derive from the Constitution.

[27] Under the Omnibus Investments Code, incentives to registered producer enterprises include: deduction of organization and pre-operating expenses (Article 45[a]); accelerated depreciation (Article 45 [b]); net operating loss carry-over (Article 45 [c]); tax exemption on imported capital equipment (Article 45 [d]); tax credit on domestic capital equipment (Article 45 [e]); tax credit for withholding tax on interest (Article 45 [f]); incentives for necessary and major infrastructure and public facilities (Article 45 [g]); employment of foreign nationals (Article 45 [h]); deduction from expansion reinvestment (Article 45 [i]); anti-dumping protection (Article 45 [j]); protection from government (Article 45 [k]); deduction of labor training expense (Article 45 [l]); and protection of patents and other proprietary rights (Article 49 [m]).

repealed Republic Act No. 5186 (Investment Incentive Act), Republic Act No. 5465 (Foreign Business Regulation Act) and Republic Act No. 6135 (Export Incentive Act) pursuant to Article 82 thereof.

Article 68 of the Omnibus Investments Code provides that if an investment by a non-Philippine national in an enterprise not registered under Book One thereof is such that the total participation by non-Philippine nationals in the outstanding capital thereof shall exceed thirty (30) percent, the enterprise must obtain prior authority from the Board of Investment, which authorization shall be granted if the proposed investment: a) would not conflict with existing constitutional provisions and laws regulating the degree of required ownership by Philippine nationals in the enterprise; or b) would not pose a clear and present danger of promoting monopolies or combinations in restraint of trade; or c) would not be made in an enterprise engaged in an area adequately being exploited by Philippine nationals; or d) would not conflict or be inconsistent with the Investment Priorities Plan in force at the time the investment is sought to be made; or e) would not contribute to the sound and balanced development of the national economy on a self-sustaining basis.

The 1973 Constitution and other statutes have expressly reserved some areas of economic activities for indigenous companies. Hence, Section 9, Article XIV of the Constitution mandates that "the disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens." The provision further allows "such citizens, corporations, or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, development, exploitation, or utilization of any of the natural resources." Section 5, Article XIV of the Constitution limits the participation of foreign investors in the governing body of any public utility enterprise to their proportionate share in the capital thereof.

Certain special laws impose restrictions on foriegn equity participation in certain ventures. It is completely disqualified from rural banking, operation of mass media and retail trade. Foreign equity in coastal shipping companies is limited to 25%, and 30% in bay and river shipping.[28]

Additional incentives to pioneer enterprise cover: tax exemption (Article 46 [a]); tax exemption on imported capital equipment (Article 46 [b]); deduction for expansion reinvestment (Article 46 [c]); post-operative tariff protection (Article 46 [d]; and employment of foreign nationals (Article 46 [e]).

Articles 47, 48, 49 and 50 provide additional incentives to agricultural producers, export producers, export traders and service exporters, respectively. Special incentives in the form of financial assistance, exporters assistance and assistance to individual applicants are likewise extended to registered enterprises under Articles 51, 52, 53, 54, 55 and 56 of the Omnibus Investments Code.

The Omnibus Investments Code refined and harmonized a host of incentives decrees and streamlined registration and incentives availment procedures.

[28] Republic Act No. 1937, sec. 806, as amended.

Presidential Decree No. 218 offers numerous incentives both to regional offices as well as to foreign executives to encourage them to set up regional headquarters in the Philippines. Corporate incentives include exemption from income tax, from three per cent contractor's tax and from local licenses, fees, dues, imposts or any other local taxes or burdens. As to foreign executives, the following incentives are extended: 1) ease of travel facilitated through multiple entry special visas; 2) exemptions from all fees under the immigration and alien registration laws; 3) exemptions from customs duties and compensating tax for personal and household effects; 4) exemption from obtaining immigration clearances, certificates, tax clearances and all other types of clearances to facilitate travel except upon final departure from the Philippines; and 5) a minimal 15 per cent tax of gross income paid in the Philippines. However, multinational corporations setting up regional headquarters here cannot engage in activities other than to act as a supervisory, communications and coordinating center for affiliates, subsidiaries or branches of the region. They are barred from actually participating in the management of any affiliate, subsidiary or branch office in the Philippines. With the exception of investment income, income they derive from within the Philippines shall be taxable.

A more recent law, Presidential Decree No. 1892, suspended for a period of one year the nationality requirement under Article 34(1) of the Omnibus Investments Code of at least 60% Philippine nationals for non-pioneer industries to be entitled to registration under Book One of the Code. This Decree likewise allows existing non-pioneer enterprises registered under Book One of the Code to increase their foreign equity beyond the 60% nationality requirement. The suspension of the nationality requirement was conditioned on fulfillment of requirements in Article 34(1) of the Omnibus Investment Code, particularly Article 34(1)(b), and such other conditions provided in Book One of the Code, and that the foreign investors will not engage in activities reserved by the Constitution and existing laws to Philippine nationals and corporations and other juridical entities owned and controlled by Philippine nationals. This Decree was designed to encourage and promote foreign investments in the various economic activities of the country provided their participation is consistent with national goals and policies and would accelerate entry of foreign investments during the current economic crisis. Presidential Decree No. 1892 expired on December 5, 1984.

Antitrust Policy Dilemma

The massive intrusion of multinationals in the Philippines elicited a mixture of reactions among Filipino businessmen and some beleaguered foreign entrepreneurs. Indeed, the need to scrutinize the multinationals' operations and transactions has become a *cause celebre* nationwide.[29]

[29] For notable examples, *see* STUDY OF PRIVATE FOREIGN INVESTMENTS IN THE PHILIPPINES, as of December 31, 1970; INTERNATIONAL LABOR OFFICE, SHARING IN DEVELOPMENT: PROGRAMME OF EMPLOYMENT EQUITY AND GROWTH FOR THE PHILIPPINES (I.L.O., Ranis Report, 1974); Campos, *supra* note 24.

Amidst the highly charged rhetoric of dependency and exploitation which accompanies any debate on multinational corporations, there seems to be no consensus regarding what effect(s) multinationals have on the developing countries' own interest—whether investment stimulates desirable development, or, is a means for the industrial countries to exploit them through the process of cumulative dependence. Most developing countries have seemingly discarded the "zero sum game"[30] in favor of a "positive sum game" and proceeded simultaneously along two tracks: inducing foreign investment and then harnessing them to their goals.[31]

Proponents of foreign direct investment in developing countries oftentimes argue vigorously that the multinationals' presence breaks down local monopolies and exposes local producers to rigorous competition. But this statement is belied by certain inherent characteristics of multinationals and their actual impact on developing economies. The heart of multinationals' enormous power lies in their economies of scale in production, in raising capital, in distribution, in advertising and in research and development, as well as the legal protection afforded them as holders of patents, trademarks, trade secrets, and mineral rights. It has been suggested that price-fixing, market-sharing, cross-licensing, mergers and joint ventures all play roles in the domestic and international growth of multinationals.[32] Whether the operations of multinationals in particular developing countries will benefit the latter remains a question of great controversy with little empirical exploration.

In opting for a policy of enticement vis-a-vis foreign direct investment, the Philippines is inevitably exposed to the same economic evils ordinarily associated with and practiced by multinationals—i.e., cartel activities; business restrictions practiced by multinationals; agreements on market distribution and allocation; tying arrangements and exclusive-dealing agreements that adversely affect competition;[33] restrictions specified in contracts for the transfer of technology; arbitrary transfer pricing between the parent company and its affiliates; monopoly practices; restrictive practices in relation to licensing arrangements; related arrangements referring to the use of patents and trademarks; market sharing; pricing policy; and participation of firms of developing countries in industrial projects of multinationals.[34]

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30 R. N. Farmer, International Business 225 (1966). The phrase "zero sum game," as it refers to multinational enterprises, was probably coined by R. Vernon to describe the negativistic attitude of developing countries vis-a-vis the presence of foreign corporations in their midst. *See also* R. Vernon, Sovereignty at Bay 4-25 (1971).

31 C. Fred Bergsten, et al., American Multinationals and American Interests, 374 (1978). According to these authors, these goals fall into four categories; 1) domestic economic objectives, such as reducing unemployment or raising tax revenues; 2) external economic objectives, such as improving the balance of payments or breaking into new markets; 3) national ownership of certain economic activities; and 4) indigenous managerial control over certain economic activities.

32 *Ibid.* at 265.

33 A tying clause requires that a customer who buys a product from a supplier buy a second product from the same supplier. An exclusive-dealing agreement requires a dealer to handle no competing products.

Empirical research supports the view that direct foreign investments are made by firms with some kind of monopoly advantage that is best exploited by maintaining management control of operations in host countries. The advantage may be a superior product or production process; lower costs owing to economies of scale or preferential access to capital or raw material; or a product that the foreign company can, through advertising, differentiate from more or less identical local competitors. Hence, such advantage is a necessary condition of foreign direct investment if the foreign firm is to meet the competition of local entrepreneurs which are closer to the market and which have shorter lines of communication. In fact, it is often the emergence of local competition behind a tariff wall that prompts foreign firms to make direct investment.[35]

Furthermore, available data suggest that it is the largest firms located in concentrated industrial sectors that make direct investments. Such enterprises appear, as a rule, in industries in which formidable barriers exist to the entry of newcomers and in which the competing firms are few in number.[36]

Philippine Antitrust Policy: An Assessment

Studies on multinational corporations in the Philippines have invariably laid emphasis on some general effects their operations have on the economic development of the country. No serious efforts so far have been made to examine the impact of multinationals on the competitive position of locally owned and controlled corporations. To be sure, there had been some animated discussions on the likelihood of Filipino entrepreneurs eventually being driven out of business by these industrial brontosauruses, but no one has so far suggested exactly how and under what circumstances this is bound to happen.[37]

It will be observed at this juncture that most of the laws surveyed in APPENDIX A of this paper are designed to combat the abuses of the consumer-oriented marketing system by categorizing certain business practices as either unfair or deceptive. Presumably, these laws were passed to remedy the evils perceived at the time they were promulgated. It took quite some time, however, before Filipino policy formulators could absorb the implications of the mushrooming growth of multinationals in the country. Though multinational enterprises existed here and there for almost as long as the modern corporation itself, they have appeared in considerable numbers

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[34] *See* U.S. CONFERENCE ON TRADE AND DEVELOPMENT RESOLUTION 56 (III) on "Foreign Private Investment And Its Relationship to Development," adopted 19 May 1972. U.N. ECONOMIC AND SOCIAL COUNCIL, "The Impact of Multinational Corporations on the Development Process and International Relations," E/500/Add/1 (June 1974, processed).

[35] D. R. Weigel, *Multinational Approaches to Multinational Corporations*, FINANCE AND DEVELOPMENT (September, 1974)), Vol. II, Number 3, 27-29 and 42. Also, R. Vernon, *Multinational Enterprises: Performance and Accountability*, in MULTINATIONAL CORPORATIONS, TRADE AND THE DOLLARS, 71 (1978).

[36] *See* R. VERNON, SOVEREIGNTY AT BAY, at 4-25 (1971).

[37] G. SUTER, AMCHAN JOURNAL, Vol. LIV, no. 10 4, 38 (October, 1978).

only during the past decade or so. How viable then is the Philippine antitrust policy on multinational corporations?

The Board of Investment (BOI),[38] as primary administrator of these incentive laws, is conferred broad rule-making powers[39] so that it can discipline firms that have reneged on their commitments to refund,[40] in monetary form, incentives they have received from the government (e.g., tax concessions). Moreover, violations of any of the terms and conditions appearing in the certificate of registration may lead to either the cancellation of registration or suspension of enjoyment of incentive benefits. The scope and nature of these broad rule-making powers of the BOI are elucidated by a Filipino scholar, thus:

> In exercising the rule-making power granted to it by law, the BOI lays down the general conditions for the entry of multinationals in specific areas of investment. In addition, the Investment Incentives Act (now Omnibus Investments Code), in granting the BOI the power to approve application for registration thereunder, gives it the authority to impose on the multinational corporation such terms and conditions as it may deem necessary to promote the objectives of the Act. Thus, rather than laying down specifically all the conditions under which multinationals should operate, the law quite appropriately leaves to the BOI, the agency best equipped for the purpose, the important and delicate task of indicating to all multinational corporations taking advantage of our hospitality what is expected to them in their role in assisting in our economic development. The BOI can therefore assess the circumstances surrounding each application and lay down the conditions most appropriate to such circumstances, having in mind our own economic goals. . . .[41]

One of the primary objectives of the BOI is "to achieve a planned dispersal of industries under conditions that will encourage competition and discourage monopolies." Hence, in its exercise of administrative supervision

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[38] The Investment Incentives Act, or Republic Act No. 5189, created the Board of Investments (BOI) and invested it with both planning and implementing functions. The BOI was charged with the responsibility of drawing up annually a list of priority areas, evaluating project applications for the manufacture of preferred products, administering the grant of various tax and non-tax incentives and supervising and monitoring registered projects.

The powers and duties of the BOI are enumerated in Paragraphs 1 to 20 of Article 7 of the Omnibus Investments Code (Pres. Decree No. 1789).

[39] Paragraph 21, Article 7, of the Omnibus Investments Code empowers the Board of Investments to "promulgate such rules and regulations as may be necessary to implement the intent and provisions of this Code."

[40] Section 1, Rule XXVI of the Rules and Regulations to Implement Pres. Decree No. 1789 authorizes the BOI in appropriate cases to require refund of incentives in whole or in part with or without interest or penalties in the event of withdrawal or suspension of operations of registered enterprises in preferred areas.

Paragraph 8, Article 7 of the Omnibus Investments Code empowers the BOI, after due notice, to cancel the registration or suspend the enjoyment of incentives benefits of any registered enterprise and/or require refund of incentives enjoyed by such enterprise including interests and monetary penalties, for a) failure to maintain the qualifications required by the Code for registration, or b) for violation of any provisions of the Code, of the rules and regulations issued under the Code, or of the terms and conditions of registration, or of laws for protection of labor or of the consuming public.

[41] *See* Campos, *supra* note 24, at 71.

to curb monopolies and combinations, the BOI is required to certify that the entry of a non-Filipino firm applying for license to do business "will not pose a clear and present danger of promoting monopolies or combination in restraint of trade."[42] But before issuing this certificate, the BOI must assess the merits of each application with the objectives of the Omnibus Investments Code in mind. In other words, the BOI should proceed on a case-by-case basis, laying down conditions which may cover matters such as the amount of required capitalization, the choice of products to be manufactured, even the training of Filipinos in specified training skills.[43] Theoretically, the BOI, in its exercise of this broad and extensive power, may deny an application for license to do business where it appears that the applicant's presence in the business would create the contingency the law seeks to forestall.

As seen in the previous discussion, most multinationals have clearly dominated many of the industries analyzed. There is further indicated that wholly-owned foreign subsidiaries earned quite sizeable profits and captured huge market shares. But beyond these statements, however, simple generalizations do not come easily. The effects of multinational enterprises differ considerably according to various characteristics of the enterprises and of the environment in which they operate. Enterprises that derive their oligopoly strength from some special technological factors have rather different influences, as a rule, from those that depend on sheer bigness as an economic advantage; and those that rely on large-scale production facilities have different influences from those that operate on the advantages afforded by tradenames or advertising alone. Moreover, there are differences in effects which are associated with time: after a foreign subsidiary has been performing some well-defined task of production or distribution for an extended period, the advantage accuring to the local economy from the continuing task are likely to decline.[44]

Despite the obvious limitation expressed above, there is one generalization which cannot be gainsaid: multinationals invariably manage to stay at the helm of the industry they are engaged in and their presence is most felt in industries where an oligopolistic situation obtains. On the basis of this practical reality, certain crucial questions need to be considered: How effective is the BOI in safeguarding and promoting the competitive climate in the Philippines? Would the broad rule-making powers granted it suffice to effectively correct certain trade imbalances and restricted practices in the domestic market?

For one thing, the said incentive laws failed to provide for a review mechanism for re-assessment of the conditions originally imposed on multinationals prior to registration.[45] This is especially true in the context of our

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[42] Pres. Decree No. 1789, art 69, par. 5, (Omnibus Investments Code).
[43] Campos, *supra* note 24, at 166.
[44] Vernon, *supra* note 30, at 71.
[45] *See* Campos, *supra* note 24, at 165-166.

present analysis since the impact of the multinationals' operations on competition in the relevant markets can only be felt after a certain period has elapsed and not prior to registration. Besides, these laws are designed not so much to promote competition *per se* as to insure survival of domestic business enterprises against foreign competition. Hence, the requirement in the law that adequate development of the industry by Philippine nationals will not be possible because of lack of capital, technology, skill or because of the business risks involved.

Another possible barrier to the BOI's effectiveness as watchdog of the competitive climate is the very law itself. The law grants multinationals, as incentives to pioneer as well as non-pioneer ventures, protection from government regulation and unfair or unnecessary import competition.[46] Given the breadth and scope of multinationals' resources and capabilities, these incentives seem utterly superfluous. They will certainly serve to further entrench the multinationals in their positions of dominance in the domestic market. Moreover, a literal interpretaiton and application of these incentives will mean that imported goods produced by competing but unlicensed multinationals abroad, which may prove cheaper and perhaps better in quailty than those produced by licensed multinationals, will not be given customs clearance as these will compete with the latter's product lines.[47]

Towards A Viable Antitrust Policy

Philippine antitrust provisions are within the rubric of criminal statutory and jurisprudential precepts although non-penal enunciation of antitrust policy may be found in special laws. For instance, prosecution of an Article 186 charge under the Revised Penal Code is gravely stymied, if not rendered impossible, by its lack of extraterritorial reach as that which the U.S. Sherman Act has. To illustrate, in the landmark *Alcoa* case,[48] a Canadian corporation was held violating Sec. 1 of the Sherman Act for its agreement with European aluminum producers to stay out of the U.S. market. In condemning the foreign aspect of this agreement; Judge Learned Hand said that a "state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends," or at least where those effects were intended. Domestic effects undoubtedly warrant domestic concern with foreign conduct causing those effects.

[46] *See supra* note 34.

[47] Empirical studies show that multinationals utilize their patents as licenses to import, to the exclusion of others, patented products (e.g., medicine, food and much-needed technological devices) made in their home countries and then sell these products at grossly inflated prices through transfer pricing.

[48] United States v. Aluminum Co., 148 F. 2d. 416, 440-445 (2d Cir., 1945). AREEDA, ANTITRUST ANALYSIS, PROBLEMS, TEXT AND CASES 125-126, 138-153 (1974), cited with approval in Continental Ore Co. v. Union Carbide & Carbide Corp. 370 U.S. 690 (1962); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 393 U.S. 1093 (1969); Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

While Philippine courts do not hesitate adopting applicable doctrines embodied in leading U.S. cases — especially in the commercial law area, where most of Philippine laws were engrafted from U.S. models — and give the latter considerable persuasive effect, the inherent defect in the Philippine antitrust implementation scheme is the negation of the applicability of the above principles to a similar factual situation. Parenthetically, as the *Alcoa* case establishes, a U.S. investor cannot escape antitrust scrutiny by simply traveling abroad or by working through foreign subsidiaries.[49] However, the rather embarrassing jurisdictional fiasco depicted in *United States v. Imperial Chemical Industries, Ltd.*[50] only serves to dramatize the glaring fact that even the United States, which is reputed to have the most sophisticated antitrust legislation in the world, is not spared from certain difficulties inherent in the application of antitrust laws to international business.

One of the most telling criticisms hurled at multinationals is that of their lack of accountability to any government.[51] To effect a viable antitrust policy, it is imperative that measures be adopted to extricate antitrust provisions from the matrix of criminal law principles such as that of territoriality.[52] Perhaps as a remedial measure to this legal kink, the proposed Parliamentary Bill No. 989[53] makes the provisions thereof applicable to both domestic and foreign corporations where their contract has substantial effect on Philippine trade or commerce. Hence, antitrust violations, even if committed abroad or outside the territorial jurisdiction of the Philippines, are within the jurisdictional competence of the Philippines so long as such violations substantially affect our trade and commerce.[54]

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[49] *See* Bergsten, *supra* note 31, at 260.

[50] For a summary of this case, *see* FUGATE, FOREIGN COMMERCE AND THE ANTI-TRUST LAWS, 129-134 (1971).

[51] As Prof. Vernon puts its: "The multinational enterprise, though capable of wielding substantial economic power, is not accountable to any public authority that matches it in geographical reach and that represents the aggregate interests of all the countries the enterprise affects." *See* R. Vernon, *supra* note 30, at 71.

[52] Article 2 of the Revised Penal Code provides:

> Except as provided in the treaties and laws of preferential application, the provisions of this Code shall be enforced not only within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zone, but also outside of its jurisdiction, against those who:
>
> 1. Should commit an offense while on a Philippine ship or airship.
> 2. Should forge or counterfeit any coin or currency note of the Philippine Island or obligations and securities issued by the Government of the Philippine Islands.
> 3. Should be liable for acts connected with the introduction into these Islands of the obligations and securties mentioned in the preceding number.
> 4. While being public officers or employees, should commit an offense in the exercise of their functions; or
> 5. Should commit any of the crimes against national security and the law of nations, defined in Title One of Book Two of this Code.

Article 14 of the Civil Code states that "Penal laws and those of public security and safety shall be obligatory upon all who live or to sojourn in the Philippine territory subject to principles of public international law and to treaty stipulations."

[53] *See* Appendix B.

[54] *Ibid.*

Another significant facet of the proposed Bill No. 989 is that it applies to all persons, natural or juridical, who are engaged in commerce. The bill seeks to make civilly liable those who commit antitrust violations where mere "preponderance of evidence" would be sufficient to impose civil liability upon the violator, awarding to the victim treble damages to compensate for his injuries. Unlike in the situation envisioned under Article 28[55] of the New Civil Code (which is anchored on private injury thereby not warranting a government-initiated prosecution), the proposed Bill authorizes the government *motu proprio* to initiate its own civil suit against the violator. As a matter of fact, the government may likewise *motu proprio* lodge its own civil suit for any violation of the proposed law.[56]

A Need For Centralized Antitrust Agency

The effective enforcement of antitrust laws in the Philippines is made extremely difficult by the lack of a centralized antitrust agency which is vested with broad investigative powers in the area of anticompetitive practices. Under the present administrative scheme, several administrative agencies—*viz.*, the Board of Investment, Securities and Exchange Commission, Fair Trade Board, Consumer Complaints Center, Technology Transfer Board, Technology Resource Center, Price Control Council, Philippine Patent Office, Securities and Exchange Commission, Board of Energy—are empowered to take cognizance of certain specific cases falling under their respective statutory jurisdictions. Needless to say, the likelihood of wasteful duplication and overlapping of enforcement efforts and occurrence of jurisdictional quarrels is great since no elaborate system of notification and consultation has been worked out either formally or informally between and among these bodies. Hence, there is an urgent need for a strong centralized antitrust agency which is charged with the duty, among others, of overseeing the competitive climate in the different industrial sectors under certain guidelines previously set by government antitrust experts.

This centralized antitrust agency, which must have an expertise on legal and economic antitrust analysis, should be given the authority to register, disapprove, review or terminate agreements which are deemed restrictive in character; conduct investigations on price levels and competitive conditions; informally negotiate corrective measures; and render binding reports on its findings. The power of this agency to make corrective measures must be extended to allow it to issue orders against price discrimination and other kinds of preference, orders requiring publication of price lists and forbidding deviation therefrom, orders regulating prices, and orders requiring divestiture or dissolution. The power to issue orders must likewise be made

[55] Article 28 of the New Civil Code states that "[u]nfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machination, or any other unjust, oppressive or highbanded method shall give rise to a right of action by the person who thereby suffers damage."

[56] *See* Explanatory Note of Parliamentary Bill No. 989.

applicable to specified classes of restrictive agreements[57] which are to be deemed contrary to public interest if they increase costs, prices, or profits unreasonbly, if they limit the supply of goods to consumers, or if they prevent or unreasonably reduce or limit competition .

The provision for a screening procedure through the registration requirement is an effective device to monitor agreements containing restrictive agreements and is designed to forestall potential domination of certain economic sectors by powerful foreign interests. Agreements entered into by foreign firms must be registered periodically if such agreements have effects upon domestic markets. Additionally, all firms established in the Philippines must be obligated to inform this agency what enterprises, to the best of their knowledge, are parties to a restrictive agreement. Registration of dominant firms provides a convenient way of obtaining information about the practices of such firms and of curbing restrictive practices.

Agreements as to merger, joint venture and related forms of business concentration must likewise be registered. Said registration might be an effective way of mobilizing badly needed data in order to formulate a more discerning public policy toward such arrangements.

Registration of licenses and assignments of patent rights and technological knowhow must be effected through this agency. While patents are themselves immune from the law against monopolies as the basis for lawful exercise of monopoly rights—and patent licenses share that immunity as means by which the patent is shared and thereby mitigated—numerous antitrust proceedings have shown that violations of antitrust laws, and arrangements inconsistent with the policy that underlines both these laws and the patent laws, can be and often are built upon or camouflaged by contractual arrangements about patents.[58] If patent licenses and patent assignments were valid only when recorded with an antitrust agency, the ability of the government to detect and terminate such provisions of the patent system should be substantially enhanced.

The enforcement efforts by this antitrust agency must be geared towards the prevention or obliteration of perceived pernicious effects of certain restrictive acts on the competitive environment. Rather than undergo the

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[57] Which may include horizontal agreements on prices, discounts or terms; vertical collective agreements on prices, discounts, or terms; horizontal agreements to require resale price maintenance; vertical agreements between a single supplier and a purchaser as to resale prices; agreemnts as to aggregated rebates; agreements to limit output or supply; agreements to allocate markets; agreements to restrict methods of production; and agreements denying particular enterprises or classes of enterprises the opportunity to buy or sell or limiting the number of distributors or sources of supply. In addition, orders are applicable to monopolies; practices that tend to bring about monopolies; practices that tend to bring about combinations in restraint of trade; refusal to sell; unjustifiable exclusion from a trade association; sale under tying arrangements; payment of excessive royalties or commission or license fees; and profiteering, black marketing and hoarding. *See* C. D. EDWARDS, AN INTERNATIONAL COMPARISON, 358 (1975).

[58] *Ibid.* at 215; *See* also Bergsten, *supra* note 31, at 249.

usually cumbersome processes attendant to judicial or quasi-judicial deliberations, proceedings in this proposed antitrust agency must be chiefly administrative in nature. Stringent application of antitrust norms should be deemphasized through the adoption of a more flexible and pragmatic approach in assessing the impact of economic activities on current or future overall economic environment. The thrust of the analysis should be on the effect of the arrangement rather than the intent. With this approach, the implementation of antitrust policy will hinge mainly on the aspects of civil liability and implementation which are principally preventive rather than punitive. Consequently, this would obviate the use of criminal law principles which hamper the prompt enforcement of antitrust and unfair trade practices laws.

Finally, the preventive approach in antitrust policy formulation will encourage governments affected by mergers, joint ventures and related forms of business concentration to fashion out procedures which will include collaboration between the home and host countries on antitrust or home-country consultations with the host government concerning actions being considered.[59] If this system of collaboration and mutual consultation is achieved, the government's bargaining power will be considerably enhanced in its negotiation with prospective investors (most or whom are based in countries with highly sophisticated antitrust legislations) for the purpose of inducing foreign investment, and then harnessing them to host country development needs. Moreover, jurisdictional irritants caused by the extraterritorial reach of antitrust laws of other countries will be hopefully avoided.

Developments in the Field of Antitrust Policy Formulation in the Philippines

Studies conducted by the United Nations and its specialized agencies have inspired a re-examination of Philippine antitrust policy vis-a-vis multi-

[59] *See* Bergsten, *supra* note 37. Also *see* E. W. KINTNER and M. R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER, 271 (1970). It has been proposed in this regard that long-run efforts to create internationally agreed antitrust concepts and regulatory procedures should begin. As a practical matter, all offices and employees of multinationals are invariably required to accomplish a "Statement of Policy on Antitrust Laws" embodying compliance with and strict adherence to applicable antitrust laws of home countries.

[60] The United Nations' initiative is traced back to ECOSOC Resolution 1721 (LIII) of July 1972 which led to the massive study by the Department of Social Affairs of the United Nations Secretariat entitled "Multinational Corporations in World Development," ST/ECA/190, followed by the report of the Group of Eminent Persons to study the impact of multinationals on the process of development, the implications thereof on international relations, and the formulation of conclusions which might be of help to governments in making national policy. The most recent development of this work has been the establishment, on a continuing basis, of a commission on transnational corporations, with a supporting information and research center on transnational corporations. Cf. ECOSOC Resolution E/RES/1913 (LVIII) (December 1974). The U.N. Conference on Trade and Development (UNCTAD), in its third session in

national corporations particularly in the context of licensing agreements, know-how licensing, and trademark licensing.

Presidential Decree No. 1263 amended Republic Act No. 165 (Philippine Patent Law)[61] because certain provisions thereof "have become obsolete and are inadequate to meet the demands of our primordial goal of industrial and overall national economic development." Its *ratio legis* is further explained in this tenor:

> In this period of heightened industrial activity and economic development in this country, the present patent system actually hinders rather than promotes industrial and economic development considering that our (present) laws merely protect rights but do not compel the patentees to do their share in the promotion of economic development by the working of the patent, either by the patentees or by willing licensees. Patentees, it is observed, use their patents purely as licenses to import to the exclusion of others, thus allowing virtual monopoly of trade. Taking advantage of this monopoly, these patentees import imported products—usually important ones like medicine, food and much-needed technological devices—made in their home countries and then sell these products in this country at excessive and abusive prices. This is in fact a universal practice which has been noted in conferences on the transfer of technology on the revision of the Paris Convention of Industrial Property, and even in the Report of the U.N. Group of Eminent Persons on the Impact of Multinational Corporations on Development and on International Relations.[62]

Noting that these restrictive practices have prevented the establishment of many important new industries or trades in the Philippines which could contribute to the development of the national economy and help alleviate the unemployment problem, the Decree seeks to remedy this by instituting measures for the regulation and supervision by the government of voluntary licensing agreements, and improving upon the previous system of compulsory licensing. Also noteworthy are the provisions of Sec. 33-C[63]

1972, adopted Resolution No. 73 (III) on restrictive trade practices an has devoted much attention to the preparation of an international code of conduct on the transfer of technology. A special committee reporting to UNCTAD's Trade and Development Board has been established and this, in turn, convened an international group of experts to help in the preparation of a draft code. *See* R. GOLDSCHEIDER, 1979 TECHNOLOGY MANAGEMENT HANDBOOK, 41-43.

[61] While patent laws are not traditionally regarded as belonging to the congeries of antitrust legislation, this subject merits special attention as it is a fertile source of restrictive trade practices in a developing economy such as the Philippines.

[62] Explanatory Note to Pres. Decree No. 1263.

[63] Rule I. Definitions—Sec. i(b). "Technology Transfer Arrangements" shall refer to contracts or agreements entered into directly or indirectly with foreign companies and/or foreign-owned companies, companies having as their principal or accessory objective the transfer, assignment or licensing of technology or trademarks, in the following manner:

1. Transfer, assignment or licensing of the use or exploitation of patents (whether registered with the Phil. Patent Office or not) for inventions, improvements, industrial models and drawings;
2. Licensing of the use or exploitation of trademarks;
3. Furnishing of technical know-how and information by plans, diagrams, models, instruction sheets, instructions, formulae, specifications, and training of personnel;

(on right of licensee) of this same decree which declares as null and void certain restrictive provisions in voluntary licensing.

The amendment of Republic Act No. 165 is certainly a significant step toward the right direction. A recent survey[64] of patent holdings in the Philippines shows that 93% of all invention patents are held by foreigners. The study however added that this figure will go down to about 75% if utility model and design patents are included since a considerable number of these models and patents are owned by Philippine nationals. Setting aside for the moment the philosophical bases for the grant of patent rights and the justification therefor, it has been conclusively determined that existing patent systems have had limited contribution to the economic and technological development of developing countries, and that existing patent systems seem to protect mostly import monopolies while at the same time discouraging the technological development of domestic firms in developing countries.[65] In any event, the Decree is therefore aimed at reconciling the often conflicting interests of the patentees in protecting the know-how related to the patent, and the legitimate development goals of the country. Moreover, it can play a useful defensive role in controlling abuses to equitable technology transfers.

Another recently promulgated law in the nature of technology control legislation is Presidential Decree No. 1520[66] which created a Technology Transfer Board "to help cope with abrupt and unforeseen changes in world economic conditions that hamper the stability and progress of industrial development, and to maintain the responsiveness of the Philippine industries to the needs of the economy and the people." The Board—composed of representatives from the National Economic and Development Authority, Central Bank of the Philippines, National Science Development Board, Technology Resource Center, Board of Investment, and Philippine Patent Office under the chairmanship of the Minister of Industry or his representatives—has the specific function of registering all technology transfer arrangements "after due evaluation of the technology transfer set by the Board, subject to such sanctions the Board and/or its member agencies may impose for the effective implementation of this requirement." The Board has adopted certain screening procedures which follow certain previously set guidelines to ensure that restrictive business practices are controlled, alleviated or eliminated. Upon fulfillment of the pre-registration requirements and the issuance of a certificate of registration, the Board is duty-bound to monitor compliance with the conditions for registration of technology transfer arrangements. But unlike the BOI, which is not vested

4. Technical consultancy, services and assistance in whatever form it may be furnished.

64 W. A. CLEMENTE ET AL., INDUSTRIAL ASPECT OF PATENT SYSTEM, 1-2 (1982).

65 *See* Bergsten, *supra* note 31, at 260.

66 Rule V, Sec. 1(c) of this law enumerates restrictive business clauses which are deemed prohibited.

with power to review conditions originally imposed on multinationals prior to registration, the Technology Transfer Board is explicitly given the power to cancel, after due investigation, the registration of the agreement and require the surrender of the certificate of registration should it be established that the terms and conditions of the technology transfer agreement have been amended or modified without the approval and registration thereof by the Board, or the terms and conditions stated in the certificate of registration have been violated. The adoption by the Board of certain screening procedures for the purpose of detecting potentially restrictive business practices enhances to a considerable extent the bargaining power of prospective local licensees who, principally because of their weaknesses in technical experience, capital and perhaps sophistication, are no match against the more powerful multinationals. This is indeed a welcome change because it is in this area that the government, through its administrative bodies, must play a more active role.[67]

[67] One author rightly observes that "as recently as ten years ago, multinational corporations were virtually unrestrained in their dealings with enterprises in developing countries. Antitrust laws—which must always be considered when licensing in the U.S. and which had then just been introduced in the European Common Market—were unknown in the less developed parts of the world. Enterprises in these countries, including their governments, who are seeking new technology, were inexperienced, and frequently naively overambitious, about the types of projects they could effectively handle. In this relatively free-wheeling atmosphere, deals were often made which are unfavorable to the licensee, or were at least ill-designated to succeed in the recipient countries." *See* R. Goldscheider, *supra*, note 60 at 31.

APPENDIX A

SURVEY OF SOME PHILIPPINE LAWS IN THE NATURE OF ANTITRUST LEGISLATION

Penal

The first Philippine statute in the nature of antitrust legislation is Act 3246 [Public Laws, Vol. 21 at 195] entitled "An Act to Prohibit Monopolies and Combinations in Restraint of Trade." The American influence is immediately apparent in its provision for recovery of treble damages in favor of any person injured in his business or property by reason of the proscribed acts; and the provision empowering the court to make or issue temporary restraining orders or prohibitions. (Section 4 authorizes the court to make or issue temporary restraining orders or prohibitions. Section 6 allows of treble damages in favor of any person injured in his business or property by reason of the forbidden acts.)

Article 186 of the Revised Penal Code (R.P.C.) penalizes 1) combination in restraint of trade, 2) monopoly to restrain free competition in the market and 3) importer's act prejudicial to lawful commerce [Public Act No. 3815 (1930). *See* II A. PADILLA, CRIMINAL LAW, REVISED PENAL CODE ANNOTATED, 446-447 (11th Ed., 1976). Article 186 was taken from Articles 543, 544 of Act 3247. Par. 3 of Article 186 was amended by Rep. Act No. 1956].

Civil and Administrative

There are special laws dealing with the problems inherent in combinations and monopolies. The Philippine Corporation Law (Secs. 13, 5-A) imposes a quantitative limitation in equity participation among corporations engaged in agricultural and mining. The newly enacted Corporation Code, in Sec. 140 thereof, expressly empowers the Batasang Pambansa to set maximum limits to stockholdings in corporations declared to be vested with public interest belonging to individuals or groups of individuals related to each other by consanguinity or affinity or by close business interests or whenever it is necessary to achieve national objectives, prevent illegal monopolies or combinations in restraint of trade, or to implement national economic policies declared in laws, rules and regulations designed to promote the general welfare and foster economic development.

Article 28 of the new Civil Code of the Philippines gives a right of action to persons who suffer damage as a result of acts constituting unfair competition in agricultural, commercial or industrial enterprises or in labor.

Sec. 4(5) of Republic Act No. 5455 (Foreign Investment and National Economy) requires non-Filipino firms to procure a written certificate from the Board of Investment to the effect that "their entry will not pose a clear and present danger of promoting monopolies or combinations in restraint of trade." [*See* note 40, *supra.*]

Republic Act No. 337, as amended, prescribes quantitative restrictions in equity participation of persons engaged in the banking business [*See* Secs. 12-B, 12-D].

Republic Act No. 6124 [55 O. G., no. 32, 7344-A, August 10, 1971], the Price Fixing Law, prescribed maximum prices of essential commodities to counteract egregious anticompetitive practices perpetuated by some unscrupulous businessmen who took advantage of the economic crisis in the early 70s and established extremely inflated prices of consumer articles. The administrative body empowered to establish "fair, just and reasonable" maximum prices for goods was the Price Control Council which was created by Executive Order No. 249 (July 27, 1970).

Executive Order No. 273 [67 O.G. 346, Jan. 18, 1971], creating the "Presidential Oil Commission" and Republic Act No. 6173 (67 O.G. at 3495, May 10, 1971), establishing the "Oil Industry Commission," were designed to cushion the impact caused by spiralling prices of petroleum products. These administrative bodies were given the power to set the prices of petroleum products and take adequate steps to prevent monopolies and combinations in restraint of trade in the petroleum industry.

Republic Act No. 5186 (1968), also known as the Investment Incentives Act, grants pereferential treatment and other benefits to enterprises registered with the Board of Investment and operating in preferred areas. Among the benefits granted to both pioneer as well as non-pioneer ventures which are particularly relevant to this study are protection from the government competition and protection from unfair or unnecessary import competition. Equally important is the protection given to investors in a preferred non-pioneer enterprise — as distinct from the enterprise itself — from infringement of patents, trademarks, and other rights. A complementary legislation is Republic Act No. 6135 (Export Incentives Act of 1971).

The Fair Trade Board was created by Executive Order No. 286 [45 O.G. 4234, October 18, 1949] to "synchronize, coordinate and make more effective the activities of the various government agencies relating to the adminstration and enforcement of the unfair competition and unfair trade practices laws and regulations." The unfair trade practices sought to be prosecuted were "cases of imitation, alteration and substitution of lawful trademarks and tradenames, misbranding, mislabeling, fraudulent designation of origin, false description, adulteration, fraudulent methods of unfair competition and unethical trade practices."

Executive Order No. 249 [66 O.G. 7344-A, July 27, 1970] amended the aforementioned Executive Order No. 286 by reorganizing the Fair Trade Board and vesting it with more power. Noting that increase in proportions of the nefarious practices just mentioned above, and the need to eradicate and suppress them, the Fair Trade Board was henceforth empowered "to synchronize, coordinate and made more effective the activities of the various government agencies relating to the administration and enforcement of the laws and regulations governing unlawful importation and/or exportation, unfair competition, unfair trade practices or deceptive acts, or practices in commerce and industry and laws against monopolies and combinations in restraint of trade, such as collusion in price-fixing, entering into any contract or conspiracy to prevent by artificial means free competition in the market or by making other transactions prejudicial to lawful commerce." Moreover, the Board was given the duty "to take steps to prevent and suppress monopolies, price-fixing agreements, boycotts, combinations in restraint of trade, interlocking directorates and offices, fraudulent advertising, hoarding, misbranding, mislabeling, unfair methods of compitition and all forms of unfair and deceptive acts or practices in commerce and industry prohibited by existing laws." The Board likewise has the power, "after termination of any investigation, to order any person, firm, association, partnership or corporation to cease and desist from practicing or using an unfair trade methods, combinations in restraint of trade, price-fixing agreements, boycotts, or deceptive or practices in commerce and industry, and refer the matter to the proper courts upon failure of such person, firm, association, partnership or corporation to comply with such order or orders."

Special laws, basically in the area of deceptive and unfair practices, were enacted to cover most of these proscribed acts:

— Act 3740 (1935) concerning misrepresentations through advertising or misbranding of certain goods;

— Rep. Act No. 71 (1946) requiring articles offered for public sale to be displayed with appropriate tags or labels to indicate the price of each article, which articles are to be sold uniformly and without discrimination at the stated price;

— Rep. Act No. 623 (1951), law on the use of marked containers to identify the containers used in manufacturing, packing or selling one's product; to protect the right to the exclusive use of the same and to protect the public from confusion or deception;

— Rep. Act No. 1556 which gives protection to the consumer by requiring the registration of any person, partnership, firm or corporation or association engaged in the manufacture, importation, sale or distribution of feeds or feeding stuffs;

— Rep. Act No. 3452 (1962): "An Act to Adopt a Program to Stabilize the Price of Palay, Rice and Corn, To Provide Incentives for Production and to Create the Rice and Corn Administration to Implement the Same and to Provide Funds Therefor;"

— Commonwealth Act No. 617 requires that all trading in rice, palay, not including the bearded and unthrushed palay in straw and in bundles, shall be conducted on the basis of the liter, the kilogram, the sack or the ganta;

— Rep. Act No. 4229 (1960) regulates the sale, dispensation and/or distribution of contraceptives, drugs and devices;

— Presidential Decree No. 280 authorizes the Food and Drug Administration to mete penalty to erring drug establishment;

— Rep. Act No. 5921 (1969) provides liability for a manufacturer, importer or distributor of drugs who, among others, manufactures, prepares, sells or administers any prescription, drug, pharmaceutical or poison under any fraudulent name, direction, or pretense to adulterate any drug, pharmaceutical, medicine, etc.;

— Rep. Act No. 3720 (1963) insures safe and good quality supply of food, drug and cosmetics and regulates the production, sale and traffic of the same to protect the health of the people;

— Act No. 3595 requires manufacturers, sellers, importers or offerors of any galvanize iron, barbed wire or nails to conform to certain standards of measures and identification;

— Act No. 3073 regulates the sale of viruses, serums, toxins and analogous products;

— Act No. 3526 regulates transactions involving paints;

— Act No. 3091 (1923) penalizes sale or offer of adulterated or misbranded insecticide or fungicide;

— Rep. Act No. 1929 (1957) prohibits sale of acetic acid in any form in groceries and retail stores selling foodstuffs;

— Commonwealth Act No. 560 (1940) provides for security against fraud in case of sawn lumber offered for sale;

— Rep. Act No. 428 (1950) penalizes any person knowingly possessing, selling or distributing in any place and manner fish and other aquatic animals, stupefied, disabled or killed by means of dynamite, or other explosives or toxic substances;

— Rep. Act No. 1071 (1954) prohibits sale of veterinary biologics and medical preparations to the public by unregistered pharmacies or drugstores, biological laboratories, veterinary clinics and government veterinary agencies;

— Republic Act No. 1517 regulates collections, processing of human blood and the establishment and operation of blood banks and blood processing laboratories;

— The Ministry Special Order No. 226, Series of 1979 (April 11, 1979) created in the Ministry of Commerce a Consumer Complaints Center — composed of the Chief, Management Division, Financial and Management Service of the Ministry of Trade, as chairman, and representatives from Bureau of Domestic Trade, Philippine Bureau of Product Standards, Philippine Patent Office, Price Stabilization Council and Trade Assistance Center. Among the functions of the Center are "to receive and evaluate complaints and inquiries from the general public and immediately take action thereon or refer the complaint/inquiry to the government agency concerned for appropriate action" and "recommend measures to make the implementation of consumer protection, price stabilization, fair trade and related laws more effective and meaningful;"

— Executive Order No. 913 strengthens the rule-making and adjudicatory powers of the Minister of Trade and Industry to further protect consumers;

— Letter of Instructions No. 1359 directs measures to prevent hoarding, profiteering and price manipulation.

Constitutional

Among the egalitarian principles enshrined in the 1973 Philippine Constitution are those directed towards the curbing of monopolies and combinations in restraint of trade or unfair competition. Foremost of these constitutional provisions is:

> The State shall promote social justice to ensure the dignity, welfare and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment and disposition of private property, and equitably diffuse property ownership and profits. [Const., article II, section 6].

The State shall likewise regulate or prohibit private monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed" [Const., article XIV, section 2].

APPENDIX B

PARLIAMENTARY BILL NO. 989

EXPLANATORY NOTE

This Bill is general and comprehensive both as to its nature and scope.

The Bill's substantive provisions seek to prohibit and penalize all contracts or agreements or conspiracies which would unreasonably restrain trade or commerce such as price-fixing, market divisions, group boycotts, etc. The Bill also seeks to prevent monopolizations or attempts to monopolize. While the Bill does not prohibit a monopoly which is "thrust upon" a person engaged in commerce by virtue of superior skill, technology, foresight, industry or other objective factors, a violation occurs if such person acts to preserve or exploit its dominance in a manner that is not the result of such objective factors.

The Bill likewise prohibits and penalizes the unjustified discriminatory practice of certain unscrupulous persons in entering into contracts with different persons similarly situated but under different contractual conditions. This practice has been usually resorted to and availed of by those who are dominant in a particular market and has anti-competitive effect. It is for this reason why the Bill also prohibits and penalizes the so-called "tie-in" arrangements.

Under Section 6 of the proposed Bill, the undue concentration of economic power in one single corporation is sought to be avoided. The fear of a financial institution with vast capital resources dominating a particular industry in which it heavily invests, led to the incorporation of some form of antitrust provisions in the recently enacted universal banking laws. While Section 7 of the proposed Bill serves another facility-of-competition function, it also seeks to prevent undue concentration of economic power through interlocking directorates.

The section on unfair competition and false advertisement serves the cause of consumerism.

The scope of this Bill is as general and comprehensive as the nature of its substantive provisions. It applies to all persons, natural or juridical, who are engaged in commerce, from the ordinary sari-sari store in every neighborhood corner to the biggest corporations in high-technology industries. It applies to both domestic and foreign corporations where their conduct has substantial effect on Philippine Trade or commerce. Antitrust violations, even if committed abroad or outside the territorial jurisdiction of the Philippines are and should be within our jurisdictional competence so long as such violations substantially affect our trade and commerce.

Contrary to popular conception, the Philippines does have some form of antitrust law. This antitrust legislation is contained in Articles 186, 187, 188 and 189 of the Revised Penal Code. The Code being penal in nature and therefore requiring "proof beyond reasonable doubt," rarely has there been any prosecution for antitrust violations, especially where the victim of such violations is the impersonal Juan de la Cruz as Consumer. This Bill therefore seeks to make civilly liable those who commit antitrust violations where "mere preponderance of evidence" would be sufficient to impose civil liability upon the violator. As a further incentive to the victim, this Bill seeks to award to the victim damages threefold that actually sustained by him. Further, to cover instances where the consuming public at large would be the victim of an antitrust violation, the government may *motu proprio* initiate its own civil suit against the violator. The government may likewise *motu proprio* initiate its own civil suit for any violation of this Bill.

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Second Regular Session

PARLIAMENTARY BILL NO. 989

Introduced by Assemblyman Soller, Minister Natividad, Assemblymen Baterina, Roman, Bello, Alinea (A.), Ortiz, Amante, Nuñez, Royeca, Fider, Espina, and Quiambao

THE ANTITRUST LAW OF THE PHILIPPINES

Be it enacted by the Batasang Pambansa in session assembled:

SECTION 1. It shall be the declared policy of the State to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and labor's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.

SEC. 2. Every contract or agreement, conspiracy or combination in the form of trust or otherwise, which unreasonably restrains trade or commerce, whether domestic or foreign, is hereby declared to be illegal. For this purpose, the following, though not exclusive, shall be considered *per se* violations of this Section:

(a) An agreement between competitors engaged in commerce which directly or indirectly fixes the purchase or selling price of any commodity;

(b) An agreement between competitors engaged in commerce to limit production or control supply; and

(c) An agreement between competitors engaged in commerce to allocate customers or to divide markets among themselves or to share sources of supply.

Nothing herein contained shall render illegal contracts or agreements prescribing minimum prices for the resale of a commodity which bears the trade mark, brand, or name of the producer or distributor of such commodities of the same general class produced or distributed by others: *Provided,* That this shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity between manufacturers, or between producers, or between wholesalers, or between brokers, or between retailers, or between persons, firms, or corporations in competition with each other.

SEC. 3. No person shall monopolize or attempt to monopolize, or combine or conspire with any other person any part of trade or commerce, whether domestic or foreign.

SEC. 4. It shall be unlawful for any person engaged in commerce, to discriminate in price or other contractual conditions between different purchasers of commodities of like grade and quality, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly: *Provided,* That nothing herein contained shall prevent price differentials which make only due allowances for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are sold or delivered: *Provided, further,* That nothing herein contained shall prevent persons engaged in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *Provided, further,* That nothing herein contained shall prevent price changes from time to time where such changes are in response to changing conditions of the market, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence, or forced sales under court process.

SEC. 5. It shall be unlawful for any person engaged in commerce to sell or lease goods, wares, merchandise, machinery, supplies or other commodities on the condition that the purchaser or lessee shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor of the seller or lessor, where the effect of such sale or lease is to substantially lessen competition or tend to create a monopoly.

It shall likewise be unlawful for any person engaged in commerce to sell or lease goods, wares, merchandise, machinery, supplies or other commodities on the condition that the purchaser or lessee shall also acquire other goods, wares, merchandise, machinery, supplies or other commodities of the same seller or lessor which commodities, either by their nature or according to commercial usage, have no substantive relation or connection with the subject of the original sale or lease.

SEC. 6. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the capital stock or the whole or any part of the assets of another corporation where the effect of such an acquisition may be substantially to lessen competition or tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same, by voting or otherwise, to bring about the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, when the effect of such formation is not to substantially lessen competition.

This section shall also be inapplicable to mergers or consolidations of financial institutions under the system of universal banking where such merger or consolidation is approved by the Monetary Board of the Central Bank. This section shall however be applicable to the investments of a universal bank in both allied and non-allied undertaking where the effect of such investments is to substantially lessen competition or tend to create a monopoly.

SEC. 7. No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than PESOS: TEN MILLION (₱10,000,000.00), other than financial institutions, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of this Act.

No person may serve as director, officer, or employee of two or more financial institutions, except that the Monetary Board of the Central Bank may by regulation permit such service as a director, officer, or employee of not more than one other such financial institution.

SEC. 8. Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are declared illegal.

The dissemination or the causing to be disseminated of any false advertisement shall be unfair or deceptive act or practice in commerce within the meaning of this Section. A "false advertisement" is one which is misleading in a material respect. In determining whether any advertisement is misleading, there shall be taken into account not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

SEC. 9. Labor organizations and unions which are instituted for the purpose of mutual help among its members, not having capital stock or conducted for profit, shall not be construed to be illegal combinations or conspiracies in restraint of trade.

SEC. 10. Any person who shall be injured in his business or property by reason of the violations of this Act may sue therefore in the Court of First Instance irrespective of the amount involved, but subject to the ordinary rules on venue, and shall recover threefold the damages sustained by him, and the cost of suit, including attorney's fee.

Whenever the public interest or national security so requires, the Ministry of Justice and the Office of the Solicitor General are hereby empowered and authorized to initiate and prosecute civil suits to restrain and prevent violations of this Act, or to intervene in any civil suit pending between private parties for the effective enforcement of any Section of this Act.

The civil suit filed by a private party or by the Government shall proceed independently of any criminal action which may be brought under the succeeding Section.

The Ministry of Justice is hereby further authorized to issue rules and regulations to implement any Section of this Act.

SEC. 11. Any person violating any section of this Act shall be punished by the penalty of *prision mayor* or a fine ranging from five hundred to fifty thousand pesos, or both.

Whenever any of the offenses is committed by a corporation or association, the officer or employee immediately responsible, the president and each one of the directors or managers of said corporation or association or its agent or representative in the Philippines in case of a foreign corporation or association, who shall have knowingly permitted or failed to prevent the commission of such offenses, shall be held liable as principals thereof.

Any property possessed under any contract or by any combination mentioned in the preceding Sections, and being the subject thereof, shall be forfeited to the Government of the Philippines.

SEC. 12. Such provisions of the Revised Penal Code which are clearly repugnant and inconsistent with any of the provisions of this Act are hereby repealed and amended, otherwise, they shall be in full force and effect.

SEC. 13. This Act shall take effect upon its approval.

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