THE ASEAN COMPETITION LAW PROJECT: THE PHILIPPINES REPORT

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Introduction

The Philippines has no general competition law, i.e., a law whose objective or purpose is "to control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development." [1] In the past three years, however, several bills have been filed in the Senate and the House of Representatives of the Congress of the Philippines which purport to fill this gap in Philippine modern legislation.

While the Philippines has no general competition law, its statute books are replete with laws some of the provisions of which deal with aspects of competition law such as monopolies and combinations in restraint of trade, restrictive business practices, price control measures and consumer protection. Statutory provisions dealing with competition can be found in more than a dozen laws with the earliest dating back to as early as July 1887 and the latest being signed into law in July 2000.

Background of Competition Law

Cultural and Historical Aspects of Competition Law

Under Spain

Monopolies existed in the Philippines when it was under Spain. They were officially established by Spain to raise funds for its King. The latter in turn funded the expenses of the colonial government. This system, called the *real hacienda* or the King's estate continued until the Philippines ceased to be a possession of the King of Spain and was made a part of *España en Ultramar* or Overseas Spain.

> "The government in Manila that once was dependent on the *real hacienda* for operating funds now acquired the status of a conventional colonial government that assumed the responsibility for raising its revenues." [2]

[1] Draft possible elements for Article 1 (objectives or purposes of the law) of the revised version of the United Nations Conference on Trade and Development Model Law on Competition.

[2] *An Economic History of the Philippines* by O. D. Corpuz, University of the Philippines Press, 1997, at p. 140)

Plowmaking was made a monopoly in the late 16th century and was farmed out in auctions conducted by the government.[3] Monopolies were later on established in certain activities, such as cockfighting,[4] and in the production and sale of certain goods such as native liquor from coconut and nipa palm, betel nut[5] and tobacco. The monopoly on native liquor was set up in 1712 while that on tobacco in 1782.[6] The latter was abolished , on account of frauds and uneconomic operations, in 1882.[7]

The first legal provisions to deal with monopolies and combinations in restraint of trade could be found in Articles 543, 544 and 545 of the Spanish Penal Code as made applicable to the Philippines (the "Old Penal Code"):

> "The royal decree of September 4, 1884 directed that the Spanish Penal Code of 1870, as modified in accordance with the recommendations of the Code Commission for Overseas Provinces, be published and applied in the Philippines. The royal decree of December 17, 1886 ordered the enforcement of the previous royal decree. The Penal Code for the Philippines was published in the Manila Official Gazette on March 13 and 14, 1887 and it took effect four months thereafter, or on July 14, 1887. It was in force up to December 31, 1931. It was modified and supplemented by various special penal laws.[8]

Under the Americans

On December 1, 1925, the Philippine Legislature enacted Act No. 3247 entitled "An Act to Prohibit Monopolies and Combinations in Restraint of Trade." This law, which supplemented the provisions of the Old Penal Code then still enforced in the Philippines, was based on the Sherman Act of the United States which took effect in 1890.

Act No. 3247 was repealed upon the approval of the Revised Penal Code (Act No. 3815, as amended) on December 8, 1930. It went into effect on January 1, 1932.

Article 186 of the Revised Penal Code. which is entitled "monopolies and combinations in restraint of trade", was taken from Articles 543, 544 and 545 of the Old Penal Code and Act No. 3247. As amended by Republic Act No. 1956, approved on June 22, 1957, it now reads as follows:

> ARTICLE 186. Monopolies and combinations in restraint of trade. - The penalty of *prision correccional* in its minimum period or a fine ranging from 200 to 6,000 pesos, or both, shall be imposed upon:
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> 1. Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or

[3] Ibid., at p. 28.
[4] Ibid., at p. 119.
[5] Ibid., at p. 66.
[6] Ibid., at p. 119.
[7] Ibid., at p. 191.
[8] *The Revised Penal Code* by Ramon C. Aquino, Central Book Supply, Inc., 1961, at pp. 1-2.

otherwise, in restraint of trade or commerce to prevent by artificial means free competition in the market.

2. Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize said merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market.

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

If the offense mentioned in this article affects any food substance, motor fuel or lubricants, or other articles of prime necessity; the penalty shall be that of *prision mayor* in its maximum and medium periods, it being sufficient for the imposition thereof that the initial steps have been taken toward carrying out the purposes of the combination.

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

Whenever any of the offenses described above is committed by a corporation or association, the president and each one of the directors or managers of said corporation or association or its agents 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.

Article 186 continues to be the law directly applicable to monopolies and combinations in restraint of trade. Since there is a dearth of Philippine case law on Article 186, resort may be had to decisions of United States courts interpreting provisions of the Sherman Anti-Trust Law.[9]

Has Article 186 been an effective deterrent to monopolies and combinations in restraint of trade? In a letter to the Executive Director of the Office of United Nations and International Organizations, answering a questionnaire of the UN Secretary General on, among other matters, how effective in practice has been Articles 185 and 186 of the Revised Penal Code penalizing machinations in public auctions and monopolies and

[9] Department of Justice Opinion No. 19, series of 1962, February 26, 1962.

combinations in restraint of trade, respectively, the then Minister of Justice responded with candor that as far as he is aware, "no business enterprise has yet been indicted under the anti-trust provisions of the Revised Penal Code, nor has any official been successfully impeached by the legislature.[10]

Early Post-War Period: Parity Rights

A different kind of monopoly was established after the Second World War. This came about with the coerced grant to the Americans of parity rights effected in the form of an ordinance appended to the 1935 Philippine Constitution. The amendment, known as the "parity amendment," provided that –

> Notwithstanding the provisions of section one, Article Thirteen [dealing with the disposition, exploitation, development and utilization of natural resources], and section eight, Article Fourteen [dealing with the operation of public utilities], of the foregoing Constitution, during the effectivity of the Executive Agreement entered into by the President of the Philippines with the President of the United States on the fourth of July, nineteen hundred and forty-six, pursuant to the provisions of Commonwealth Act Numbered Seven hundred and thirty-three, but in no case to extend beyond the third of July, nineteen hundred and seventy-four, the disposition, exploitation, development, and utilization of all agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines, and the operation of public utilities, if open to any person, **be open to citizens of the United States and to all forms of business enterprises owned or controlled, directly or indirectly, by citizens of the United States in the same manner as to, and under the same conditions imposed upon, citizens of the Philippines or corporations or associations owned or controlled by citizens of the Philippines**. (Emphases and bracketed comments supplied)

By virtue of the Laurel-Langley Agreement of 1956 between the Philippines and the United States, American parity rights in the Philippines were extended not only to the exploitation of natural resources but to all economic activities. Thus, American businessmen, vis-a-vis businessmen of other nationalities, could venture into the same businesses that Philippine nationals could go into, including the ownership of land. This monopoly continued until the termination of parity rights on July 3, 1974, except for the ownership of land acquired from private individuals which was extended by decree to May 17, 1975 by then President Ferdinand E. Marcos.[11]

Mid-Century Nationalization Laws: In General

Apart from the severe economic dislocation suffered by the country after the Second World War and the other problems that came with it, the Philippine economy also suffered from alien control of the domestic trade. To remedy this problem, various laws designed to limit the access of non-Philippine nationals to certain sectors of the economy were passed. Among these laws were –

[10] Department of Justice Opinion No. 160, series of 1983, October 17, 1983.

[11] *History of the Filipino People* by Teodoro A. Agoncillo, Garotech Publishing, 8th ed., 1990, at p.515

(1) Republic Act No. 37, approved on October 1, 1946 and effective on January 1, 1947, which granted preference to Filipino citizens in the lease of public market stalls;

(2) Republic Act No. 1180, approved on June 19, 1954, which nationalized the retail trade (and in respect of which a more extensive discussion follows);

(3) Republic Act No. 1292, approved on June 15, 1955, which created a Filipino retailers' fund for the purpose of providing credit facilities for the promotion and development of Filipino retail trade and required importers of prime commodities to sell to Filipino retailers at least 30% of their imports at the same mark-up as their sales through their then trade channels;

(4) Republic Act No. 1345, approved on June 17, 1955, which created the National Marketing Corporation, a government corporation that will engage in the procurement, purchase and distribution of merchantable goods to Filipino retailers and businessmen; and

(5) Republic Act No. 3018, approved on August 2, 1960 and effective on January 1, 1961, which limited the right to engage in the rice and corn industry to citizens of the Philippines. This law was repealed in 2000 by Republic Act No. 8762.

Mid-Century Nationalization Laws: The Nationalization of the Retail Trade

Under Section 1 of Republic Act No. 1180 ("RA 1180"), otherwise known as the Retail Trade Nationalization Law, no person who is not a citizen of the Philippines, and no association, partnership, or corporation the capital of which is not wholly owned by citizens of the Philippines, shall engage directly or indirectly in the retail business. As used in RA 1180, the term "retail business" means any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or goods for consumption, but shall not include:

(a) a manufacturer, processor, laborer, or worker selling to the general public the products manufactured, processed or produced by him if his capital does not exceed P5,000, or

(b) a farmer or agriculturist selling the products of his farm. (Sec. 4)

In confirming the constitutionality of the law, the Philippine Supreme Court, in the case of *King, et al. vs. Hernaez, et al.*, G.R. No. L-14859, March 31, 1962, held that the purpose of RA 1180 –

> " x x x is to completely nationalize the retail trade in the Philippines. In other words, its primordial purpose is to confine the privilege to engage in retail trade to Filipino citizens by prohibiting any person who is not a Filipino citizen or any entity whose capital is not wholly owned by citizens of the Philippines from engaging,

> directly or indirectly, in the retail business. The nationalization of retail trade is, therefore, complete in the sense that it must be wholly owned by a Filipino citizen or Filipino controlled entity in order that it may be licensed to operate. The law seeks a complete ban to aliens who may not engage in it directly or indirectly. And the reasons behind such ban are the pernicious and intolerable practices of alien retailers who in the past have either individually or in organized groups contrived in many dubious ways to control the trade and dominate the distribution of goods vital to the life of our people thereby resulting not only in the increasing dominance of alien control in retail trade but at times in the strangle hold on our economic life. "

RA 1180 may not have elicited as much concern among most foreign businessmen if it were interpreted as applicable only to consumer goods, i.e., goods for personal or household consumption. It was, however, read broadly as being applicable also to industrial or commercial goods. Efforts at having the law amended by Congress proved difficult. However, when Martial Rule was declared by then President Ferdinand E. Marcos in 1972, the opponents of RA 1180 saw an opportunity to restrict the scope of the law. Using his legislative power under martial law, President Marcos issued Presidential Decree No. 714 ("PD 714") on May 28, 1975 amending RA 1180. The "Whereas" clauses of PD 714 provided the justification for the amendment of RA 1180:

> WHEREAS, the statutory definition in Republic Act No. 1180, otherwise known as the Retail Trade Nationalization Law, of the term "retail business" is vague and ambiguous, and this ambiguity has given rise to conflicting theories as to its precise scope;
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> WHEREAS, it is believed to be not within the intendment of the said nationalization law to include within its scope sales made to industrial or commercial users or consumers;
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> WHEREAS, it is likewise in the interest of the national economy to exclude from the provisions of the said law the business of restaurants located in hotels, irrespective of the amount of capital, as long as the restaurant is merely incidental to the hotel business; x x x .

Two additional economic activities were excluded by PD 714 from the definition of "retail trade":

(1) A manufacturer or processor selling to industrial and commercial users or consumers who use the products bought by them to render service to the general public and/or to produce or manufacture goods which are in turn sold by them; and
(2) A hotel-owner or keeper operating a restaurant irrespective of the amount of capital, provided that the restaurant is necessarily included in, or incidental to, the hotel business.

As further discussed later in this Report, RA 1180, as amended by PD 714, was repealed on March 7, 2000 by Republic Act No. 8762.

Post-Marcos Period: The 1986 Constitution

After Ferdinand E. Marcos was deposed as President of the Philippines as a result of the peaceful revolution conducted by Filipinos in February 1986, Corazon C. Aquino took over the reigns of government as President and issued Proclamation No. 3 which ordained the adoption of a provisional constitution pending the adoption of a regular one. The same Proclamation called for an appointed Constitutional Commission to draft a permanent constitution. The draft of the new Constitution was completed and adopted by the Commission on October 15, 1986, and was ratified by a plebiscite, and took effect, on February 2, 1987.

Within this rather lengthy Constitution is a plethora of provisions dealing, directly and indirectly, with matters relevant to competition law. Some of these provisions expressly reserve to Philippine nationals certain economic activities. These provisions are all set out in **Annex A** to this Report. The most explicit provision dealing with monopolies and combinations in restraint of trade is Section 19 of Article XII on the National Economy and Patrimony which reads as follows

> SECTION 19. The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

The Supreme Court, in the cases of *Francisco S. Tatad vs. The Secretary of the Department of Energy and the Secretary of the Department of Finance*, G.R. No. 124360, November 5, 1997, and *Edcel C. Lagman, et al. vs. Hon. Ruben Torres, et al*., G.R. No. 127867, November 5, 1997, which are discussed more extensively at the latter part of this Report, described the import of Section 19 of Article XII of the Constitution in the following language:

> Section 19, Article XII of our Constitution is anti-trust in history and in spirit. It espouses competition. The desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies. Competition is thus the underlying principle of Section 19, Article XII of our Constitution.
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> x x x
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> Again, we underline in scarlet that the fundamental principle espoused by Section 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market. But the competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail. Monopolistic or oligopolistic markets deserve our careful scrutiny and laws which barricade the entry points of new players in the market should be viewed with suspicion.

It also provided a definition of the terms “monopoly” and “combination in restraint of trade”:

> A monopoly is a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right or power to carry on a particular business or trade, manufacture a particular article, or control the sale or the whole

supply of a particular commodity. It is a form of market structure in which one or only a few firms dominate the total sales of a product or service. On the other hand, a combination in restraint of trade is an agreement or understanding between two or more persons, in the form of a contract, trust, pool, holding company, or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce in a certain commodity, controlling its production, distribution and price, or otherwise interfering with freedom of trade without statutory authority. Combination in restraint of trade refers to the means while monopoly refers to the end.

A Survey of Philippine Laws Dealing With Aspects of Anti-Trust and Competition Law Matters

Price Control Measures

Beginning in 1934, various laws and other issuances having the force of law were promulgated to deal with the problem of hoarding, price manipulation, speculation and monopoly of essential goods, articles and commodities:

(1) Act No. 4164, approved on December 1, 1934, which penalized the excessive increase in the price of certain prime necessities of life on the occasion of a public calamity.

(2) Republic Act No. 6124, approved on April 2, 1970 and in force up to June 30, 1971, which provided for the fixing of the maximum selling price of essential articles or commodities and created a Price Control Council. Articles and commodities deemed essential to the public interest were medicines, drugs and surgical supplies; food and foodstuffs; clothes, clothing, and sewing and weaving materials and supplies; fuels and lubricants; construction materials; educational supplies and equipment; and fertilizers, insecticides, pesticides and other agricultural inputs.

(3) Republic Act No. 6361, approved on July 27, 1971 and in force up to June 30, 1973, which dealt with the same subject matter as, and replaced, Republic Act No. 6124. However, the list of articles and commodities deemed essential to the public interest became longer and now specifically included: optical and dental supplies; milk, soft drinks and other beverages; animal and poultry feeds and veterinary supplies; crude oil and petroleum products; office supplies and equipment; motor vehicles and spare parts, tires, batteries, engines and other machineries; household utensils, appliances and other household necessities; and footwear including all the components thereof.

(4) Presidential Decree No. 1674, issued on February 16, 1980 and repealed in 1992 by Republic Act No. 7581, which provided a mechanism for price regulation that would check price manipulation activities and at the same time afford legitimate business a fair return on investment through the exercise of reasonable regulation. In the light of increases in the price of oil products which threatened to trigger unconscionable increases in the prices

of prime and essential commodities as a result of speculative, monopolistic, profiteering, hoarding and other activities calculated to take advantage of the situation, it also created a price stabilization council.

(5) Letter of Instruction No. 1305, issued on March 29, 1983 and repealed in 1992 by Republic Act No. 7581, which directed measures to prevent cement hoarding, price manipulation and profiteering, such as the seizure and confiscation of hoarded cement,

(6) Letter on Instruction No. 1342, on July 7, 1983 and repealed in 1992 by Republic Act No. 7581, which ordered immediate measures to prevent price manipulation and to protect consumers and directed the Price Stabilization Council to increase its vigilance, particularly its price monitoring and enforcement, in order to afford maximum protection to consumers, prevent price manipulation and hoarding during the critical period of price adjustments.

(7) Letter of Instruction No. 1359, issued on October 12, 1983 and repealed in 1992 by Republic Act No. 7581, which directed measures to prevent hoarding, profiteering and price manipulation, such as imprisonment, fine, seizure of products, cancellation of permits, and loss of citizenship and deportation if the offender is a naturalized Filipino.

(8) Republic Act No. 7581, approved on May 27, 1992, which declared and implemented the policy of the State (i) to ensure the availability of basic necessities and prime commodities at reasonable prices at all times without denying legitimate business a fair return on investment, and (ii) to provide effective and sufficient protection to consumers against hoarding, profiteering and cartels with respect to the supply, distribution, marketing and pricing of said goods, especially during periods of calamity, emergency, widespread illegal price manipulation and other similar situations. Section 5 of Republic Act No. 7581 describes what are considered illegal acts of price manipulation as follows:

> SECTION 5. Illegal Acts of Price Manipulation. — Without prejudice to the provisions of existing laws on goods not covered by this Act, it shall be unlawful for any person habitually engaged in the production, manufacture, importation, storage, transport, distribution, sale or other methods of disposition of goods to engage in the following acts of price manipulation of the price of any basic necessity or prime commodity.
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> (1) Hoarding, which is the undue accumulation by a person or combination of persons of any basic commodity beyond his or their normal inventory levels or the unreasonable limitation or refusal to dispose of, sell or distribute the stocks of any basic necessity of prime commodity to the general public or the unjustified taking out of any basic necessity or prime commodity from the channels of reproduction, trade, commerce and industry. There shall be prima facie evidence of hoarding when a person has stocks of any basic necessity

or prime commodity fifty percent (50%) higher than his usual inventory and unreasonably limits, refuses or fails to sell the same to the general public at the time of discovery of the excess. The determination of a person's usual inventory shall be reckoned from the third month immediately preceding before the discovery of the stocks in case the person has been engaged in the business for at least three (3) months; otherwise, it shall be reckoned from the time he started his business.

(2) Profiteering, which is the sale or offering for sale of any basic necessity or prime commodity at a price grossly in excess of its true worth. There shall be prima facie evidence of profiteering whenever a basic necessity or prime commodity being sold: (a) has no price tag; (b) is misrepresented as to its weight or measurement; (c) is adulterated or diluted; or (d) whenever a person raises the price of any basic necessity or prime commodity he sells or offers for sale to the general public by more than ten percent (10%) of its price in the immediately preceding month: Provided, That, in the case of agricultural crops, fresh fish, fresh marine products, and other seasonal products covered by this Act and as determined by the implementing agency, the prima facie provisions shall not apply; and

(3) Cartel, which is any combination of or agreement between two (2) or more persons engaged in the production, manufacture, processing, storage, supply, distribution, marketing, sale or disposition of any basic necessity or prime commodity designed to artificially and unreasonably increase or manipulate its price. There shall be prima facie evidence of engaging in a cartel whenever two (2) or more persons or business enterprises competing for the same market and dealing in the same basic necessity or prime commodity, perform uniform or complementary acts among themselves which tend to bring about artificial and unreasonable increase in the price of any basic necessity or prime commodity or when they simultaneously and unreasonably increase prices on their competing products thereby lessening competition among themselves.

Laws Directly Dealing with Unfair Competition, Monopolies and Combinations in Restraint of Trade

Apart from Article 186, as amended, of the Revised Penal Code, there are other laws which expressly proscribe or provide remedies against unfair competition, monopolies and combinations in restraint of trade. These laws are the following:

(1) Article 28, Republic Act No. 386, as amended, approved on June 18, 1949 and effective August 30, 1950, otherwise known as the Civil Code of the Philippines –

ARTICLE 28. Unfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machination or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who thereby suffers damage.

(2) Article 8, Republic Act No. 6938, approved on March 10, 1990, otherwise known as the Cooperative Code of the Philippines –

ARTICLE 8. Cooperatives Not in Restraint of Trade. — No cooperative or method or act thereof which complies with this Code shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily in violation of any of the laws of the Philippines.

(3) Section 17, Republic Act No. 7925, approved on March 1, 1995, otherwise known as the Public Telecommunications Policy Act of the Philippines –

SECTION 17. Rates and Tariffs. — The Commission shall establish rates and tariffs which are fair and reasonable and which provide for the economic viability of telecommunications entities and a fair return on their investments considering the prevailing cost of capital in the domestic and international markets.

The Commission shall exempt any specific telecommunications service from its rate or tariff regulations if the service has sufficient competition to ensure fair and reasonable rates or tariffs. The Commission shall, however, retain its residual powers to regulate rates or tariffs when ruinous competition results or when a monopoly or a cartel or combination in restraint of free competition exists and the rates or tariffs are distorted or unable to function freely and the public is adversely affected. In such cases, the Commission shall either establish a floor or ceiling on the rates or tariffs.

(4) Sections 2, 3 and 11, Republic Act No. 8479, approved on February 10, 1998, otherwise known as the Downstream Oil Industry Deregulation Act of 1998 –

SECTION 2. Declaration of Policy. — It shall be the policy of the State to liberalize and deregulate the downstream oil industry in order to ensure a truly competitive market under a regime of fair prices, adequate and continuous supply of environmentally-clean and high-quality petroleum products. To this end, the State shall promote and encourage the entry of new participants in the downstream oil industry, and introduce adequate measures to ensure the attainment of these goals.

SECTION 3. Coverage. — This Act shall apply to all persons or entities engaged in any and all the activities of the domestic downstream oil industry, as well as persons or companies directly importing refined petroleum products for their own use.

SECTION 11. Anti-Trust Safeguards. — To ensure fair competition and prevent cartels and monopolies in the Industry, the following acts are hereby prohibited:

(a) Cartelization which means any agreement, combination or concerted action by refiners, importers and/or dealers, or their representatives, to fix prices, restrict outputs or divide markets, either by products or by areas, or allocate markets, either by products or by areas, in restraint of trade or free competition, including any contractual stipulation which prescribes pricing levels and profit margins;

(b) Predatory pricing which means selling or offering to sell any oil product at a price below the seller's or offeror's average variable cost for the purpose of destroying competition, eliminating a competitor or discouraging a potential competitor from entering the market: Provided, however, That pricing below average variable cost in order to match the lower price of the competitor and not for the purpose of destroying competition shall not be deemed predatory pricing. For purposes of this prohibition, "variable cost" as distinguished from "fixed cost", refers to costs such as utilities or raw materials, which vary as the output increases or decreases and "average variable cost" refers to the sum of all variable costs divided by the number of units of outputs.

Changes in Economic Laws and Competition Policy in Response to Globalization

In response to its perceptions of its needs, the demands of globalization, its commitments under the Marrakesh Agreement Establishing the World Trade Organization, and the prodding of international financial institutions such as the World Bank and the Asian Development Bank from whom it has borrowed and proposes to borrow, the Philippines, beginning in 1986 with the administration of then President Corazon C. Aquino, accelerating with the administration of then President Fidel V. Ramos six years later, and continuing during the shortened term of former President Joseph Ejercito Estrada, adopted new policies and enacted a host of new laws in implementation of these policies which, generally, changed the competitive environment. Some of the more important pieces of legislation affecting competition and the changes in policy they implemented are as follows:

(1) Republic Act No. 7042 (“RA 7042”), approved on June 13, 1991, as amended by Republic Act No. 8179, approved on March 28, 1996, otherwise known as the Foreign Investments Act – Prior to RA 7042, the government’s view of foreign investments may be best described as negative: foreigners cannot invest in the Philippines except in certain areas. RA 7042 changed this view to a positive one: foreigners can invest in the Philippines except in those areas reserved by the Constitution or statutes to Philippine nationals. This is expressed succinctly in Section 7 of the law which, as amended, reads as follows:

Sec. 7. Foreign Investments in Domestic Market Enterprises. — Non-Philippine nationals may own up to one hundred percent (100%) of

domestic market enterprises unless foreign ownership therein is prohibited or limited by the Constitution and existing law or the Foreign Investment Negative List under Section 8 hereof.

For example, prior to RA 7042, a foreigner cannot put up a travel agency or engage in trading as these businesses were considered as adequately exploited by Philippine nationals. Now, foreigners can invest in these businesses subject only to the requirement that an investment of at least US$200,000 (which used to be US$500,000) be made. The investment requirement is reduced further to US$100,000 if the business will employ at least 50 persons or if it the business will involve advanced technology. Attached as **Annex B** is the Fourth Regular Foreign Investment Negative List which was promulgated by Executive Order No. 286, dated August 24, 2000, pursuant to Section 8 of RA 7042.

(2) Republic Act No. 7394, approved on April 13, 1992, otherwise known as the Consumer Act of the Philippines – The law declares it to be the policy of the State "to protect the interests of the consumer, promote his general welfare and to establish standards of conduct for business and industry." It sets out standards on consumer product quality and safety, particularly in the areas of food, drugs, cosmetics and hazardous substances, and regulates deceptive, unfair and unconscionable sales acts and practices including those relating to weights and measures, product and service warranties, labeling, packaging, advertising and sales promotion, repairs and credit transactions.

(3) Republic Act No. 7652 ("RA 7652"), approved on June 4, 1993, otherwise known as the Investors' Lease Act – Prior to RA 7652, foreigners were allowed to lease land for an initial period of only 25 years subject to renewal, with the mutual consent of both parties, for another 25 years (see Presidential Decree No. 471, issued May 24, 1974, which fixed a maximum period for the duration of leases of private lands to aliens). RA 7652 allowed the initial term to be as long as 50 years with the possibility of an extension of such term, also upon mutual agreement of the parties, for an additional period of 25 years or a grand total of 75 years subject to the conditions, among others, that the leased area shall be used solely for the purpose of the investment and that the leased premises shall comprise such area only as may reasonably be required for the purpose of the investment. In the case of tourism projects, the lease of private lands by qualified foreign investors is limited to projects with an investment of not less than US$5 million, 70% of which shall be infused in the said project within 3 years from the signing of the lease contract. The policy of the law, as set out in Section 2 thereof, is as follows:

SECTION 2. Declaration of Policy. — It is hereby declared the policy of the State to encourage foreign investments consistent with the constitutional mandate to conserve and develop our own patrimony. Towards this end, the State hereby adopts a flexible and dynamic policy of the granting of long-term lease on private lands to foreign investors for the

establishment of industrial estates, factories, assembly or processing plants, agro-industrial enterprises, land development for industrial, or commercial use, tourism, and other similar priority productive endeavors.

(4) Republic Act No. 7653 ("RA 7653"), approved on June 14, 1993, otherwise known as the Bangko Sentral ng Pilipinas, or Central Bank of the Philippines, Law – The new State policy is to maintain a central monetary authority that shall function and operate as an independent and accountable body in the discharge of its responsibilities concerning money, banking and credit and enjoy fiscal and administrative autonomy. Prior to RA 7653, the independence of the Central Bank of the Philippines was suspect as most of the members of its governing body, the Monetary Board, were also members of the President's cabinet and, therefore, more prone to political pressure. Under the new law, majority of the members are required to come from the private sector and to work on a full-time basis.

(5) Republic Act No. 7721 ("RA 7721"), approved on May 18, 1994, sometimes called the Foreign Banks Liberalization Law – Prior to RA 7721, there were only four foreign-owned banks operating branches in the Philippines: two British banks, Standard Chartered Bank (established in 1872) and Hongkong and Shanghai Bank (established in 1875), and two American banks, i.e., Citibank N.A. (established in 1902) and Bank of America N.T. & S.A. (established in 1947). RA 7721 liberalized the entry and scope of operations of foreign banks in the Philippines. Under Section 1 of the law –

> The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos and encourage, promote, and maintain a stable, competitive, efficient, and dynamic banking and financial system that will stimulate economic growth, attract foreign investments, provide a wider variety of financial services to Philippine enterprises, households and individuals, strengthen linkages with global financial centers, enhance the country's competitiveness in the international market and serve as a channel for the flow of funds and investments into the economy to promote industrialization.
>
> Pursuant to this policy, the Philippine banking and financial system is hereby liberalized to create a more competitive environment and encourage greater foreign participation through increase in ownership in domestic banks by foreign banks and the entry of new foreign bank branches.
>
> In allowing increased foreign participation in the financial system, it shall be the policy of the State that the financial system shall remain effectively controlled by Filipinos.

There are three modes of entry for foreign banks wishing to operate in the Philippines: (i) by acquiring, purchasing or owning up to 60% of the voting stock of an existing bank; (ii) by investing in up to 60% of the voting stock of a new banking subsidiary incorporated under the laws of the Philippines; or (iii) by establishing branches with full banking authority; provided, that a

foreign bank may avail itself of only one mode of entry; and, provided further, that a foreign bank or a Philippine corporation may own up to 60% of the voting stock of only one domestic bank or new banking subsidiary. (Sec. 2) Today there are 10 additional foreign banks doing business in the Philippines through branches and about half a dozen others operating through investments in locally-formed banking corporations.

Section 8 of RA 7721 expressly provides for the equal treatment of foreign banks:

> SECTION 8. Equal Treatment. — Foreign banks authorized to operate under Section 2 of this Act, shall perform the same functions, enjoy the same privileges, and be subject to the same limitations imposed upon a Philippine bank of the same category. These limits include, among others, the single borrower's limit and capital to risk asset ratio as well as the capitalization required for expanded commercial banking activities under the General Banking Act and other related laws of the Philippines.
>
> x x x
>
> Any right, privilege or incentive granted to foreign banks or their subsidiaries or affiliates under this Act, shall be equally enjoyed by and extended under the same conditions to Philippine banks. Philippine corporations whose shares of stocks are listed in the Philippine Stock Exchange or are of long standing for at least ten (10) years shall have the right to acquire, purchase or own up to sixty percent (60%) of the voting stock of a domestic bank.

(6) Republic Act No. 8293, approved on June 6, 1997, otherwise known as the Intellectual Property Code of the Philippines ("IPC") - The IPC repealed the Patent Law (Republic Act No. 165, approved on June 20, 1947), Trademark Law (Republic Act No. 166, approved on June 20, 1947), the Decree on Intellectual Property or the Copyright Law (Presidential Decree No. 49, issued on November 14, 1972), Compulsory Book Licensing Law (Presidential Decree No. 285,, issued on September 3, 1973), and Article 188 (on substituting and altering trademarks, trade names or service marks) and Article 189 (on unfair competition, fraudulent registration of trademark, trade name or service mark, fraudulent designation of origin, and false description) of the Revised Penal Code. The Declaration of State Policy provides that –

> The State recognizes that an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, attracts foreign investments, and ensures market access for our products. It shall protect and secure the exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such periods as provided in this Act.

The use of intellectual property bears a social function. To this end, the State shall promote the diffusion of knowledge and information for the promotion of national development and progress and the common good.

It is also the policy of the State to streamline administrative procedures of registering patents, trademarks and copyright, to liberalize the registration on the transfer of technology, and to enhance the enforcement of intellectual property rights in the Philippines. (Sec. 2)

(7) Republic Act No. 8555, approved on February 26, 1998 - This law amends Republic Act No. 8182, approved on June 11, 1996, which excludes Official Development Assistance (ODA) from the country's foreign debt limit in order to facilitate the absorption and optimize the utilization of ODA resources. Section 11-A, which this law adds to Republic Act No. 8182, provides that –

SEC. 11-A. In the contracting of any loan, credit or indebtedness under this Act or any law, the President of the Philippines may, when necessary, agree to waive or modify the application of any provision of law granting preferences in connection with, or imposing restrictions on, the procurement of goods or services: Provided, however, That as far as practicable, utilization of the services of qualified Filipino citizens or corporations or associations owned by such citizens in the prosecution of projects financed under this Act shall be prepared on the basis of the standards set for a particular project: Provided, further, That the matter of preference in favor of articles, materials, or supplies of the growth, production or manufacture of the Philippines, including the method or procedure in the comparison of bids for purposes therefor, shall be the subject of agreement between the Philippine Government and the lending institution.

(8) Republic Act No. 8556, approved February 26, 1998, otherwise known as the Financing Company Act of 1998 - This law amends Republic Act No. 5980, as amended, approved on August 4, 1969. Its expanded Declaration of Policy, which now refers to placing the operations of financing and leasing companies on a "competitive" basis, reads as follows:

SECTION 2. Declaration of Policy. — It is hereby declared to be the policy of the State to regulate and promote the activities of financing and leasing companies to place their operations on a sound, competitive, stable and efficient basis as other financial institutions, to recognize and strengthen their critical role in providing medium and long-term credit for investments in capital goods and equipment especially by small and medium enterprises particularly in the countryside and to curtail and prevent acts or practices prejudicial to the public interest so that they may be in a better position to extend efficient service in a fair manner to the general public and to industry, commerce and agriculture and thereby more fully contribute to the sound development of the national economy.

More interestingly, the equity now required to be held by Philippine nationals in financing companies was lowered from 60%, under the old law, to 40% (Sec. 6)

(9) Republic Act No. 8762 ("RA 8762"), approved on March 7, 2000, otherwise known as the Retail Trade Liberalization Act of 2000 - This law liberalized the retail trade business and repealed RA 1180. Section 2 of the law, declaring the State's policy states that –

> It is the policy of the State to promote consumer welfare in attracting, promoting and welcoming productive investments that will bring down prices for the Filipino consumer, create more jobs, promote tourism, assist small manufacturers, stimulate economic growth and enable Philippine goods and services to become globally competitive through the liberalization of the retail trade sector.
>
> Pursuant to this policy, the Philippine retail industry is hereby liberalized to encourage Filipino and foreign investors to forge an efficient and competitive retail trade sector in the interest of empowering the Filipino consumer through lower prices, higher quality goods, better services and wider choices.

Under Section 3(1)(d) of RA 8762, sales which are limited only to products manufactured, processed or assembled by a manufacturer through a single outlet, irrespective of capitalization, is not considered retail sales and, therefore, may be made by foreign nationals.

Moreover, under Section 5 of RA 8762, qualified foreign retailers may, upon registration with the Securities and Exchange Commission and the Department of Trade and Industry, or in case of foreign-owned single proprietorships, with the latter, engage or invest in retail enterprises in the Philippines falling under Categories B, C and D of the classification established by the law:

(a) Category B enterprises are those with a minimum paid-up capital of the equivalent in Philippine Pesos of US$2,500,000 but less than US$7,500,000. They may be wholly owned by foreigners except for the first 2 years after the effectivity of RA 8762 wherein foreign participation shall be limited to not more than 60% of total equity.

(b) Category C enterprises are those with a paid-up capital of the equivalent in Philippine Pesos of US$7,500,000 or more. They may be wholly owned by foreigners; provided, however, that in no case shall the investments for establishing a store, falling under both Categories B and C, be less than the equivalent in Philippine Pesos of US$830,000.

(c) Category D are enterprises specializing in high-end or luxury products, i.e., goods which are not necessary for life

> maintenance and whose demand is generated in large part by the higher income groups including, but not limited to, products such as: jewelry, branded or designer clothing and footwear, wearing apparel, leisure and sporting goods, electronics and other personal effects. with a paid-up capital of the equivalent in Philippine Pesos of US$250,000 per store.

Foreign investors acquiring shares from existing retail stores, whether or not publicly listed, whose net worth is in excess of the peso equivalent of US$2,500,000 may purchase only up to a maximum of 60% of the equity thereof within the first 2 years from the effectivity of RA 8762 and thereafter, they may acquire the remaining percentage consistent with the allowable foreign participation as provided in the law (Sec. 6).

All retail trade enterprises under Categories B and C, in which foreign ownership exceeds 80% of equity, shall offer a minimum of 30% of their equity to the public through any stock exchange in the Philippines within 8 years from their start of operations (Sec. 7).

For ten (10) years after the effectivity of RA 8762, at least 30% of the aggregate cost of the stock inventory of foreign retailers falling under Categories B and C and 10% for Category D shall be made in the Philippines (Sec. 9).

Qualified foreign retailers are not allowed to engage in certain retailing activities outside their accredited stores through the use of mobile or rolling stores or carts, the use of sales representatives, door-to-door selling, restaurants and sari-sari stores and such other similar retailing activities (Sec. 10).

(10) Republic Act No. 8791, approved on May 23, 2000, otherwise known as the General Banking Law of 2000 - This law regulated the organization and operations of banks, quasi-banks and trust entities and repealed the old General Banking Act (Republic Act No. 337, as amended, approved July 24, 1948). Its Declaration of Policy reads as follows:

> SECTION 2. Declaration of Policy. — The State recognizes the vital role of banks in providing an environment conducive to the sustained development of the national economy and the fiduciary nature of banking that requires high standards of integrity and performance. In furtherance thereof, the State shall promote and maintain a stable and efficient banking and financial system that is globally competitive, dynamic and responsive to the demands of a developing economy.

(11) Republic Act No. 8799, approved July 19, 2000, otherwise known as the Securities Regulation Code - This law repealed the Revised Securities Act (Batas Pambansa Blg. 178, approved on February 23, 1982). The Declaration of State Policy in Section 2 provides that –

> The State shall establish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of the capital market, protect investors, ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market.

(12) Republic Act No. 8800, approved July 19, 2000, otherwise known as the Safeguard Measures Act - This law, which applies to products being imported into the Philippines irrespective of source, was enacted to minimize, if not prevent, the destruction of local industries buffeted by the strong winds of globalization. Its Declaration of Policy states that –

> The State shall promote the competitiveness of domestic industries and producers based on sound industrial and agricultural development policies, and the efficient use of human, natural and technical resources. In pursuit of this goal and in the public interest, the State shall provide safeguard measures to protect domestic industries and producers from increased imports which cause or threaten to cause serious injury to those domestic industries and producers. (Sec. 2)

Proposed Competition Laws

At the Eleventh Congress of the Philippines House of Representatives, there were six (6) bills filed dealing with various aspects of competition law. All have not gone beyond first reading and none has been reported out by the House Committees to which they have been referred. Starting with the oldest of the bills, these are:

(a) House Bill No. 183, filed on July 1, 1998, entitled "An Act Penalizing Unfair Trade Practices And Combinations In Restraint Of Trade, Creating The Fair Trade Commission, Appropriating Funds Therefor, And For Other Purposes" – The focus of this bill is on the criminalization of certain unlawful business practices and the creation of a Fair Trade Commission.

(b) House Bill No. 271, filed on July 1, 1998, entitled "An Act Providing For Antitrust Penalties" – The language of Sections 1 and 2 of this bill is virtually identical with the language of Sections 1 and 2 of the Sherman Act of 1890. It also provides for the award of treble damages to the injured party.

(c) House Bill No. 1373, filed on July 28, 1998, entitled "An Act Penalizing Unfair Trade Practices And Combinations In Restraint Of Trade, Creating The Fair Trade Commission, Appropriating Funds Therefor, And For Other Purposes" – This bill is similar to House Bill No. 183

(d) House Bill No. 4455, filed on October 13, 1998, entitled "An Act Prescribing A Fair Competition Law, Its Enforcement, The Establishment Of A Fair Trade Commission, Delineating Its Powers And Functions, And For Other Purposes" – Compared with the other bills on the same subject filed earlier, this bill is longer and more detailed. Interestingly, it contains a provision

specifying the instances when the acquisition or maintenance of monopoly power is not to be interpreted as a violation of the prohibition against monopolies and cartels. These situations are when the monopoly is (i) authorized by law, (ii) attained or maintained through superior skill, (iii) acquired or maintained in exploitation of one's duly registered patent, copyright, trademark, trade name, musical works and compositions, or other intellectual property, and (iv) acquired or maintained in the exercise of one's contractual rights.

(e) House Bill No. 5281, filed on November 12, 1998, entitled "An Act Creating A Special Body That Shall Regulate And Exercise Authority Over Monopolistic Practices, Combinations In Restraint Of Trade And Unfair Competition As Hereinafter Defined And Appropriating Funds Therefor" – It provides, among others, for the creation of a Philippine Antitrust Commission.

(f) House Bill No. 8790, filed on November 16, 1999, entitled "An Act Prohibiting Monopolies, Attempt To Monopolize An Industry Or Line Of Commerce, Manipulation Of Prices Of Commodities, Asset Acquisition And Interlocking Memberships In The Board Of Directors Of Competing Corporate Bodies And Price Discrimination Among Customers, Providing Penalties Therefor And For Other Purposes" – There are two interesting provisions in this bill: the first one expressly authorizes the Government to file a civil action against the defendant, in the concept of parens patriae and on behalf of natural persons residing in the Philippines, to secure treble damages for any monetary injury sustained by such natural persons by reason of any violation of the proposed law, and the second one authorizes a consent judgment upon application by the Government in a civil action brought by or on behalf of the Republic of the Philippines, which consent judgment shall not be used in another action or proceeding against the defendant.

At least three (3) bills, similar to some of the foregoing House Bills, were filed in the Philippines Senate. They have not also gone beyond first reading and none of them has been reported out by the Senate Committees to which they have been referred. These bills are the following:

(a) Senate Bill No. 150, filed on June 30, 1998, entitled "An Act Creating The Fair Trade Commission, Prescribing Its Powers And Functions In Regulating Trade Competition And Monopolies, And For Other Purposes" – Unique to this bill is the provision requiring that the Fair Trade Commission be apprised before certain trusts are formed. Trusts that have received a favorable ruling from the Commission may not be challenged under the proposed law.

(b) Senate Bill No. 862, filed on July 17, 1998, entitled "An Act Providing For A More Effective Implementation Of The Constitutional Mandate Against Monopolies, Combinations In Restraint Of Trade And Unfair Competition By Re-Defining And Strengthening Existing Laws, Processes, And For Other Purposes" – At 59 Sections, this is the longest bill on the subject filed

in both the Senate and the Houses of Representatives. It contains a detailed enumeration of prohibited or unlawful acts and courses of conduct (i) in trade, commerce and industry in general, (ii) in the telecommunication and public utility sectors, (iii) in the banking sector, and (iv) among corporations. It establishes an Antitrust Commission and describes in detail its structural organization, powers and functions.

(c) Senate Bill No. 1792, filed on November 3, 1999, entitled "An Act Prohibiting Monopolies, Attempt To Monopolize An Industry Or Line Of Commerce, Manipulation Of Prices Of Commodities, Asset Acquisition And Interlocking Memberships In The Board Of Directors Of Competing Corporate Bodies And Price Discrimination Among Customers, Providing Penalties Therefor, And For Other Purposes" – This bill is similar to House Bill No. 8790 and appears to be its counterpart in the Senate.

In a letter addressed to Senator Ramon B. Magsaysay, Jr., dated October 24, 2000, Chairperson Lilia R. Bautista of the Philippines Securities and Exchange Commission ("SEC"), apparently in reply to Senator Magsaysay's question on the possibility of consolidating the three Senate bills mentioned above, made the following comments:

1. Should the proposed law "adopt the US anti-trust legislation or the European restrictive business practice approach as reflected in the Treaty of Rome of the European Union?"

2. Considering that there is already an existing price control law, "it may not be necessary to recreate the same in an anti-trust legislation."

3. Most countries have separate laws for anti-trust and consumer protection and the Philippines might want to follow suit particularly because it already has consumer protection laws.

4. Perhaps new institutions, e.g., a Fair Trade Commission or an Anti-Trust Commission, need not be created. Instead, existing government agencies performing similar functions could simply be strengthened and vested with more authority to enforce the proposed legislation. This approach is also in line with the goal of Government to streamline the bureaucracy and reduce the budgetary deficit by reducing the size of its present workforce.

Chairperson Bautista also expressed reservations about the provisions in Senate Bills Nos. 862 and 1792 dealing with (i) inter-locking directorships, (ii) parent-subsidiary corporate relationship, and (iii) stock ownership in different corporations:

1. Inter-locking directorships - "It is not unusual to find directors occupying the same positions in another corporation. Usually, we often find 'interlocking directors' in a parent-subsidiary relationship between corporations wherein they transact business with one another on a regular basis for some legitimate business reasons, not only because one has big investments therein but also because their services may have proven to be valuable and efficient. Because

of this business reality, it would be impractical to 'absolutely' prevent interlocking directorship. The people who are sought to be prohibited from sitting in the board may be the same people who contributed to the competence or technical expertise that result to the growth of the business."

2. Parent-subsidiary corporate relationship - **"**It is a well-recognized fact that a person has the right to choose his business associates. Thus, the formation of a 'close corporation' is given special recognition under the Corporation Code, taking into consideration that close corporations have special legitimate needs different from those of widely held corporations, relaxing in their favor some of the general rules and requirements applicable to all business corporations. Where business associates belong to a small, closely-knit group, like a family, they usually prefer to keep the organization exclusive and would not welcome strangers. Since it is through their efforts and managerial skills that they expect the business to grow and prosper, it is quite understandable that they would not trust outsiders to come in and interfere with their management thereof, and much less share whatever fortune, big or small, that business may bring. Thus, recognizing the unique quality and legitimate needs of 'close corporations', the Corporation Code allows investors to form 'close corporations' limiting, the shareholders to members of the family or close business associates with whom they have 'trust and confidence.' Under Section 96 of the Corporation Code, any corporation may be incorporated as a close corporation except the following: mining or oil companies, stock exchanges, banks, insurance companies, public utilities, educational institutions and corporations declared to be vested with public interest pursuant to Section 140 of the Code."

3. Stock ownership in different corporations - "At present there are certain business activities wherein only few investors are willing or capable of investing into and which can be undertaken by only few moneyed or competent investors. Prohibiting 'stock ownership' in different corporations might shy away willing investors who have capability of investing and whose efficient management skills, competence or technical expertise can contribute to economic recovery of the country. Such an idea would discourage existing big corporations from forming business subsidiaries and therefore would run counter to the policy of the government to liberalize business in order to promote investments in the country."

In sum, the SEC believes that "it would be impractical to adopt laws on monopolies of general application to all sectors of the economy" considering business realities in the country and the present economic situation. According to Chairperson Bautista, "it is not the opportune time to absolutely prohibit interlocking directorship, parent-subsidiary relationships or formation of close corporations." What is needed "is an Anti-Trust law which initially focuses on the prevention of cartels on basic products and industries (e.g., rice, corn, fish) which are of utmost importance to national interest."

The Eleventh Congress is now in recess and will resume for a short period on June 4 to 7, 2001 to tackle bills certified by the President as urgent (e.g., the power deregulation

bill). Upon the end of term of the Eleventh Congress sometime in July 2001, all the House and Senate Bills mentioned above would be deemed archived and would have to be refiled when the Twelfth Congress opens. The chances of any of these bills becoming law this year are dim. The administration of newly installed President Gloria Macapagal-Arroyo has not indicated that the enactment of an anti-trust law, much less a broader competition law, is in its list of priority legislation.

The Supreme Court on Monopolies and Combinations in Restraint of Trade

There are less than a handful of cases that have reached the Supreme Court of the Philippines dealing with monopolies and combinations in restraint of trade, as mentioned earlier,[12] notwithstanding the fact that the basic law on the subject, Article 186 of the Revised Penal Code, has been in the statute books for more than 69 years (close to 114 years if one were to trace back the provision to the Old Penal Code). And what the Minister of Justice stated in 1983 about "no business enterprise has yet been indicted under the anti-trust provisions of the Revised Penal Code"[13] remains to be a correct statement. Few as the cases may be, the Supreme Court has had occasion in five cases, the last of which was decided in December 1999, to speak on the subject of monopolies and combinations in restraint of trade. These cases are briefly discussed below.

(1) Combination in restraint of trade - Is Article 22 of the constitution of the Philippine Rating Bureau, which provides that the members of the Bureau "agree not to represent nor to effect reinsurance with, nor to accept reinsurance from any company, body, or underwriter, licensed to do business in the Philippines not a member in good standing of the Bureau", illegal as a combination in restraint of trade? The Philippines Supreme Court, in the case of *Filipinas Compañia de Seguros, et al., vs. Hon. Francisco Y. Mandanas, et al.,* G.R. No. L-19638, June 20, 1966, ruled that the said Article 22 is not illegal as a combination in restraint of trade and that it finds nothing unlawful, or immoral, or unreasonable, or contrary to public policy, either in the objectives sought to be attained by the Bureau, or in the means availed of to achieve the said objectives, or in the consequences of the accomplishment thereof.

According to the Court, "the purpose of said Article 22 is not to eliminate competition, but to promote ethical practices among non-life insurance companies, although, incidentally, it may discourage, and, hence, eliminate unfair competition, through underrating, which, in itself, is eventually injurious to the public." The Court quoted with approval the words of Mr. Justice Brandeis in the case of *Board of Trade of Chicago vs. U.S.*, 246 U.S. 231, 62 Led. 683 (1918):

> " . . . the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its

[12] See p. 4.
[13] Id.

> condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable."

It went on to quote the U. S. Supreme Court in *Sugar Institute, Inc. vs. U.S.*, 297 U.S. 553 as follows:

> "The restrictions imposed by the Sherman Act are not mechanical or artificial. We have repeatedly said that they set up the essential standard of reasonableness. *Standard Oil Co. vs. United States*, 221 U.S. 1, 55 L. ed. 619 31 S. Ct. 502, 34 L.R.A. (N.S.) 834, Ann. Cas. 1912D, 734, *United States vs. American Tobacco Co.*, 221 U.S. 106, 55 L. ed. 663, 31 S. Ct. 632. They are aimed at contracts and combinations which 'by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restraining competition or unduly obstructing the course of trade.' *Nash vs. United States*, 229 U.S. 373, 376, 57 L. ed. 1232, 1235, 33 S. Ct. 780; *United States vs. American Linseed Oil Co.*, 262 U.S. 371, 388, 389, 67 L. ed. 1035, 1040, 1041, 43 S. Ct. 607. Designed to frustrate unreasonable restraints, they do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law."

(2) Combinations in restraint of trade and interlocking directorates - In the leading case of *John Gokongwei, Jr. vs. Securities And Exchange Commission, et al.*, G.R. No. L-45911, April 11, 1979, petitioner Gokongwei sought, among others, to declare null and void the amended by-laws of San Miguel Corporation ("SMC") which disqualifies any stockholder engaged in any business that competes with or is antagonistic to that of SMC from being nominated or elected to the SMC Board of Directors.

In its defense, SMC contends that exclusion of a competitor from its Board is a legitimate corporate purpose considering that, being a competitor, Gokongwei cannot devote an unselfish and undivided loyalty to SMC; that it is essentially a preventive measure to assure stockholders of SMC of reasonable protection from the unrestrained self-interest of those charged with the promotion of the corporate enterprise; that access to confidential information by a competitor, such as Gokongwei, may result either in the promotion of the interest of the competitor at the expense of SMC, or the promotion of both the interests of Gokongwei and SMC, which may, therefore, result in a combination or agreement in violation of Article 186 of the Revised Penal Code by destroying free competition to the detriment of the consuming public.

The Supreme Court ruled in favor of SMC and stated that "anti-trust laws or laws against monopolies or combinations in restraint of trade are aimed at raising levels of competition by improving the consumers' effectiveness as the final arbiter in free markets. These laws are designed to preserve free and unfettered competition as the rule of trade. 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.

The Court went on and observed that -

> 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 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.

According to the Court, -

> "The election of petitioner to the Board of respondent Corporation can bring about an illegal situation. This is because an express agreement is not necessary for the existence of a combination or conspiracy in restraint of trade. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangements, and what is to be considered is what the parties actually did and not the words they used. For instance, the Clayton Act prohibits a person from serving at the same time as a director in any two or more corporations, if such corporations are, by virtue of their business and location of operation, competitors so that the elimination of competition between them would constitute violation of any provision of the anti-trust laws. There is here a statutory recognition of the anti-competitive dangers which may arise when an individual simultaneously acts as a director of two or more competing corporations. A common director of two or more competing corporations would have access to confidential sales, pricing and marketing information and would be in a position to coordinate policies or to aid one corporation at the expense of another, thereby stifling competition. This situation has been aptly explained by Travers, thus:
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> > "The argument for prohibiting competing corporations from sharing even one director is that the interlock permits the coordination of policies between nominally independent firms to an extent that competition between them may be completely eliminated. Indeed, if a director, for example, is to be faithful to both corporations, some accommodation must result. Suppose X is a director of both Corporation A and Corporation B. X could hardly vote for a policy by A that would injure B without violating his duty of loyalty to B; at the same time he could hardly abstain from voting without depriving A of his best judgment. If the firms really do compete — in the sense of vying for economic advantage at the expense of the other — there can hardly be any reason for an interlock between competitors other than the suppression of competition."
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> According to the Report of the House Judiciary Committee of the U. S. Congress on Section 9 of the Clayton Act, it was established that: "By means of the interlocking directorates one man or group of men have been able to dominate and control a great number of corporations . . . to the detriment of the small ones dependent upon them and to the injury of the public."

Shared information on cost accounting may lead to price fixing. Certainly, shared information on production, orders, shipments, capacity and inventories may lead to control of production for the purpose of controlling prices.

Obviously, if a competitor has access to the pricing policy and cost conditions of the products of San Miguel Corporation, the essence of competition in a free market for the purpose of serving the lowest priced goods to the consuming public would be frustrated. The competitor could so manipulate the prices of his products or vary its marketing strategies by region or by brand in order to get the most out of the consumers. Where the two competing firms control a substantial segment of the market this could lead to collusion and combination in restraint of trade. Reason and experience point to the inevitable conclusion that the inherent tendency of interlocking directorates between companies that are related to each other as competitors is to blunt the edge of rivalry between the corporations, to seek out ways of compromising opposing interests, and thus eliminate competition. As respondent SMC aptly observes, knowledge by CFC-Robina of SMC's costs in various industries and regions in the country will enable the former to practice price discrimination. CFC-Robina can segment the entire consuming population by geographical areas or income groups and charge varying prices in order to maximize profits from every market segment. CFC-Robina could determine the most profitable volume at which it could produce for every product line in which it competes with SMC. Access to SMC pricing policy by CFC-Robina would in effect destroy free competition and deprive the consuming public of opportunity to buy goods of the highest possible quality at the lowest prices.

(3) Monopolies - In the case of *Philippine Ports Authority vs. Hon. Rafael L. Mendoza, et al.*, G.R. No. L-48304, September 11, 1985, the policy of integration in the port of Cebu City adopted by the Philippine Ports Authority ("PPA") was declared by the Supreme Court as not violative of any constitutional and legal provision on monopolies. The said policy required that there should be only one arrastre or stevedore operator or contractor to engage in cargo handling services in the port and that, conformably with this policy, it would be necessary that any two or more contractors presently operating within the same port premises who desire to continue or renew their cargo handling services must merge into only one organization within a prescribed period after receipt of due notice from the PPA. The Supreme Court declared that -

Private monopolies are not necessarily prohibited. The use of the word "regulate" in the Constitution indicates that some monopolies, properly regulated, are allowed. Regulate means includes the power to control, to govern, and to restrain, but regulate should not be construed as synonymous with suppress or prohibit (Kwong Sing vs. City of Manila, 41 Phil. 108). "Competition can best regulate a free economy. Like all basic beliefs, however, that principle must accommodate hard practical experience. There are areas where for special reasons the force of competition, when left wholly free, might operate too destructively to safeguard the public interest. Public utilities are an instance of that consideration." (Oleck, Modern Corporation Law, Vol. IV, p. 197). By their very nature, certain public services or public utilities such as those which supply water, electricity, transportation, telegraph, etc. must be given exclusive franchises if public interest is to be served. Such exclusive franchises are not violative of the law against monopolies (Anglo-Fil Trading Corporation vs. Lazaro, supra).

> In the case at bar, the area affected is maritime transportation in the port of Cebu. The operations there, particularly arrastre and stevedoring, affect not only the City of Cebu, the principal port in the South, but also the economy of the whole country as well. Any prolonged disjunction of the services being rendered there will prejudice not only inter-island and international trade and commerce. Operations in said port are therefore imbued with public interest and are subject to regulation and control for the public good and welfare. PPA's policy of integration through compulsory merger may not even be in this instance considered as promoting a monopoly because the fact of the matter is that while the sole operator permitted by PPA to engage in the arrastre and stevedoring operations in the port of Cebu is only USDI, actually USDI is comprised of the eleven (11) port services contractors that previously used said ports but decided to merge and ultimately constituted themselves as USDI.

(4) Monopolies, anti-competitive behavior and predatory pricing - The downstream oil industry in the Philippines, prior to 1996, was heavily regulated and subject to price control. To deregulate the industry, Republic Act No. 8180 ("RA 1180"), otherwise known as the Downstream Oil Industry Deregulation Act of 1996 was enacted on March 28, 1996. The constitutionality of the law was challenged by some legislators before the Supreme Court in the cases of *Francisco S. Tatad vs. The Secretary of the Department of Energy and the Secretary of the Department of Finance*, G.R. No. 124360, November 5, 1997, and *Edcel C. Lagman, et al. vs. Hon. Ruben Torres, et al*., G.R. No. 127867, November 5, 1997. The Supreme Court ruled in favor the petitioners and declared RA 1180 as unconstitutional because, as summarized by Justice Consuelo Yñares-Santiago in the case of *Congressman Enrique T. Garcia vs. Hon. Renato C. Corona, et al*., G.R. No. 132451, December 17, 1999, "its provisions on tariff differential, stocking of inventories, and predatory pricing inhibit fair competition, encourage monopolistic power, and interfere with the free interaction of the market forces." These provisions, and the Supreme Court's comments thereon, are as follows:

(a) Section 5(b) on tariff differential -

> Any law to the contrary notwithstanding and starting with the effectivity of this Act, tariff shall be imposed and collected on imported crude oil at the rate of three percent (3%) and imported refined petroleum products at the rate of seven percent (7%), except fuel oil and LPG, the rate for which shall be the same as that for imported crude oil Provided, That beginning on January 1, 2004 the tariff rate on imported crude oil and refined petroleum products shall be the same: Provided, further, That this provision may be amended only by an Act of Congress.

Said the Supreme Court:

> In the cases at bar, it cannot be denied that our downstream oil industry is operated and controlled by an oligopoly, a foreign oligopoly at that. Petron, Shell and Caltex stand as the only major league players in the oil market. All other players belong to the Lilliputian league. As the dominant players, Petron, Shell and Caltex boast of existing refineries of various capacities. The tariff differential of 4% therefore works to their immense benefit. Yet, this is only one edge of the tariff differential. The other edge cuts and cuts deep in the heart of their competitors. It erects a high barrier to the entry of new players. New players that intend to equalize the market power of Petron,

Shell and Caltex by building refineries of their own will have to spend billions of pesos. Those who will not build refineries but compete with them will suffer the huge disadvantage of increasing their product cost by 4%. They will be competing on an uneven field. The argument that the 4% tariff differential is desirable because it will induce prospective players to invest in refineries puts the cart before the horse. The first need is to attract new players and they cannot be attracted by burdening them with heavy disincentives. Without new players belonging to the league of Petron, Shell and Caltex, competition in our downstream oil industry is an idle dream.

(b) Section 6 on inventory requirement -

To ensure the security and continuity of petroleum crude and products supply, the DOE shall require the refiners and importers to maintain a minimum inventory equivalent to ten percent (10%) of their respective annual sales volume or forty (40) days of supply, whichever is lower.

Commented the Supreme Court:

The provision on inventory widens the balance of advantage of Petron, Shell and Caltex against prospective new players. Petron, Shell and Caltex can easily comply with the inventory requirement of R.A. No. 8180 in view of their existing storage facilities. Prospective competitors again will find compliance with this requirement difficult as it will entail a prohibitive cost. The construction cost of storage facilities and the cost of inventory can thus scare prospective players. Their net effect is to further occlude the entry points of new players, dampen competition and enhance the control of the market by the three (3) existing oil companies.

(c) Section 9(b) on predatory pricing -

To ensure fair competition and prevent cartels and monopolies in the downstream oil industry, the following acts are hereby prohibited:

(a) x x x.

(b) Predatory pricing which means selling or offering to sell any product at a price unreasonably below the industry average cost so as to attract customers to the detriment of competitors.

Explained the Supreme Court:

Finally, we come to the provision on predatory pricing x x x. Respondents contend that this provision works against Petron, Shell and Caltex and protects new entrants. The ban on predatory pricing cannot be analyzed in isolation. Its validity is interlocked with the barriers imposed by R.A. No. 8180 on the entry of new players. The inquiry should be to determine whether predatory pricing on the part of the dominant oil companies is encouraged by the provisions in the law blocking the entry of new players. Text-writer Hovenkamp, 36 gives the authoritative answer and we quote:

> "The rationale for predatory pricing is the sustaining of losses today that will give a firm monopoly profits in the future. The monopoly profits will never materialize, however, if the market is flooded with new entrants as soon as the successful predator attempts to raise its

> price. Predatory pricing will be profitable only if the market contains significant barriers to new entry."
>
> As aforediscussed, the 4% tariff differential and the inventory requirement are significant barriers which discourage new players to enter the market. Considering these significant barriers established by R.A. No. 8180 and the lack of players with the comparable clout of PETRON, SHELL and CALTEX, the temptation for a dominant player to engage in predatory pricing and succeed is a chilling reality. Petitioners' charge that this provision on predatory pricing is anti-competitive is not without reason.

The final question resolved by the Supreme Court in these cases is whether the offending provisions of RA 1180 can be individually struck down without invalidating the entire law. The Court held that, the separability clause notwithstanding, –

> . . . the offending provisions of R.A. No. 8180 so permeate its essence that the entire law has to be struck down. The provisions on tariff differential, inventory and predatory pricing are among the principal props of R.A. No. 8180. Congress could not have deregulated the downstream oil industry without these provisions. Unfortunately, contrary to their intent, these provisions on tariff differential, inventory and predatory pricing inhibit fair competition, encourage monopolistic power and interfere with the free interaction of market forces.

(5) Deregulation, price controls and competition - As a result of the decision of the Supreme Court in the *Tatad/Lagman* cases declaring RA 8180 unconstitutional, the Congress of the Philippines quickly enacted Republic Act No. 8479 ("RA 8479") otherwise known as the Downstream Oil Industry Deregulation Act of 1998, on February 10, 1998. This new deregulation law no longer contained the offending provisions of RA 8180. The constitutionality of this law was then challenged in the case of *Congressman Enrique T. Garcia vs. Hon. Renato C. Corona, et al*., G.R. No. 132451, December 17, 1999. Petitioner Garcia, a member of the House of Representatives, sought to declare Section 19 of RA 8479, which sets the time for the full deregulation of the industry, as unconstitutional. Section 19 reads as follows:

> SECTION 19. Start of Full Deregulation. — Full deregulation of the Industry shall start five (5) months following the effectivity of this Act: Provided, however, That when the public interest so requires, the President may accelerate the start of full deregulation upon the recommendation of the DOE and the Department of Finance (DOF) when the prices of crude oil and petroleum products in the world market are declining and the value of the peso in relation to the US dollar is stable, taking into account relevant trends and prospects: Provided, further, That the foregoing provision notwithstanding, the five (5)-month Transition Phase shall continue to apply to LPG, regular gasoline and kerosene as socially-sensitive petroleum products and said petroleum products shall be covered by the automatic pricing mechanism during the said period.
>
> Upon the implementation of full deregulation as provided herein, the Transition Phase is deemed terminated and the following laws are repealed:
>
> a) Republic Act No. 6173, as amended;
> b) Section 5 of Executive Order No. 172, as amended;

c) Letter of Instruction No. 1431, dated October 15, 1984;
d) Letter of Instruction No. 1441, dated November 20, 1984, as amended;
e) Letter of Instruction No. 1460, dated May 9, 1985;
f) Presidential Decree No. 1889; and
g) Presidential Decree No. 1956, as amended by Executive Order No. 137:

Provided, however, That in case full deregulation is started by the President in the exercise of the authority provided in this Section, the foregoing laws shall continue to be in force and effect with respect to LPG, regular gasoline and kerosene for the rest of the five (5)-month period.

The contention of Petitioner Garcia, as stated by the Court in its decision, was as follows:

> Petitioner contends that Section 19 of R.A. 8479, which prescribes the period for the removal of price control on gasoline and other finished products and for the full deregulation of the local downstream oil industry, is patently contrary to public interest and therefore unconstitutional because within the short span of five months, the market is still dominated and controlled by an oligopoly of the three (3) private respondents, namely, Shell, Caltex and Petron.
>
> The objective of the petition is deceptively simple. It states that if the constitutional mandate against monopolies and combinations in restraint of trade is to be obeyed, there should be indefinite and open-ended price controls on gasoline and other oil products for as long as necessary. This will allegedly prevent the "Big 3" —Shell, Caltex and Petron—from price-fixing and overpricing. Petitioner calls the indefinite retention of price controls as "partial deregulation."

In its reply to Petitioner Garcia's argument, the Court emphasized that it is not concerned with whether or not there should be deregulation. The same is a matter outside its jurisdiction:

> Unquestionably, the direction towards which the nation's efforts at economic and social upliftment should be addressed is a function of Congress and the President. In the exercise of this function, Congress and the President have obviously determined that speedy deregulation is the answer to the acknowledged dominion by oligopolistic forces of the oil industry. Thus, immediately after R.A. 8180 was declared unconstitutional in the *Tatad* case, Congress took firm steps to fashion new legislation towards the objective of the earlier law. Invoking the Constitution, petitioner now wants to slow down the process.

In conclusion, the Court declared:

> Reduce to its basic arguments, it can be seen that the challenge in this petition is not against the legality of deregulation. Petitioner does not expressly challenge deregulation. The issue, quite simply, is the timeliness or the wisdom of the date when full deregulation should be effective.

> In this regard, what constitutes reasonable time is not for judicial determination. Reasonable time involves the appraisal of a great variety of relevant conditions, political, social and economic. They are not within the appropriate range of evidence in a court of justice. It would be an extravagant extension of judicial authority to assert judicial notice as the basis for the determination.

CONCLUSION

The formulation of policies and solutions to problems relating to competition cannot be made properly without adequate empirical studies. Most literature on the subject dealt with the Philippine economy as a whole or a sector or sub-sector thereof, e.g., banking, inter-island shipping, textile manufacturing, and the electric power industry. Others were studies on the political economy. These studies describe the barriers to entry in the Philippine market and the structures of the said market.[14]

More recently, a series of discussion papers dealing with the issue of competition generally and in respect of specific sectors of the Philippine economy were released by the Philippine APEC Study Center Network (PASCN). Some of these papers, which are preliminary in character and admittedly subject to further revisions, are as follows:

1. *Recommendations for Philippine Anti-Trust Policy and Regulation* by Anthony R.A. Abad, PASCN Discussion Paper No. 2000-09, January 2000 – This study reviews existing anti-trust laws and regulations in the Philippines, examines their effectiveness and adequacy and how well they conform with international rules, and makes recommendations for a new legal and regulatory framework for anti-trust enforcement in the Philippines based on the structure for a competition law suggested by the report of the World Bank and the Organization for Economic Cooperation and Development entitled *A Framework for the Design and Implementation of Competition Law and Policy*.

2. *Analysis of the State of Competition and Market Structure of the Banking and Insurance Sectors* by Ma. Melanie R.S. Milo, PASCN Discussion Paper No. 2000-11, October 2000 – This paper looks at how competition and efficiency in the financial services sector, particularly the banking and insurance industries, have been affected by the regulatory regime and market structure. It concludes that while there have been extensive reforms in the financial sector, particularly in banking, the reform process is not yet complete. More particularly, an appropriate balance between prudential and efficiency objectives has to be achieved.

3. *The State of Competition and Market Structure of the Philippine Air Transport Industry* by Myrna S. Austria, PASCN Discussion Paper No. 2000-

[14] See section surveying Philippine literature in the field of industrial organization at pp. 1-21 of Vol. II, *Barriers to Entry Study, April 1992, Final Report*, prepared by SGV Consulting for the U.S. Agency for International Development.

12, November 2000 – This study finds that significant competition in the domestic air transport industry has been brought about by the liberalization and deregulation policies and regulations of the Government and that this has resulted in lower air fares and improvements in service and efficiency. However, the international air transport segment of the industry still has to be liberalized. Promotion of competition in this segment is imperative.

4. *The State of Competition in the Philippine Manufacturing Industry* by Rafaelita A. Mercado-Aldaba, PASCN Discussion Paper No. 2000-13, December 2000 –The study observes that even after 20 years of trade liberalization the real growth of the manufacturing sector has been slow and no major increase in the size of the industry has been perceived. The industry studies reviewed in this paper show that the industry is still characterized by heavy protection and regulation and high concentration. It concludes that liberalization does not, by itself, guarantee competition and that the absence of competition laws would make it difficult to control possible abuses of their dominant positions by large firms.

5. *Competition Policy for the Philippine Downstream Oil Industry* by Peter Lee U, PASCN Discussion Paper No. 2000-14, April 2000 – This paper studies the developments in the industry before and after deregulation, starting with the original Downstream Oil Industry Deregulation Act (Republic Act No. 8180) which the Philippine Supreme Court struck down as unconstitutional in November 1997, and then the Downstream Oil Industry Deregulation Act of 1998 (Republic Act No. 8479). It also discusses the bill recently filed in the Senate and the House of Representatives which proposes the establishment of a National Oil Exchange which would purchase all the requirements for refined products in the country and resell them to local companies for distribution. Finally, it examines the experience of other countries, such as Thailand and New Zealand, in regulating their downstream oil industry.

6. *Competition in Philippine Telecommunications: A Survey of Critical Issues* by Ramonette B. Serafica, PASCN Discussion Paper No. 2000-15, February 2000 – The liberalization of the telecommunications sector effected by the administration of former President Fidel V. Ramos was quite a success but more has to be done in terms of establishing competition rules to enhance and safeguard the competitive process in order to create a strong competitive environment in the industry.

The importance of the continued accumulation of relevant and accurate economic and business data and the preparation of thorough studies of the economy and its various sectors, sub-sectors and industries in the formulation of competition policy, the enactment of laws to implement such policies, and the judicial determination of the constitutional validity of those policies and laws cannot be overemphasized. More needs to be done but nothing is more important at this time than the enactment of a general competition law suitable for the country. In the process of having such a law enacted, it is the hope that an intelligent and rational discussion of the issues surrounding competition law and the policy

choices that would have to be made could be had and that there would be full and active participation by all affected sectors.

ANNEX A
The ASEAN Competition Law Project: The Philippines Report

Provisions of
THE 1986 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES
Relevant to Competition Law

Article II
Declaration of Principles and State Policies

SECTION 19. The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.

SECTION 20. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments.

Article VI
The Legislative Department

SECTION 28. (2) The Congress may, by law, authorize the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government.

Article XII
National Economy and Patrimony

SECTION 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key raising the quality of life for all, especially the underprivileged.

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

In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership.

SECTION 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical of financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

SECTION 3. Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks. Agricultural lands of the public domain may be further classified by law according to the uses which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands. Private corporations or associations may not hold such alienable lands of the public domain except by lease, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one thousand hectares in area. Citizens of the Philippines may lease not more than five hundred hectares, or acquire not more than twelve hectares thereof by purchase, homestead, or grant.

Taking into account the requirements of conservation, ecology, and development, and subject to the requirements of agrarian reform, the Congress shall determine, by law, the size of lands of the public domain which may be acquired, developed, held, or leased and the conditions therefor.

SECTION 4. The Congress shall, as soon as possible, determine by law the specific limits of forest lands and national parks, marking clearly their boundaries on the ground. Thereafter, such forest lands and national parks shall be conserved and may not be increased nor diminished, except by law. The Congress shall provide, for such period as it may determine, measures to prohibit logging in endangered forests and watershed areas.

SECTION 5. The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.

The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

SECTION 6. The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.

SECTION 7. Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.

SECTION 8. Notwithstanding the provisions of Section 7 of this Article, a natural-born citizen of the Philippines who has lost his Philippine citizenship may be a transferee of private lands, subject to limitations provided by law.

SECTION 9. The Congress may establish an independent economic and planning agency headed by the President, which shall, after consultations with the appropriate public agencies, various private sectors, and local government units, recommend to Congress, and implement continuing integrated and coordinated programs and policies for national development.

Until the Congress provides otherwise, the National Economic and Development Authority shall function as the independent planning agency of the government.

SECTION 10. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.

SECTION 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

SECTION 12. The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive.

SECTION 13. The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.

SECTION 14. The sustained development of a reservoir of national talents consisting of Filipino scientists, entrepreneurs, professionals, managers, high-level technical manpower and skilled workers and craftsmen in all fields shall be promoted by the State. The State shall encourage appropriate technology and regulate its transfer for the national benefit.

The practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law.

SECTION 15. x x x.

SECTION 16. The Congress shall not, except by general law, provide for the formation, organization, or regulation of private corporations. Government-owned or controlled corporations may be created or established by special charters in the interest of the common good and subject to the test of economic viability.

SECTION 17. x x x.

SECTION 18. The State may, in the interest of national welfare or defense, establish and operate vital industries and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the Government.

SECTION 19. The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

SECTION 20. x x x.

SECTION 21. Foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public.

SECTION 22. Acts which circumvent or negate any of the provisions of this Article shall be considered inimical to the national interest and subject to criminal and civil sanctions, as may be provided by law.

Article XIII
Social Justice and Human Rights

SECTION 1. The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.

To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.

SECTION 2. The promotion of social justice shall include the commitment to create economic opportunities based on freedom of initiative and self-reliance.

Labor

SECTION 3. The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

It shall guarantee the rights of all workers to self-organizations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth.

Agrarian and Natural Resources Reform

SECTION 4. The Sate shall, by law, undertake an agrarian reform program founded on the right of farmers and regular farmworkers, who are landless, to own directly or collectively the lands they till or, in the case of other farmworkers, to receive a just share of the fruits thereof. To this end, the State shall encourage and undertake the just distribution of all agricultural lands, subject to such priorities and reasonable retention limits as the Congress may prescribe, taking into account ecological, developmental, or equity considerations, and subject to the payment of just compensation. In determining retention limits, the State shall respect the rights of small landowners. The State shall further provide incentives for voluntary land-sharing.

SECTION 5. The State shall recognize the rights of farmers, farmworkers, and landowners, as well as cooperatives, and other independent farmers' organizations to participate in the planning, organization, and management of the program, and shall provide support to agriculture through appropriate technology and research, and adequate financial, production, marketing, and other support services.

SECTION 6. The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands.

The State may resettle landless farmers and farmworkers in its own agricultural estates which shall be distributed to them in the manner provided by law.

SECTION 7. The State shall protect the rights of subsistence fishermen, especially of local communities, to the preferential use of local marine and fishing resources, both inland and offshore. It shall provide support to such fishermen through appropriate technology and research, adequate financial, production, and marketing assistance, and other services. The State shall also protect, develop, and conserve such resources. The protection shall extend to offshore fishing grounds of subsistence fishermen against foreign intrusion. Fishworkers shall receive a just share from their labor in the utilization of marine and fishing resources.

SECTION 8. The State shall provide incentives to landowners to invest the proceeds of the agrarian reform program to promote industrialization, employment creation, and privatization of public sector enterprises. Financial instruments used as payment for their lands shall be honored as equity in enterprises of their choice.

Health

SECTION 12. The State shall establish and maintain an effective food and drug regulatory system and undertake appropriate health manpower development and research, responsive to the country's health needs and problems.

Article XIV
Education, Science and Technology, Arts, Culture, and Sports

Education

SECTION 4. (2) Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum of the capital of which is owned by such citizens. The Congress may, however, require increased Filipino equity participation in all educational institutions.

The control and administration of educational institutions shall be vested in citizens of the Philippines.

No educational institution shall be established exclusively for aliens and no group of aliens shall comprise more than one-third of the enrollment in any school. The provisions of this subsection shall not apply to schools established for foreign diplomatic personnel and their dependents and, unless otherwise provided by law, for other foreign temporary residents.

Science and Technology

SECTION 11. The Congress may provide for incentives, including tax deductions, to encourage private participation in programs of basic and applied scientific research. Scholarships, grants-in-aid, or other forms of incentives shall be provided to deserving science students, researchers, scientists, inventors, technologists, and specially gifted citizens.

SECTION 12. The State shall regulate the transfer and promote the adaptation of technology from all sources for the national benefit. It shall encourage the widest participation of private groups, local governments, and community-based organizations in the generation and utilization of science and technology.

SECTION 13. The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.

Arts and Culture

SECTION 16. All the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State which may regulate its disposition.

Article XVI
General Provisions

SECTION 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.

(2) The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.

Only Filipino citizens or corporations or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry.

The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

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ANNEX B

The ASEAN Competition Law Project: The Philippines Report

FOURTH REGULAR FOREIGN INVESTMENT NEGATIVE LIST

Effective October 24, 2000
Issued Pursuant to Section 8, Republic Act No. 7042, as amended

List A:

Foreign Ownership Is Limited By Mandate of the Constitution and Specific Laws

No Foreign Equity

1. Mass media except recording (Art. XVI, Sec. 11 of the Constitution; Presidential Memorandum dated 04 May 1994)

2. Practice of all professions[1]

    a. Engineering

        i. Aeronautical engineering
        ii. Agricultural engineering
        iii. Chemical engineering
        iv. Civil engineering
        v. Electrical engineering
        vi. Electronics and communication engineering
        vii. Geodetic engineering
        viii. Mechanical engineering
        ix. Metallurgical engineering
        x. Mining engineering
        xi. Naval architecture and marine engineering
        xii. Sanitary engineering

    b. Medicine and allied professions

        i. Medicine
        ii. Medical technology
        iii. Dentistry
        iv. Midwifery
        v. Nursing

[1] This is limited to Filipino citizens save in cases prescribed by law.

vi. Nutrition and dietetics
vii. Optometry
viii. Pharmacy
ix. Physical and occupational therapy
x. Radiologic and x-ray technology
xi. Veterinary medicine

c. Accountancy
d. Architecture
e. Criminology
f. Chemistry
g. Customs brokerage
h. Environmental planning
i. Forestry
j. Geology
k. Interior design
l. Landscape architecture
m. Law
n. Librarianship
o. Marine deck officers
p. Marine engine officers
q. Master plumbing
r. Sugar technology
s. Social work
t. Teaching

(Art. XII, Sec. 14 of the Constitution; Sec. 1 of Republic Act No. 5181)

3. Retail trade enterprises with paid-up capital of less than US$2,500,000 (Sec. 5 of RA 8762)

4. Cooperatives (Ch. III, Art. 26 of RA 6938)

5. Private security agencies (Sec. 4 of RA 5487)

6. Small-scale mining (Sec. 3 of RA 7076)

7. Utilization of marine resources in archipelagic waters, territorial sea, and exclusive economic zone (Art. XII, Sec. 2 of the Constitution)

8. Ownership, operation and management of cockpits (Sec. 5 of Presidential Decree No. 449)

9. Manufacture, repair, stockpiling and/or distribution of nuclear weapons (Art. II, Sec. 8 of the Constitution)[2]

[2] Domestic investments are also prohibited (Art. II, Sec. 8 of Constitution; Conventions/Treaties to which the Philippines is a signatory).

10. Manufacture, repair, stockpiling and/or distribution of biological, chemical and radiological weapons (Various treaties to which the Philippine is a signatory and conventions supported by the Philippines)[2]

11. Manufacture of firecrackers and other pyrotechnic devices (Sec. 5 of RA 7183)

Up to Twenty-Five Percent (25%) Foreign Equity

12. Private recruitment, whether for local or overseas employment (Art. 27 of PD 442)

13. Contracts for the construction and repair of locally-funded public works (Sec. 1 of Commonwealth Act No. 541, Letter of Instruction No. 630) except:

    a. Infrastructure/development projects covered in RA 7718; and
    b. Projects which are foreign funded or assisted and required to undergo international competitive biddings (Sec. 2(a) of RA 7718)

Up to Thirty Percent (30%) Foreign Equity)

14. Advertising (Art. XVI, Sec. 11 of the Constitution)

Up to Forty Percent (40%) Foreign Equity

15. Exploration, development and utilization of natural resources (Art. XII, Sec. 2 of the Constitution)[3]

16. Ownership of private lands (Art. XII, Sec. 7 of the Constitution; Ch. 5, Sec. 22 of CA 141)

17. Operation and management of public utilities (Art. XII, Sec. 11 of the Constitution; Sec. 16 of CA 146)

18. Ownership/establishment and administration of educational institutions (Art. XIV, Sec. 4 of the Constitution)

19. Culture, production, milling, processing, trading excepting retailing, of rice and corn and acquiring, by barter, purchase or otherwise, rice and corn and the by-products thereof[4] (Sec. 5 of PD 194; Sec. 15 of RA 8762)

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[3] Full foreign participation is allowed through financial or technical assistance agreement with the President (Art. XII, Sec. 2 of the Constitution).

20. Contracts for the supply of materials, goods and commodities to government-owned or controlled corporation, company, agency or municipal corporation (Sec. 1 of RA 5183)

21. Contracts for the construction of defense-related structures (Sec. 1 of CA 541)

22. Project Proponent and Facility Operator of a BOT Project requiring a public utilities franchise (Art. XII, Sec. 11 of the Constitution; Sec. 2(a) of RA 7718)

23. Operation of deep sea commercial fishing vessels (Sec. 27 of RA 8550)

24. Adjustment companies (Sec. 323 of PD 612 as amended by PD 1814)

25. Ownership of condominiums units where the common areas in the condominium project are co-owned by the owners of the separate units or owned by a corporation (Sec. 5 of RA 4726)

Up to Sixty Percent (60%) Foreign Equity

26. Financing companies regulated by the Securities and Exchange Commission (SEC) Sec. 6 of RA 5980 as amended by RA 8556)[5]

27. Investment houses regulated by the SEC (Sec. 5 of PD 129 as amended by RA 8366)[5]

28. Retail trade enterprises with a minimum paid-up capital of US$2,500,000 but less than US$7,500,000 (Sec. 5 of RA 8762)[6]

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[4] Full foreign participation is allowed provided that within the 30-year period from start of operation, the foreign investor shall divest a minimum of 60 percent of their equity to Filipino citizens (Sec. 5 of PD 194, NFA Council Resolution No. 193 s. 1998).

[5] No foreign national may be allowed to own stock in financing companies or investment houses unless the country of which he is a national accords the same reciprocal rights to Filipinos (Sec. 6 of RA 5980 as amended by RA 8556; PD 129 as amended by RA 8366).

[6] Full foreign participation shall be allowed after 25 March 2002 but in no case shall investments for establishing a store be less than US$830,000. Full foreign participation is currently allowed in the following categories: C) Enterprises with a paid-up capital of US$7,500,000 or more, provided that investments for establishing a store should not be less than US$830,000, and D) Enterprises specializing in high-end or luxury products, provided that the paid-up capital per store is not less than US$250,000 (Sec. 5 of RA 8762).

LIST B:

FOREIGN OWNERSHIP IS LIMITED FOR REASONS OF SECURITY, DEFENSE, RISK TO HEALTH AND MORALS, AND PROTECTION OF SMALL-AND-MEDIUM-SCALE ENTERPRISES

Up to Forty Percent (40%) Foreign Equity

1. Manufacture, repair, storage, and/or distribution of products and/or ingredients requiring Philippine National Police (PNP) clearance:

    a. Firearms (handguns to shotguns), parts of firearms and ammunition therefor, instruments or implements used or intended to be used in the manufacture of firearms
    b. Gunpowder
    c. Dynamite
    d. Blasting supplies
    e. Ingredients used in making explosives:

        i. Chlorates of potassium and sodium
        ii. Nitrates of ammonium, potassium, sodium barium, copper (ll), lead (ll), calcium and cuprite
        iii. Nitric acid
        iv. Nitrocellulose
        v. Perchlorates of ammonium, potassium and sodium
        vi. Dinitrocellulose
        vii. Glycerol
        viii. Amorphous phosphorus
        ix. Hydrogen peroxide
        x. Strontium nitrate powder
        xi. Toluene

    f. Telescopic sights, sniper scope and other similar devices (RA 7042) as amended by RA 8179)

2. Manufacture, repair, storage and/or distribution of products requiring Department o National Defense (DND) clearance:

    a. Guns and ammunition for warfare
    b. Military ordinance and parts thereof (e.g., torpedoes, mines, depth charges, bombs, grenades, missiles)
    c. Gunnery, bombing and fire control systems and components
    d. Guided missiles/missile systems and components
    e. Tactical aircraft (fixed and rotary-winged), parts and components thereof
    f. Space vehicles and component systems

g. Combat vessels (air, land and naval) and auxiliaries
h. Weapons repair and maintenance equipment
i. Military communications equipment
j. Night vision equipment
k. Stimulated coherent radiation devices, components and accessories
l. Armament training devices
m. Others as may be determined by the Secretary of the Department of National Defense (RA 7042 as amended by RA 8179)

3. Manufacture and distribution of dangerous drugs (RA 7042 as amended by RA 8179)

4. Sauna and steam bathhouses, massage clinics and other like activities regulated by law because of risks they impose to public health and morals (RA 7042 as amended by RA 8179)

5. All forms of gambling, e.g. race track operation (RA 7042 as amended by RA 8179)

6. Domestic market enterprises with paid-in equity capital of less than the equivalent of US$200,000 (RA 7042 as amended by RA 8179)

7. Domestic market enterprises which involve advanced technology or employ at least fifty (50) direct employees with paid-in-equity capital of less than the equivalent of US$100,000 (RA 7042 as amended by RA 8179)

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