The Philippine Competition Act: A Mestiza?

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Abstract

The proliferation of competition law regimes among developing countries has exponentially grown in the past three decades. Although competition law is not new in the Philippine legal system, it was only in 2015 that Philippines eventually passed into law a national competition law regime, which appears to be a marriage of EU and US regimes. Anent, this article undertakes to analyze the implications of combining the two systems in the Philippine Competition Act. In particular, one major concern is the interpretation of the analytical framework of the two competition law systems – the dichotomy of per se doctrine and rule of reason in the US on the one hand, and the bifurcated framework of Article 101 of the TFEU and the dichotomy of "object" rule and "effect" rule. It argues that fusion created a complex regime that has a downside effect on the administrability and predictability of the law. It illustrates further that the motivations of the adoption of the PCA reflect that the Philippine competition law aims to achieve multifaceted goals, not only purely economic goal and that the lawmaking dynamics can zealously overshadow contextualization. The paper concludes that it would have been more pragmatic for the lawmakers to have singly focused on the US antitrust legal system as model in designing the provisions of the PCA both from institutional and normative consideration. For one, the Philippine competition law norms, prior to the passage of the PCA, have always been aligned with the US antitrust law system.

Keywords: Philippine Competition Act, Competition Law, Per Se Doctrine, Rule of Reason, Object or Effect Rule, Legal Certainty, Predictability, Fairness, Fusion, Tension, Legal Transplant

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I. Introduction

It is a popular claim that "mixed breeds are always beautiful." In the Philippines, the word *mestiza,* a daughter of mixed heritage, is commonly used to describe a beautiful woman. One might find this prefatory statement goes off on a tangent or ridiculous to begin a legal discourse. But the statement might make sense to the subject of this article by treating legal transplant as similar to the practice of mixed marriage among people of a different heritage. By analogy, does the fusion of the United States and European competition law systems in the adopting jurisdiction produce better legal framework to the latter? What will be the implications of the fusion to the administrability and predictability of the law? Will the fusion lead to effective enforcement? These are fundamental questions that this article undertakes to answer with the convergence of US and EU competition law systems in the Philippine Competition Act (PCA).[1] In particular, this article examines, for the first time, the implications of fusion of substantive provisions and the analytical frameworks of US and EU competition law systems. Broadly, this article aims to achieve the following: (1) to discuss the linguistic ambiguity and vagueness in the Philippine Competition Act, particularly Sections 14 and 26 of the PCA, (2) to analyze the implications of the fragmented analytical framework of Section 14 to the error-cost framework of competition law enforcement, and (3) to contribute in the literatures of designing competition law and the general debates about competition law convergence and divergence in developing countries.

Developing countries import competition laws from developed or advanced jurisdictions either for political or economic reasons.[2] But how competition laws are transplanted varies across jurisdictions. Of all the models developed by earlier and matured jurisdictions, the United States and European Union competition law systems are taking the lead. As one scholar rightly puts it, "[c]ompetition policy is one of the US's most successful-though more recent-export products".[3] But how the two leading competition law systems

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1) Copy available at http://phcc.gov.ph/republic-act-no-10667/ (visited on September 7, 2019).

2) For discussion of competition law legal transplant, *See* Tay-Cheng M, *Legal Transplant, Legal Origin, and Antitrust Effectiveness*, 65-88 (J. Competition L. & Econ.) (2013). This article shows that, in the process of antitrust transplant, the impact of legal tradition on antitrust effectiveness depends on whether or not the country is receptive to the transplanted antitrust regime.

parachuted in new jurisdictions tells different and divergent stories.

As a preliminary issue, there is a large and growing body of literature, both from academics and institutions, providing general guidance or model on how competition law should be designed[4] for developing countries and *how* legal norms should be transplanted. The analysis of these works reveals that the emphasis is on *contextualization.*[5] The rule is "no one size fits all." According to this view, competition law within developing countries must be design to adapt to the *unique* conditions they face, perhaps to the unique conditions *each* developing country faces. This view is underpinned by the idea that the political, economic, social, and cultural conditions in developing countries are different from those in developed nations. Thus, the competition law system appropriate for developing nations must be different.[6] The *contextualist* view warned that legal transplants can be disastrous if they do not take into consideration the special and relevant characteristics of the adopting jurisdiction. The drafting of the PCA reflects this concern. The lawmaking dynamics and the copy-and-paste approach seem to overshadow the significance of context.

A. PCA as Game-Changer

The enactment of the PCA is viewed as a "game-changer." Philippine lawmakers believed that the law is necessary for the economy to reach its next level of growth. According to Chairman Arsenio M. Balisacan of the Philippine

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3) Henry Ergas in his article described that "[c]ompetition policy is one of the US's most successful-though more recent-export products. After many years as an American eccentricity, antitrust law entered into a phase of rapid diffusion in the closing years of the twentieth century, both in the advanced economies and, perhaps even more startlingly, in the rest of the world. Since 2000, nearly 70 developing and transition economies have adopted some form of competition law." *See* Henry Ergas, *Should Developed Countries Require Developing Countries to Adopt Competition Laws: Lessons from the Economic Literature*, 5 EUR. Competition J. 347, 376 (2009).

4) *See* Alizedney M. Ditucalan, *Institutional Design of Philippine Competition Law,* 8 (KLRI J. L. & Legislation (2018).

5) Contextualization as a process of competition law designing in developing economies means that the special and relevant characteristics of the jurisdiction must be recognized and taken into account.

6) *See* George L. Priest, *Competition Law in Developing Nations: The Absolutist View Competition Law and Development* (Ed. D. Daniel Sokol, Thomas K. Cheng, and Ionnnis Lianos, Stanford University Press, 2013).

Competition Commission, "[t]he Philippines has failed to become a significant player in the prospering Asian region, which is worrisome, amid the push for ASEAN economic integration" and the passage of the PCA is a "step in the right direction."[7] Chairman Balisacan added that "the country has waited for so long to see the establishment of a comprehensive and coherent competition law and policy."[8] While it is true that the PCA establishes a national competition law regime, competition law is not new in the Philippines. In fact, Philippines was actually ahead, among Asian countries, to have adopted competition law statutes albeit scattered in different legislations and among the few countries that elevated or transformed them into a constitutional regime.[9] However, these laws, for various reasons, have not fully developed into a robust competition law regime. Studies have identified the following as main factors for the apparent idleness of their enforcement. These are regulatory conflicts, regulatory capture, lack of coherent enforcement and comprehensive competition law, and lack of jurisprudence.[10] In more particular, I wish to offer the following circumstances. First, the first designated enforcement agency, the Office for Competition of the DOJ, was only institutionalized in 2011, not even a body similar to the Federal Trade Commission of the United States; second, competition law was alien in Philippine law schools, which obviously hampered the development of this specialized field of law in the Philippine legal community (the bench and the bar); third, Philippines is not a common law country despite being a colony of the United States, which explains the underdevelopment of the earlier statutes. In contrast to its legal origin, the antitrust law of the United States developed over the years as a common law principle; fourth, the lack of competition culture played much in the equation; and finally, the lack of strong consumer-advocacy groups had also greatly contributed for the failure of the law to fully develop as well-functioning legal

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7) *See* Arsenio M. Balisacan (PCC Chairman), Competition a game changer in PHL economy, available at https://phcc.gov.ph/column1-bm-camb-competition-a-game-changer-in-phl-economy / (visited on 5 September 2019); *See* also Chris Schanabel, *Is the Philippine Competition Act really a game-changer?*, available at https://www.rappler.com/business/economy-watch/98290-philippine-competition-act-part-3 (visited on 5 September 2019).

8) *Id.*

9) *See infra* discussion in Part II, D.

10) Ditucalan, *supra* note 4; See generally Erlinda M. Medalla, *Government Policies and Regulations: Interface with Competition Policy*, 307 (Erlinda M. Medalla (ed), Toward a National Competition Policy for the Philippines) (2002). *See* http://dirp4.pids.gov.ph/ris/books/pidsbk02- competition.pdf (visited on 10 January 2018).

regime. Indeed, the passage of the law is a "game-changer" as it addresses some of the above factors.[11]

However, the more fundamental concern of the PCA is to pave the way for a robust competition law regime, that must be both administrable and predictable. Certainly, any ambiguity in the law can hold hostage the trajectory lifecycles of this "game-changing" legislation.[12]

B. Note on Methodology

This article relies on four major sources of information. The first source of information is from the United States Supreme Court jurisprudence interpreting Section 1 of the Sherman Act and case laws on Article 101 of the TFEU by the European Court of Justice interpreting the substantive provisions, particularly the standard of analysis, of their respective competition law statutes. Treaties and commentaries of leading legal scholars of US antitrust law and EU competition law were likewise examined to further highlight the development and the similarities and dissimilarities of the two regimes. On the premise that Philippines is a developing country, the second source of information is the large and growing body of literature on competition law and development, and competition law designing. Revisiting this body of literature is essential in order to put context to the discussion. The third major source is the legislative history of Republic Act 10667 during the Sixteenth Congress of the Philippines. Records of previous congresses were also examined to trace the textual evolution of R.A. 10667. The legislative history is necessary to understand the motivations of the lawmakers and their contemporaneous understanding of the law. Needless to mention, in case of ambiguity in the provisions, this information serves as primary tool of statutory construction. Finally, I had also the chance to interview three members of the four commissioners of the Philippine Competition Commission.

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11) William E. Kovacic argued that "improvements in institutional arrangements tend to yield superior policy outcomes." *See* William Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Law Systems: Explaining Variation in the Implementation of New Regimes*, available at http://lcp.law.duke.edu/.

12) For a discussion on competition law lifecycles, see generally Kovacic and Galdos, *supra,* note 11.

II. The Philippine Competition Law System

The number of competition law institutions has exponentially grown in developing countries in recent years.[13] This phenomenon underpins the recent notion of competition law is not only a prescription for the protection and promotion of competition but also an important driver of socio-economic development.[14] While there is a strong consensus about the need or indispensability of competition law in the modern market economy, adopting countries with developing economies exhibited varying motivations and reasons in enacting their respective competition law. The motivations are equally varying from one jurisdiction to another.[15] *Gal* and *Fox* argued that "strong motivations exist to follow the competition laws of other jurisdictions, even if the followed law does not completely match domestic conditions."[16] The Philippine experience elucidates this claim.

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13) *See* Diane R. Hazel, *Competition in Context: The Limitations of Using Competition Law as a Vehicle for Social Policy in the Developing World*, 37 Hous. J. Int'l L. 275 (2015); *See also* Taimoon Stewart et al., *Competition Law in Action: Experiences from Developing Countries,* 4 (*Int'l Dev. Research Ctr*) (2007); Michael Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries, in* Competition, Competitiveness and Development: Lessons from Developing Countries 21 (2004); Philippe Brusick & Simon J. Evenett, *Should Developing Countries Worry About Abuse of Dominant Power?,* 2008 Wis. L. Rev. 269, 270 (2008); Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path,* 13 Sw. J.L. & Trade in Ams. 211, 214 (2006); Diane P. Wood, *Antitrust at the Global Level,* 72 U. Chi. L. Rev. 309, 309 (2005); *see* William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement,* 77 Chi.-Kent L. Rev. 265, 265-66 (2001).

14) The inclusion of public interest objectives in developing economies has generated controversy and debate in the global antitrust and competition law community. *See* Patrick Smith & Andrew Swan, *Public Interest Factors in African Competition Policy,* AFR. & MIDDLE E. ANTITRUST REV. 1, 1 (2014). See however, other scholars who counterargue this view, e.g. A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programsfor Developing Countries,* arguing that antitrust reform is not the most appropriate way to eliminate market power in recently liberalized countries 19 N.C. J. INT'L L. & CoM. REG. 209, 212 (1994).

15) *See* Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, and David J. Gerber, *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015).

16) Michal S. Gal and Eleanor M. Fox, *Drafting competition law for developing jurisdictions: learning from experience*, 300 (The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law, Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, and David J. Gerber, Edward Elgar, 2015).

A. The Making of PCA

Republic Act 10667, otherwise known as the Philippine Competition Act (PCA), is the consolidated product of substitute House Bill 5286 of the House of Representatives and substitute Senate Bill 2282 of the House of the Senate during the 16th Congress of the Republic of the Philippines. President Benigno S. Aquino III signed into law R.A. 10667 on July 21, 2015. After its publication, the law took effect on August 8, 2015. Worthy to note, it took the Philippine Congress twenty-five years to pass this national competition law regime.[17]

The first attempt to have a national competition law was in the Eighth Congress in the 1980s. Since then, the bill remained in the legislative mill for more than two decades. There were several similar legislative measures in the subsequent congresses, but they all failed to hurdle the final legislative process. Eventually, the 16th Congress succeeded in resurrecting it. The strong forces that led to the full support of this legislation in both Houses were Philippines' compliance with the ASEAN Economic Integration blueprint, which requires the passage of national competition law. In a nutshell, the PCA mandates the creation of a national competition authority called the Philippine Competition Commission (PCC). The Philippine Competition Commission shall "implement the national competition policy" of the government. As a quasi-judicial body, it shall have "original and primary jurisdiction over the enforcement and implementation" of the PCA. The law is enforced through the PCC for preliminary investigation and administrative sanctions, through the Office for Competition – Department of Justice, for a criminal prosecution, and through private parties for civil actions. The law mainly covers three prohibited antitrust subjects, viz: anticompetitive agreements under Section 14, abuse of dominant position under Section 15, and prohibited mergers and acquisitions under Section 20.

The anti-competitive agreements provisions are divided into three categorie s.[18] The first category deals with horizontal agreements that are per se illegal, such as price-fixing and bid-rigging.[19] The second category covers horizontal agreements that are by their object or effect substantially lessen competition, such as product limitation and market sharing.[20] The third one provides for

17) *See* Ditucalan, *supra* note 4.
18) *See infra* Figure 1 in Part III at 13.
19) R.A. 10667, sub-section 14(a).
20) *Id.*, sub-section 14(b).

those not covered by the first two categories, subject to efficiency justification exemptions under Section 14 (c). This category also embraces vertical agreements to a limited extent. Agreement refers to any type or form of undertaking, collective recommendation, independent or concerted action or practices, whether formal or tacit.[21]

Section 15 listed *nine* conducts that are considered an abuse of dominant position, although there were only *six* conducts prohibited under the substitute bills of both Houses. Paragraphs (c), (h) and (i) were only added during the bicameral conference meetings. Conduct is defined as "any type or form of undertaking, collective recommendation, independent or concerted action or practice, whether formal or informal."[22] The nine conducts can actually be reduced to five categories, such as (1) predatory pricing under para. (a), (2) imposing barriers to competition under para. (b), (3) price and non-price vertical restraints or foreclosures para. (c), (e) and (f), (4) price discriminations under para. (d), (g), and (h), and (5) market limitation under para. (i).

The provision is silent whether the enumeration is exclusive, although the original text in Section 6 of substitute House Bill 5286 and in Section 2 of Substitute Senate Bill 2282 categorically provided that the list is not exclusive. It can, therefore, be interpreted that the intent of the lawmakers in removing the phrase "but is not limited to" in the House bill and the word "includes" in the Senate bill is to make the listing exclusive. Otherwise, they should have retained the original wording during the bicameral conference meetings. The Implementing Rules and Regulation of the Philippine Competition Act (IRR-PCA), which was promulgated by the PCC on May 31, 2016, reclassified the formal listing as non-exclusive under §2 of the IRR-PCA. It says, "[i]t shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict, or lessen competition, *including ....*" As a matter of administrative law, rules and regulations promulgated in accordance with the power conferred by law would have the force and effect of law[23] if the same are germane to the subjects of the legislation and if they conform with the standards prescribed by the same law.[24] At best the same may be treated as an *administrative interpretation* of the law, which may be set aside by the court in the final determination of what the law

21) *Id.*

22) *Id.*, sub-section14(c).

23) Victorias Milling Company, Inc. v. Social Security Commission, 114 Phil. 555 (1962).

24) People v. Maceren, G.R. No. L-32166, October 18, 1977, 79 SCRA 450.

means.[25] In the Substitute Senate Bill, abuse of dominant position is treated as criminal offense, but it was reclassified during the bicameral conference meetings as purely administrative offense by adopting the House' version.

Under Section 20, mergers or acquisitions transactions (M&A) that result in SLC in the relevant market shall be prohibited, subject to certain exemptions under Section 21.[26]As a general rule, the PCC has the power to prohibit mergers or acquisitions that will substantially lessen competition. The parties to a merger or an acquisition that falls within the threshold[27] are required to notify the PCC through its Mergers and Acquisitions Office within the waiting period of thirty days after a definitive agreement is reached.[28] Within the waiting period, the parties are prohibited to consummate the M&A.[29] An M&A consummated in violation of this compulsory regime shall be considered void and the parties shall be imposed an administrative fine of 1% to 5% of the value of the transaction.[30] The statutory waiting period of thirty days may be extended by

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25) Cebu Institute of Technology v. Ople, G.R. No. L-58870, L-68345, L-69224-5, 70832, 76521, 76596.

26) *See infra* discussion on merger and acquisition review in Part II, A.

27) Initially, Section 17 of the PCA has set the transactional value to PhP one billion for mandatory notification. But just recently, in its Memorandum Circular No. 18-001, the PCC raised the new thresholds to PhP five billion for the Size of Person, and PhP two billion for the Size of Transaction as defined in the Implementing Rules and Regulations. This is the first time the PCC has adjusted the thresholds since the PCA was enacted with the PhP one billion default threshold. To date, the PCC has received 152 notifications (equivalent to 134 transactions) and approved 125 transactions worth a total of PhP 2.25 trillion, while others are in different stages of review. Majority of these came from the manufacturing, financial, electricity, real estate and transportation sectors. See Philippine Competition Commission, 'PCC Adjusts Thresholds for Compulsory M&A Notifications' (March 5, 2018), see http://phcc.gov.ph/pcc-adjusts-thresholds-compulsory-ma-notifications. (visited on 02 September 2019). In PCC Advisory 2019-001, the PCC made another adjustment. Hence, effective 01 March 2019, parties to a merger or acquisition shall be required to provide notification when: (a) The aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities, including that of all entities that the ultimate parent entity controls, directly or indirectly, exceeds Five Billion Six Hundred Million Pesos (PhP 5,600,000,000.00). and (b) The value of the transaction exceeds Two Billion Two Hundred Million Pesos (PhP 2,200,000,000.00), as determined in subsections (1), (2), (3) or (4), as the case may be. *See* https://phcc.gov.ph/wp-content/uploads/2019/02/Advisory-19-001_2019.02.21_Adjustment-of-Thresholds.pdf. (visited on 02 September 2019).

28) R.A. 10667, section 17.

29) *Id.*

30) *Id.*

the PCC for an additional sixty days.[31] The total period for the review of the PCC shall not exceed ninety days from the initial notification.[32] If the period expired and no decision has been promulgated for whatever reason, the merger or acquisition shall be deemed cleared for SLC.[33] The favorable recommendation from a governmental agency with a competition mandate offers is a *disputable presumption* that the proposed M&A is not anticompetitive.[34] There are two phases of the merger review. A *Phase 1* review takes for a maximum period of thirty days from complete notification and payment. This involves an assessment to determine if the notified merger raises any competition concerns that would warrant comprehensive review. If no competition concerns are found, the merger may be cleared within the period for Phase 1 review.[35] A *Phase 2* review is a more detailed and in-depth assessment of the merger and takes for a maximum period of sixty days.[36] Before the PCC renders a decision, the parties may propose commitments that would remedy, mitigate, or prevent SLC. At the end of the Phase 1 or 2 review process,[37] the PCC may order to (1) prohibit the M&A, or (2) prohibit the M&A unless and

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31) *Id.*

32) *Id.*, section 3.

33) *Id.*, section 4.

34) *Id.*, section 6.

35) *See* PCC Rules on Merger Procedure.

36) *Id.*

37) *See* Philippine Competition Act section 21, which provides:

Exemptions from Prohibited. Mergers and Acquisitions. – Merger or acquisition agreement prohibited under Section 20 of this Chapter may, nonetheless, be exempt from prohibition by the Commission when the parties establish either of the following:

(a) The concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or likely to result from the merger or acquisition agreement; or

(b) A party to the merger or acquisition agreement is faced with actual or imminent financial failure, and the agreement represents the least anti-competitive arrangement among the known alternative uses for the failing entity's assets:

Provided, that an entity shall not be prohibited from continuing to own and hold the stock or other share capital or assets of another corporation which it acquired prior to the approval of this Act or acquiring or maintaining its market share in a relevant market through such means without violating the provisions of this Act:

Provided, further, that the acquisition of the stock or other share capital of one or more corporations solely for investment and not used for voting or exercising control and not to otherwise bring about, or attempt to bring about the prevention, restriction, or lessening of competition in the relevant market shall not be prohibited.

until it is modified by changes specified by the PCC, or (3) prohibit the M&A unless and until the pertinent party or parties enter into legally enforceable agreements specified by the PCC.[38]

A party seeking exemption under Section 21 of the PCA must demonstrate significant gains in the implementation of the agreement.[39] As a default rule, favorable ruling clearing the M&A from SLC is final, except when there is fraud or false material information.[40]

B. Motivations

The legislative history of R.A. 10667 revealed several motivations for its final enactment that are worth-telling. The lawmakers realized the need to consolidate the "numerous, fragmented and scattered" competition law statutes which have remained unenforced and "largely ineffective because they do not provide clear-cut guidelines to determine whether an act constitutes unfair competition, monopolistic behavior, or restraint of trade."[41] They realized the need to have a specific "central body" that shall determine violations of Philippine competition laws.[42] The first two motivations are obvious responses to the lack of enforcement of relevant competition law provisions. But what hastened the immediate passage of the law was the Philippines' commitment to the ASEAN economic integration.[43] This appeared to be the strong force that led full support for its enactment in both houses of the Philippine Congress. It is worth mentioning too that the Philippine lawmakers further pushed the mandate of the law by articulating broader economic and non-economic goals. These are to level the playing field for businesses,[44] to allow more Filipinos to exercise entrepreneurial spirit, to encourage competition, innovation,[45] to usher investment and economic development, and to help eradicate poverty.[46] This is typical in developing countries that used competition policy for development objectives. *Bakholm* argues:

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38) *Id.,* section 18.
39) *Id.,* section 22.
40) *Id.,* section 23.
41) *See* Sponsorship Speech of Rep. Enriquez Cojuanco, History of HB No. 5286, p. 408.
42) *Id.*
43) *Id.*
44) *See* Sponsorship Speech of Sen. Bam Aquino, Session 2, July 30, 2014, Sixteen Congress.
45) *Id.*
46) *See supra* note 41.

"[N]on-economic goals are not always irreconcilable with efficiency. Hence, certain enhanced economic opportunities and certain imperative of access to basic needs are reconcilable with developmental efficiency. It is only in the cases where efficiency does not correspond with non-economic goals that the competition authority might want to consider whether competition law is the best instrument or whether it would require undesirable tradeoffs between efficiency and access to basic needs. Competition law can fully supply this approach. As to the objective of protecting jobs, it should be pursued only to the extent that it does not frustrate attempts to build or induce modern businesses and jobs."[47]

Blair and *Sokol* also argued that as developing countries adopt competition laws as part of an overall policy package to stimulate economic growth and development, they have included objectives in their competition laws that industrialized or Western nations may not view as appropriate.[48] But this approach could lead to a clash between the Western approach and developing countries' approaches.[49] For instance, taking into *public interest* when assessing a merger would create different standards in competition law enforcement and the inclusion has generated controversy and debate in the global antitrust and competition law community.[50] While public interest objective is controversial, it is worthy to note that under 1987 Philippine Constitution "the state shall regulate or prohibit monopolies when public interest so requires,"[51] making "public interest" as the standard for regulating or prohibiting monopolies.

Indeed, the exponential growth of competition law in developing economies occupied much of the recent debates, ranging from institutional design to the expanding goals of competition law and its nexus to development. As the competition law continues to penetrate the legal system of developing economies, the debate will continue. New challenges and constraints will emerge too. Disruptive innovations, like big data, platforms, and AI are already disrupting traditional competition law norms. As the law evolves and responds

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47) Mor Bakholm, *Dual Language in Modern Competition Law - Efficiency Approach versus Development Approach and Implications for Developing Countries*, 34 World Competition 495, 522 (2011).

48) Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach,* 78 Antitrust L.J. 471, 473 (2012).

49) Mor Bakholm, *supra* note 46.

50) Patrick Smith & Andrew Swan, *Public Interest Factors in African Competition Policy,* AFR. & Middle E. Antitrust Rev. 1, 1 (2014).

51) Section 19, Article XI (National Economy and Patrimony), 1987 Constitution.

to these new antitrust concerns, that were not captured by the law when transplanted, the gaps between competition law norms evolving in developing countries and in developed countries continue to widen. To borrow *Jenny*'s own words, "[d]ealing with multiple competition laws increases transaction costs due to conflicts and contradictions."[52] This is recently reechoed by *Chew* arguing from a business perspective. According to her, divergence among competition regimes can be problematic. Business operating in different countries will be subjected to different competition regimes with different procedural requirements.[53] But like *Jenny*, *Chew* failed to present that within one adopting jurisdiction, the convergence of substantive and procedural norms are already prevailing in developing countries, as seen in the case of the Philippines, but this poses even greater challenge to developing countries.

C. The Aquino Push

The election of President Benigno Simeon Aquino III in the May 2010 National and Local Elections ushered the hope to pass a national competition law, which had been languishing in the legislative mills for more than two decades. During his first State of the Nation Address (SONA) in July of 2010, President Aquino asked the Fifteenth Congress[54] to pass an antitrust law. President Aquino III said, "[a]ccording to our Constitution, it is the government's duty to ensure that the market is fair for all. No monopolies, no cartels that kill competition. We need an Anti-Trust Law that will give life to these principles, to afford Small- and Medium-Scale Enterprises the opportunity to participate in the growth of our economy."[55]

The Fifteenth Congress positively responded to his call. Different versions of the bill were filed in both Houses. In the House of Representatives (lower

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52) *See* Frederic Jenny, *Competition Law in Global Economy*, rieti, 2014, *available at* https://www.rieti.go.jp/en/events/bbl/14030601.html (visited on 18 July 2019).

53) *See* Corinne Chew, *Diversity of National Competition Laws in the ASEAN Region and the Resulting Challenges for Business Operating in the Region*, 63 (Regionalisation of Competition Law and Policy within the ASEAN Economic Community, Burton Ong, ed., Cambridge University Press, 2018).

54) Fifteenth Congress was composed of lawmakers who served the term covering July 2010 to 2013.

55) State of the Nation Address of His Excellency Benigno S. Aquino III, July 26, 2010, Batasan Pambansa Complex, Quezon City, available at https://www.officialgazette.gov.ph/2010/07/26/state-of-the-nation-address-2010-en/.

house), the measure was consolidated to House Bill 4835, which shall be known as the Philippine Fair Competition Act of 2011. House Bill 4853 was the substitute bill of 12 bills[56] filed during the said Congress. On Aug. 08, 2011, the House adopted the Explanatory Note of the bill as the sponsorship remarks on the measure; terminated the period of sponsorship and debate; approved the Committee amendments as contained in the Committee Report. The bill was then approved on Second Reading. Fifteenth Congress finally adjourned and the bill remained un-acted upon.

The election of new members of the House of Representatives after the midterm 2013 May elections renewed the hope for the enactment of a comprehensive anti-trust law, which stalled during the Fifteenth Congress. True enough, as early as July, there were already bills introduced by the Members of the House of Representatives. Among these bills are House Bill Nos. 388,[57] 453,[58] 1133,[59] 3366,[60] 4320,[61] 4346,[62] 4446[63] were identical bills. These bills were the same as House Bill 4835 of the Fifteenth Congress. House Bill 4835 was a substitution of 12 bills filed during the Fifteenth Congress.

D. Earlier Competition Law Regimes

1. Relationship with US Antitrust

Long before the passage of Republic Act 10667, otherwise known as the Philippine Competition Act, the Philippines had long-standing competition law statutes in its legal arsenal.[64] In *Tatad,*[65] the Supreme Court of the Philippines

56) House Bill Nos. 549, 913, 1007, 1583, 1733, 1980, 3100, 3134, 3244, 3476, 3534 and 3985 per Committee Report No. 1215 submitted by the Committee on Trade and Industry, Economic Affairs and Appropriations on June 08, 2011, available at http://congress.gov.ph/legisdocs/basic_15/HB04835.pdf.

57) Introduced by Rep. Rep. Rodriquez and Rep. Maximo B. Rodriguez, Jr., filed on July 1, 2013.

58) Introduced by Rep. Marcelino R. Teodoro, filed on July 1, 2013.

59) Introduced by Rep. Feliciano Belmonte, Jr., filed on July 5, 2013.

60) Introduced by Rep. Teodorico T. Haresco Jr., filed on November 18, 2014.

61) Introduced by Rep. Sergio A. F. Apostol, filed on April 23, 2014.

62) Introduced by Rep. Anthony G. del Rosario, filed on May 5, 2014.

63) Introduced by Rep. Giorgidi B. Aggabao, filed on May 20, 2014.

64) *See* Ditucalan, *supra* note 4; see also Tristan A. Catindig, The Asean Competition Project: The Philippines Report. *Available at* http://www.jftc.go.jp/eacpf/02/philippines_r.pdf (Last visited on July 19, 2019).

65) 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.

described the import of Section 19 of Article XII of the Philippine 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."

The first legal provisions enforced to deal with monopoly and combinations in restraint of trade can be found in Articles 543, 544, and 545 of the Spanish Penal Code, which was enforced during the Spanish occupation.[66] After the Spaniards ceded the Philippine territories to the Americans under the Treaty of Paris, the Philippine Legislature enacted on December 1, 1925, Act. No. 3247 (An Act to Prohibit Monopolies and Combinations in Restraint of Trade), which was based on the Sherman Act of the United States, supplementing the provisions of the *old* Spanish Penal Code, which was older than the Sherman Act.[67] Later, with the passage of the Revised Penal Code (Act. No. 3815) (RPC), Article 186 of the RPC superseded Act. No. 3247.[68] Article 186 of the RPC punishes monopolies and combinations in restraint of trade when there is a: "(1) combination to prevent free market; (2) monopoly to restrain free competition in the market; and (3) manufacturer, producer, or processor or importer combining, conspiring or agreeing with any person to make transactions prejudicial to lawful commerce or to increase the market price of merchandise."[69] Interestingly, the only case that reached the Supreme Court of the Philippines involving the provision the RPC was the 1905 case of *U.S. vs. Fulgueras.*[70] Fulgueras was a case of spreading of false rumors to restrain free

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Hon. Ruben Torres, et al., G.R. No. 127867, November 5, 1997.

66) *See* generally Ditucalan, *supra* note 4.

67) The Code was passed on December 8, 1930 but took effect on January 1, 1932. Id.

68) See generally Ramon C. Aquino, The Revised Penal Code (Central Book Supply, Inc.,), Articles 114-367, at 332- 34 (1961). Article 186 of the Revised Penal Code was taken from Articles 543-535 of the old Penal Code and Sections 1-7 of Act No. 3247.

69) Revised Penal Code, art. 186, Act No. 3815, as amended (Phil.). See Luis B. Reyes, *The Revised Penal Code: Criminal Law* 286-87 (Rex Book Store, 2008) (The penalty imposable by law is *prision correctional* (six months and one day to six years) or a fine of PhP 200 to PhP 6,000 or both. If the offense affects any food substance, motor fuel or lubricants, or other articles of prime necessity, the penalty shall be that of *prision mayor* (six years and one day to twelve years).).

competition, but this was decided under the regime of the old Penal Code. On monopoly, there are only two cases went up to the Supreme Court, *viz: Gokongwei, Jr., vs Security and Exchange Commission, et al.*[71] (1979) and *Tatad* vs. *Secretary of Department of Energy, et al.,*[72] (1997). However, unlike the US landmark cases, such as the 1897 *Trans-Missour*i (166 U.S. 290), the *Joint Traffic* (171 U.S. 5050, or the *Standard Oil* (221 U.S. 1), *Gokongwei Jr*. and *Tatad* didn't leave an embryonic impact to the development of competition law in the Philippines.

The US Clayton Act, particularly Section 7, did also find its way in the Philippine statute book. The Corporation Law,[73] the first corporation law enforced in the Philippines, contained a similar provision of Section 7 of the Clayton Act [*See* Figure 5]. The provision was introduced by Section 20 Act 3518, which amended the 1906 company law, The Corporation Law. The 1906 Corporation Law (Act 1459) was later repealed by Batas Pambansa Bilang 68 (BP 68), known as the Corporation Code of the Philippines, but BP 68 didn't have similar provision. Just last February 21, 2019, Pres. Rodrigo R. Duterte signed into law Republic Act No. 11232 of the Revised Corporation Code of the Philippines repealing Batas Pambansa Blg. 68.

2. Executive Order No. 45

The election of President Aquino III marked a huge leap for the needed initial institutional reforms for Philippine competition law enforcement. The first step by the Aquino administration was the creation of the Office for Competition of Department of Justice (OFC-DOJ) pursuant to Executive Order No. 45. This executive order designated the OFC-DOJ as the Competition Authority beginning June 9, 2011 with mandates, which are not only limited to investigation and prosecution of infringers of competition laws.[74] Pursuant to

70) G.R. No. 2176. April 18, 1905.

71) G.R. No. L-45911, 89 SCRA 339.

72) G.R. No. 14360.

73) Act 1459.

74) The OFC has the following duties and responsibilities, *viz*: (1) Investigate all cases involving violations of competition laws and prosecute violators to prevent, restrain and punish monopolization, cartels and combinations in restraint of trade; (2) Enforce competition policies and laws to protect consumers from abusive, fraudulent, or harmful corrupt business practices; (3) Supervise competition in markets by ensuring that prohibitions and requirements of competition laws are adhered to, and to this end, call on other government agencies and/or

Section 1 of EO 45, the Department of Justice issued Department Circular No. 011 (Guidelines Governing the Implementation of Executive Order No. 45, Series of 2011). This Guidelines set forth the rules to be observed in the investigation of OFC on cartelization, monopolies, and combinations in restraint of trade. The investigation, however, as used in the Guidelines refers only to *fact-finding examination, study or inquiry* for determining whether the allegations in a complaint or finding in a report may be the subject of administrative, civil and/or criminal action.[75] In the event that the Investigation Report,[76] as approved by the Secretary of Justice, recommends the filing of administrative, civil/or criminal charges, the OFC shall prepare and file the appropriate complaint/s within fifteen (15) calendar days upon approval by the Secretary of Justice. Administrative cases shall be filed with the court of competent jurisdiction. Criminal complaints shall be filed with the National Prosecution Service (NPS) of DOJ for preliminary investigation.[77] The passage of Philippine Competition Act redefines the above system. The investigation power is now lodged with the Philippine Competition Commission.

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entities for submission of reports and provision for assistance; (4) Monitor and implement measures to promote transparency and accountability in markets; (6) Prepare, publish and disseminate studies and reports on competition to inform and guide the industry and consumers; and (7) Promote international cooperation and strengthen Philippine trade relations with other countries, economies, and institutions in trade agreements. (Sec. 1) | Comment: EO 45 speaks of competition laws but during its effectivity there is only one competition law regime that has penal sanction, that is, Article 186 of the Revised Penal Code.

75) Department of Justice Dep't. Cir. No. 11, Rule 2. (Scope of the Investigation), section 3.

76) The Investigation Report is the result of the investigation conducted by the OFC, which was either commenced by a complaint under oath from any person or upon a request from a government agency. The Report contains: (a) Brief statement of the complaint; (b) Statement of facts; (c) Statement of the findings including the acts or omissions constituting violation of provisions of competition laws and pertinent laws; (d) Basis for the finding copies of documents; and (c) Recommended actions including the filing of appropriate charges if any. (*See* section 1, Rule 4, DC No. 11) The Report shall be approved by the OFC Head and submitted to the Secretary of Justice within thirty (30) calendar days for the termination of the investigation. (See, *id*., section 2.).

77) *Id.*, Rule 5, section 2.

3. Constitutions and the Civil Code

Despite the apparent weak, or lack of, enforcement of the statutory regime under Article 186 of the Revised Penal Code, the Framers of the 1973 Philippine Constitution deemed it necessary to make it a constitutional policy. The same constitutional treatment was carried into the 1987 Philippine Constitution.[78] Section 19 of Article XII explicitly states "[T]he State shall *regulate or prohibit monopolies* when the public interests so require. *No combinations in restraint of trade or unfair competition shall be allowed*." It is interesting to the point that this constitutional provision has elevated the competition policy and law of the Philippines into a superior legal regime.

While not strictly related to competition affecting market position, the Civil Code of the Philippines provides for a general cause of action for unfair competition.[79] This is a separate cause of action. Article 28 of the New Civil Code provides, "[u]nfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machinations or any other unjust, oppressive or highhanded method *shall give rise to a right of action* by the person who thereby suffers damage."

The above survey of laws tells us that Philippines was ahead of other countries in Asia, and perhaps among other jurisdictions in the world, to have earlier competition law because of the US influence. However, these laws have not developed into a robust competition law regime for factors that are both institutional and normative.[80]

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78) *See* Constitution (1987), Article XIV, § 2 (Phil.). See also id. Article XII, §§ 1, 13, 19 (National Economy and Patrimony); id. Article XIII, §§ 1, 2, 11 (Social Justice and Human Rights).

79) Civil Code, Article 28, Rep. Act 386, as amended (Phil.) ("Unfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machinations or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who thereby suffers damage.") (emphasis added), http://www.gov.ph/downloads/1949/06jun/19490618-RA-0386-JPL.pdf . (visited on 10 January).

80) *See supra* discussion in 1.2.

III. The US-EU Fusion: Tension Within

Agreements affecting the price or its components, restricting outputs, allocating the customers, dividing the market and other types of co-operation and collusion between and among competitors are generally condemned as anticompetitive. By the specific provision of law, they are considered either illegal on their face or presumptively illegal, except when they are subject to specific exemption.[81] In the United States, these agreements are governed by Section 1 of the Sherman Act[82] as *combinations in restraint of trade*. The *United States v. Trans-Missouri Freight Ass'n (166 U.S. 290, 1897)* in 1897 is the first Section 1 case that reached the United States Supreme Court (the "USSC"). The case involved a cartel created by the eighteen railroads controlling traffic west of the Mississippi to remove fratricidal rate wars. In a closely divided decision, the USSC, in a terse opinion by Justice Peckham, held that Section 1 condemned "every" restraint of trade; it admits no exceptions. Applying the Sherman Act literally, the USSC appeared to condemn all agreements in restraint of trade, not just those unreasonable ones, but two cases within a year indicated a slight retreat from this analysis. Thus, in *Hopkins v. United States,*[83] the USSC read *Trans-Missouri* to apply only to "direct" agreements in restraint of trade. The *Hopkins* qualified that only those agreements whose main purpose was to fix prices were condemned.[84] In *United States v. Joint Traffic Association*1, the USSC was urged to reconsider the conclusion in *Trans-Missouri*. Although standing upon its holding in *Trans-Missouri*, the USSC, as it did in *Hopkins,* backed away from the sweeping statement of the rule in the prior case. This time the USSC distinguished between arrangements which "directly" and "immediately" reduce competition, as would a rate agreement among competitors and arrangements which had only indirect or incidental effects. [85] Here, then, is an embryonic statement of the *per se* doctrine and also the other way of expressing what has come to be known as *the rule of reason*: where an arrangement does

81) Eleanor M. Fox and Daniel A. Crane, Global Issues in Antitrust and Competition Law, 6 (Thomson Reuters 2010) (West Academic Publishing 2017).

82) Section 1 [Sherman Act]. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

83) Hopkins v. United States, 171 U.S. 578 (1898)

84) *See* 166 U.S. 290 (1897).

85) Laurence Anthony Sullivan, Antitrust (West Publishing Co., 1977, pp. 169).

not obviously stifle competition, but may adversely affect it, analysis of the arrangement must be pursued to gauge its purpose and effect.

Briefly, the *per se* approach characterizes certain behaviors which are manifestly anti-competitive and should be deemed to be illegal *per se*. Under this legal standard, "there are certain agreements or practices which because of their pernicious effect on competition and lack of redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[86] Under competition law theory, *per se* prohibited practices have hardly any compensating benefits, which is what explains why they are regarded illegal without further examination on the merits of the case.[87] The application of per se doctrine does not seem to require much analysis except that the court must be satisfied that the practice governed by the rule has existed. Once the practice is established, no further analysis of its purpose or effect is necessary.[88] Under the rule of reason approach, a court is required to weigh "all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing unreasonable restraint on competition."[89] It requires the weighing of the anti-competitive and pro-competitive effects, and their balancing if necessary. This rule of reason approach makes the US antitrust law more flexible, but also widely criticized for its complexity that leads to uncertainty and unpredictability.[90]

In the European Union, Article 101[91] of the Treaty of Functioning of

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86) Northern Pacific Railway v United States, 356 U.S. 1, 5 (1958)

87) Ignacio De Leon, *Institutional Assessment of Antitrust Policy: The Latin American Experience*, 203-204 (Walter Kluwer 2009).

88) US v Socony-Vacuum Oil, 310 US 150 (1940).

89) Continental T.V., Inc. v GTE Sylvania Inc, 433 US 36, 49 (1977)

90) Barry J Rodger & Angus MacCulloch, *Competition Law and Policy in the EC and UK*, 183 (3rd edition, Cavenlish Publishing Ltd 2004).

91) Article 101 [TFEU] "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

European Union (TFEU) provides for restrictions by "object" or "effect" in assessing "agreements of undertakings" that prevent, restrict, or distort competition. The policy of Article 101 (1) is to prohibit joint, not individual conduct which prevents, restricts or distorts competition. While Section 1 of the Sherman Act simply prohibits contracts (also combination and conspiracy) which are "unreasonable" restraint of trade using the dichotomy of *per se* rule and rule of reason, Article 101 is divided into parts, with substantive appraisal of an agreement being divided between Article 101(1) and Article 101(3). Article 101(1) prohibits agreements "between undertakings" that have as *object* or *effect* the restriction of competition and that affect trade between Member States, while Article 101(3) provides that the Article 101(1) prohibition does not apply to agreements that meet four criteria: that they produce specified benefits, allow consumers a fair share of the benefits, contain only indispensable restrictions, and do not lead to an elimination of competition.[92] Generally, the *object category* is the equivalence of *per se* illegality doctrine and the *effect category* is the equivalence of rule of reason, *but* distinct in many respects. The categorization of an agreement as having as its object the restriction of competition means that the parties (for example to naked price-fixing) cannot argue that the fixing of prices does not restrict competition. It thus has similarities to the rule of *per se* illegality adopted in the US. But as earlier mentioned this parallelism of US *per se* illegality rule and the EU restriction by object should not be taken further than this. In contrast to the US *per se* illegality rule, it follows that the parties to a price-fixing agreement can still *theoretically* argue efficiency-enhancing effect by proving that it satisfies the criteria of Article 101 (3).

The EU law framework analysis is done through the bifurcation of Article 101 using "object" analysis or "effect" analysis and the Article 101 (3) exceptions. There is a tendency by some to compare "object" illegality to per se illegality, and the "effect" test to the rule of reason. Although there is some connection between 'object' and per se illegality, it is incorrect to equate the two because per se doctrine simply cannot exist under Article 101 framework. As to the comparison of the "effect" test and rule of reason, under the latter both

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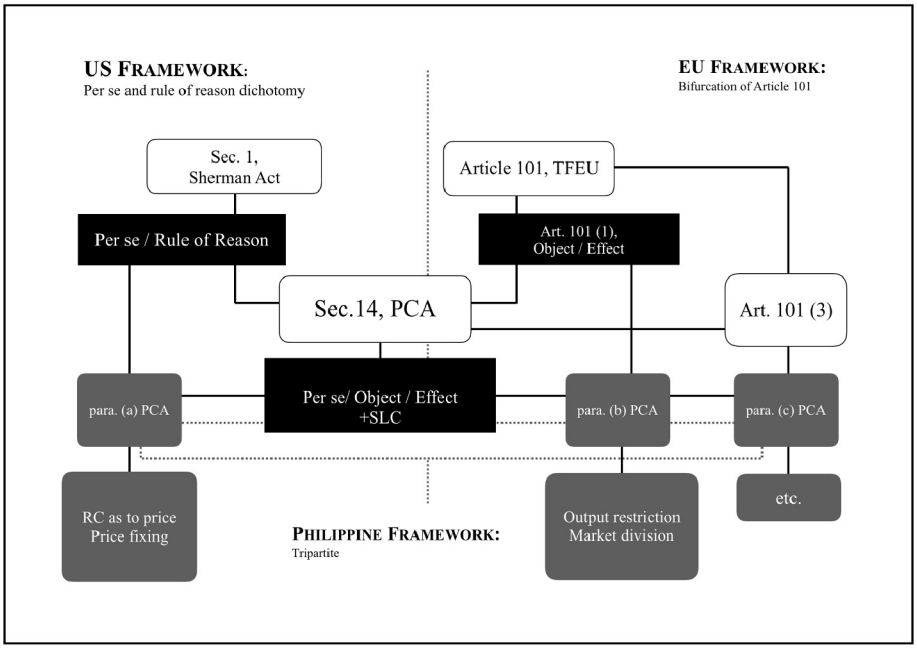
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

92) *See* Alison Jones, *The Journey Toward an Effects-Based Approach under Article 101 TFEU - The Case of Hardcore Restraints*, 55 Antitrust Bull. 783 (2010).

anti-competitive and pro-competitive effects are assessed, but as a matter of EU law, the former generally only considers anti-competitive effects, with pro-competitive effects left to the Article 101(3) standard of analysis. But the combined process of applying the 'effect test' and Article 101(3) greatly resembles the rule of reason.

The Philippine regime on anti-competitive agreements is spelled out in Section 14 of the Philippine Competition Act, which is the counterpart of Section 1 of the Sherman Act in the United States and Article 101 of the TFEU in the European Union. However, as explained earlier and illustrated in *Figure 1* below, the two legal systems use different analytical frameworks, which converged into a tripartite Philippine framework under Section 14 of the PCA.

Figure 1



As defined under PCA, the word '*agreement'* is defined as "any type or form of contract, arrangement, understanding, collective recommendation, or concerted action, whether formal or informal, explicit or tacit, written or oral."[93] The definition of *agreement* would obviously show that it captures more than

just *contract*[94] as understood in civil law.[95] Section 14 covers both horizontal agreements[96] under para. (a) & (b) and vertical agreements under para. (c). Unlike horizontal agreement, vertical agreement was not categorically defined in Section 14, but it is captured by the catch-all wording of Section 14 (c). Moreover, Section 14 laid down the basic analytical framework in evaluating whether an agreement constitutes anti-competitive. Given, therefore, the lines dividing the US and EU standards of analysis, why did the Philippine lawmakers in enacting the Philippine Competition Act adopt this kind of *hybrid* standard of analysis for Section 14? Was it deliberate or just an accident of copying? Before we answer the questions, it is worth pointing out that the Philippine provision on anticompetitive agreement stands unique among the competition law regimes in the 10 ASEAN member states and even in the other jurisdictions[97] by fusing the key concepts of "per se" of the US antitrust law, and the "object or effect" test and Article 101 (3) of TFEU in the same provision.

A. House Bill 5826

It may seem absurd, but the general notion about *mestiza* might have sat well in the minds of the Philippine lawmakers during the crafting of the bill. During the debates at the House of Representatives, *Rep. Terry Ridon* asked *Rep. Anthony Del Rosario,* one of the main authors of the bill, about the source of the provision on permissible mergers and acquisition. He answered "[it] is actually a combination of the EU and ASEAN models. We actually took the best of each and put it together *hoping that this would be a far more superior law compared to the two mentioned*."[98]

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93) Sub-section 4 (3)(c), PCA.

94) Compared agreement to "contract" as defined in Art. 1305 of the New Civil Code of the Philippines. Article 1305 defines contract as "a meeting of minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service."

95) See Prof. Ioannis Lianos argued that the concept of antitrust agreement or more generally "collusion" for Article 81 purposes needs to be treated less like the contract law idea of an "agreement" and more in keeping with the economics and the objectives of competition policy itself

96) Agreement between and among competitors.

97) Based on the OECD Competition Law in Asia-Pacific: A Guide to Selected Jurisdiction, it would appear that Philippines is the only jurisdiction that adopted the key concept under the US antirust law and EU competition law.

During also the interpellation of *Rep. Magtanggol Gunigundo*, *Rep. Del Rosario* when asked what "template or model" did they use in coming up with the House Bill No. 5286, his response was: "Mr. Speaker, it's actually a *combination of the US, EU and ASEAN models*. We pretty much took the best practices of each and incorporated them into the current version being deliberated."[99] So apparently, the idea of "best practices", for the authors of the bill, is *copying and combining* the US and EU model (including as they claim ASEAN). During his sponsorship speech at the plenary, *Rep. Enriquez Cojuanco* explained the sources of Section 5a and 5b[100] of HB No. 5286 (later became Section 14 of the PCA) of the bill. He said:

> *"Section 5a of per se violations adopts the distinctive features of the Sherman Act of the United States*. Quoting the US Supreme Court, I quote, "There are certain agreements or practices which, because of their pernicious effect on competition and lack of redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."
>
> *Rep. Cojuanco* further explained that:
>
> "On the other hand, their anti-competitive agreement, which is *subject to the rule of reason*, and under *Section 5b*, this covers agreement entered into by an entity, other than those specified under Section 5a, which has the object or effect of unreasonably and substantially preventing, restricting or lessening

98) History of HB No. 5286, p. 441.

99) *Id.*, p. 538.

100) SEC. 5. *Anti-Competitive Agreements*. –

(a) The following agreements, between or among competitors, are *per se* prohibited:
  (1) Restricting competition as to price, or components thereof, or other terms of trade;
  (2) Setting, limiting, or controlling production, markets, technical development, or investment;
  (3) Dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means; or
  (4) Fixing price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation and other analogous practices of bid manipulation.

(b) An entity is likewise prohibited to enter into any agreement other than those specified in Section 5(a) hereof which has the object or effect of unreasonably and substantially preventing, restricting or lessening competition in the relevant market: *Provided,* That any agreement which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit, may not necessarily be considered an anti-competitive agreement.

competition. And, *patterned after the EU*, we provide that *any agreement which contributes to improving production or distribution of goods and services within the relevant market or promoting technical and economic progress, shall not be considered as anti-competitive."*

One can readily observe in the quoted statement of *Rep. Cojuanco* his reference to *rule of reason* for §5b. The statement admits two possible interpretations: (1) he meant the rule of reason as understood in US antitrust jurisprudence, or (2) he was merely describing the EU "object or effect" rule as the equivalence of US rule of reason.

During the interpellation of *Rep. Gunigondo*, he asked *Rep. Del Rosario* to identify which particular provisions were taken from the US model and which were from the EU. *Rep. Del Rosario* answered reiterated what *Rep. Cojuanco* earlier said. He explained that " *Section 5 (a)*, Anti-competitive Agreement, is based on the *US model*, while *Section 5 (b*) is based on the *European Union model*; same thing with Section 6, and Section 8, Mr. Speaker. The ASEAN model is actually based on the EU model. So, whenever I say EU, that also refers to ASEAN, Mr. Speaker."[101]

B. Senate Bill 2282

The Senate version tells a different story. SB No. 2282 virtually copied Article 101 of the TFEU, except that the key term was initially typographically written as "object and effect."[102] Similar to the HB. No. 5286, SB No, 2282 also

101) History of HB No. 5286, pp. 538-540.

102) Sec. 14. *Anti-competitive Agreements* - It shall be a criminal offense for entities to enter into any agreement with the object and effect of unreasonably and substantially preventing, restricting or lessening competition:

(a) Directly or indirectly fix, control or maintain prices;

(b) Set, limit or control production, relevant markets, technical development or investment to the prejudice of consumers; ,

(c) divide or share the relevant market, whether by volume of sales or purchases, territory, type of goods services, buyers or sellers any other means;

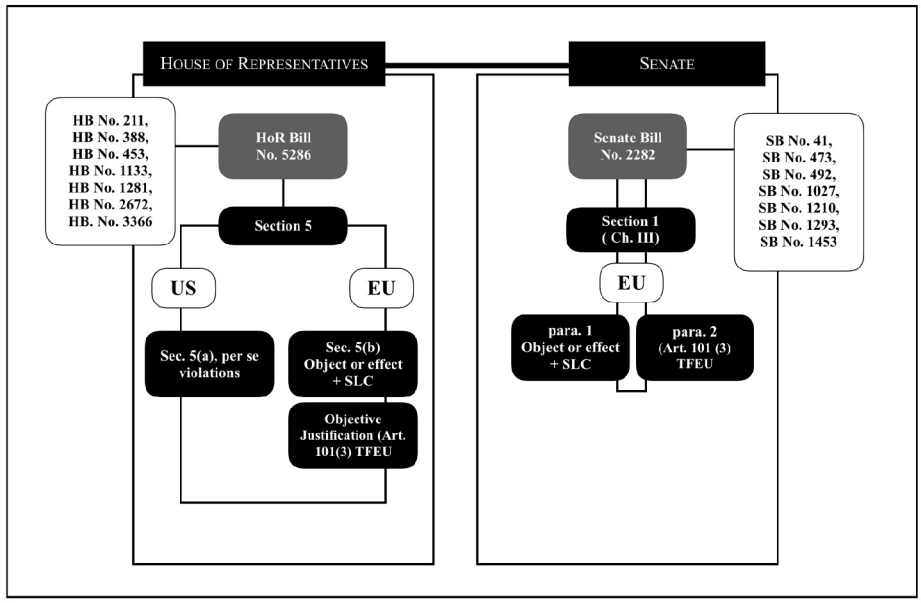
(d) Apply dissimilar conditions to equivalent transactions with other parties, thereby placing them *at* a competitive disadvantage; and

(e) Other similar conduct which is similar in nature, gravity, object and effect of the above enumeration shall be deemed or considered by the Commission as covered by this section.

Provided that any such agreement which contributes to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, shall not be deemed a violation of this Act.

incorporated Article 101 (3) of the TFEU but without the two other criteria, such as indispensable restriction and the agreement must not afford the parties the possibility of eliminating competition. It is worth pointing that the objective justification clause in both versions is qualifying the restriction by object or effect, which is Section 5b of the House version and the main Senate version as a whole. As *Figure 2* illustrates, the two branches of Philippine Congress greatly contrast in designing the anti-competitive agreements provision.

Figure 2



C. Bicameral Version: *Hybridized*?

It is obvious that the two branches of the Congress are heading towards opposite models: the House a US-EU combination and a pure EU model for the Senate. The Senate design for Section 14 is a paradigm shift given that the earlier competition laws of the Philippines had consistently followed the US system. Conflicting provisions are not uncommon in a bicameral congress. Most often than not, important laws passed by the Philippine Congress of the Philippines, being bicameral, normally passed through the bicameral

conference process. Procedurally, in case there are conflicting provisions from the version of the Senate and of the House of Representatives, the bill is referred to the powerful Bicameral Conference Committee composed of Members of the two Houses to reconcile the differences. In the process, the Bicameral Committee may amend or introduce an entirely new provision in the bill as long as it is germane to the purpose of the proposed bill. Thereafter the report of the Bicameral Committee is submitted for ratification of the conference committee report.[103]

On December 15, 2014, the Senate approved in the third reading SB. No. 2282, its version of the PCA, following the EU model for the anti-competitive regime.[104] In the following year, the House of Representatives approved H.B. No. 5610 in the third reading[105] on May 19, 2015 with the US-EU model on its anti-competitive agreement provision. On May 26, 2015, the Senate requested the House for a conference on the disagreeing provisions.[106] On June 2, 2015, the Bicameral Conference Committee on the Disagreeing Provisions of House Bill No. 5286 and Senate Bill No. 2282 had its first meeting. The Bicameral Conference Committee (BCC) meeting lasted for 4 days.[107] As the journal of the BCC would reveal, Section 14 was among the last provisions that the BCC deliberated because of its complexity. It was on the third day (June 5, 2015) that the BCC finally touched upon Section 5 of HB No. 5286 and Section 1 (Chapter III) of SB No. 2282. In an effort to reconcile the two conflicting provisions, Sen. Bam Aquino, the Senate Chairperson in the BCC, suggested putting together in a "hybrid nature" the provisions of the Senate and the House.

As it appeared, "hybrid nature" would mean merging the two provisions.

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103) *See* Ditucalan, *supra* note 4.

104) *See* SB. No. 2282 Legislative History, https://www.senate.gov.ph/lis/bill_res.aspx?congress=16&q=SBN-2282.

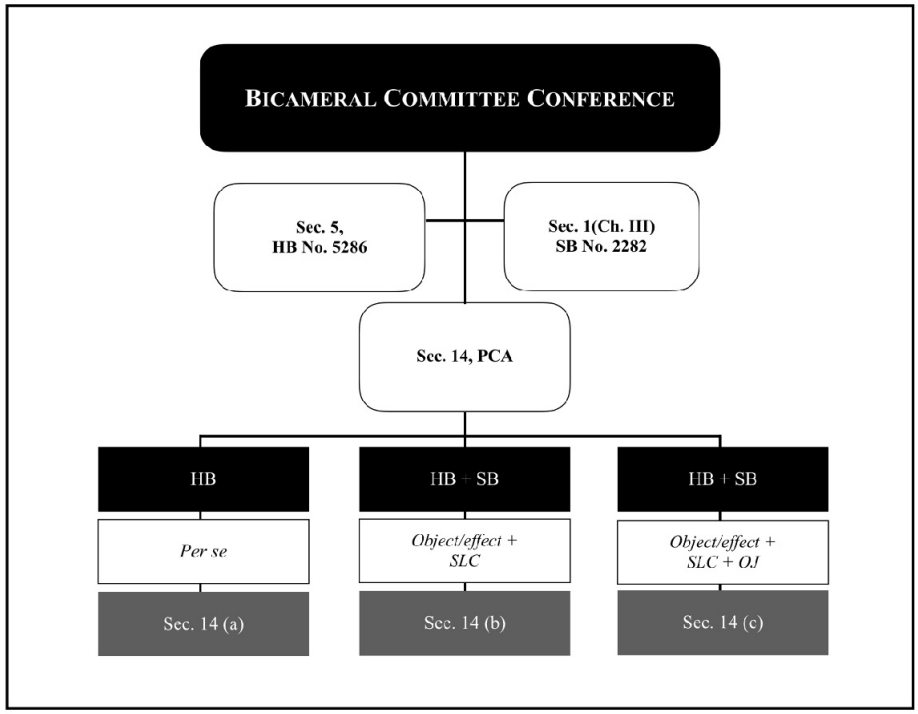
105) If the bill garnered the required majority vote during a plenary session, the bill is calendared for *third reading.* A final form of the bill is distributed to the Members of the Congress at least three days before its passage. During the scheduled calendar of the bill for *third reading* and provided there is a quorum, the House where the bill is pending conducts a roll call vote. Upon the last reading of the bill, no amendment thereto shall be allowed. A vote of "yeas" and "nays" is entered in the Journal during the roll call vote. (*See* Alizedney M. Ditucalan, Introduction to Philippine Law (Legal System of Asia, Korea Legislation Research Institute, 2016).

106) *See* SB. No. 2282 Legislative History, https://www.senate.gov.ph/lis/bill_res.aspx?congress=16&q=SBN-2282.

107) First meeting (June 2, 2015); Second meeting (June 4, 2015); Third Meeting (June 5, 2015); Fourth and last meeting (June 8, 2015).

Without any further explanation and debates of its context and possible implications, the BCC resolved the disagreeing provisions in this manner (*Figure 3*), to wit: (1) Section 14 (a) was taken from the House version, particularly para. (a), items no. 1 and 2 of Section 5 of HB No. 5286. This became the per se provision; (2) Section 14 (b) took still the wording of HB No. 5286, but reclassified items nos. 4 and 5 into restriction by object or effect, which was also the same with the Senate version. It also dropped the word "unreasonably" which was present in both in the two versions with no explanation at all. So this is a combination of the Senate and House versions although the wording in the items is closer to the House version; and (3) Section 14 (c), which is the other agreements clause, also combined the two versions, but limited its coverage only to agreements not following under Section 15 (a) and Section (b), which was a total departure from the Senate original version.

Figure 3



By how Section 14 of the PCA was finally worded, the Bicameral Conference

Committee divided Section 14 of the PCA into three categories (*Figure 3*). The first category is horizontal agreements that are subject to *per se* illegality rule. The second category is horizontal agreements that are subject to restriction by object or effect rule. This provision has been 'erroneously' referred to several times during the congressional debates and during the bicameral conference as the rule of reason.[108] The third category is other agreements (horizontal and vertical) that are subject to object or effect plus Section14 (c) exception criteria: (a) the agreement must contribute to improving the production or distribution of goods and services or to promoting technical or economic progress and (2) allowing consumers a fair share of the resulting benefits. It must be noted that Section 14 (c) differs from Article 101 (3) of TFEU in as much as Section 14 (c) only applies to other agreements and dropped criteria of indispensable restriction and agreement must not afford the parties the possibility of eliminating competition. Another aspect that distinguishes the "tripartite" analytical framework was the inclusion of the phrase "substantial preventing, restricting or lessening competition", which is present in all the substantive provisions of the PCA (*Figure 4*).

108) Below is an excerpt during the bicameral conference on June 5, 2015 when Section 14 was finally deliberated.

THE CHAIRMAN (REP. CUA). Yes. Just for further clarification of Section 14. So iyong Section 14.1, it's *per se*, so if the act is committed, it's automatically a crime.

THE CHAIRMAN (SEN. AQUINO). Yes.

THE CHAIRMAN (REP. CUA). It's automatically basis for action. Whereas, for 14.2, it's rule of reason and the Commission or the DOJ whichever agency will act upon the case—

THE CHAIRMAN (SEN. AQUINO). Shall act on it also.

THE CHAIRMAN (REP. CUA). Shall first—

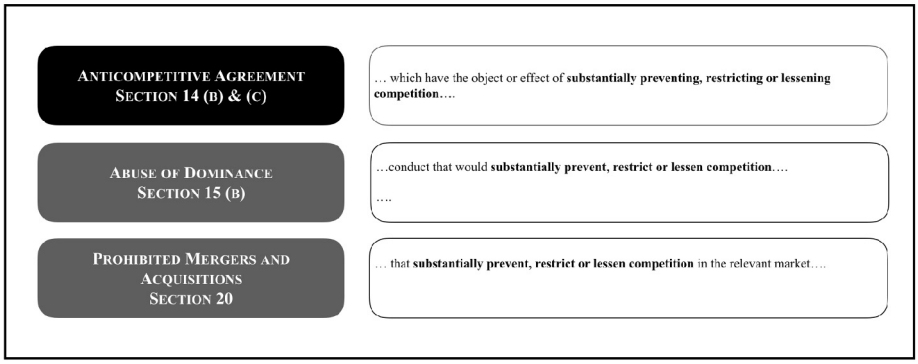
THE CHAIRMAN (SEN. AQUINO). But we'll consider the rule of reason as an element.

REP. RODRIGUEZ. For both.

THE CHAIRMAN (SEN. AQUINO). Yes. All right. So accepted.

THE CHAIRMAN (REP. CUA). Yes.

Figure 4

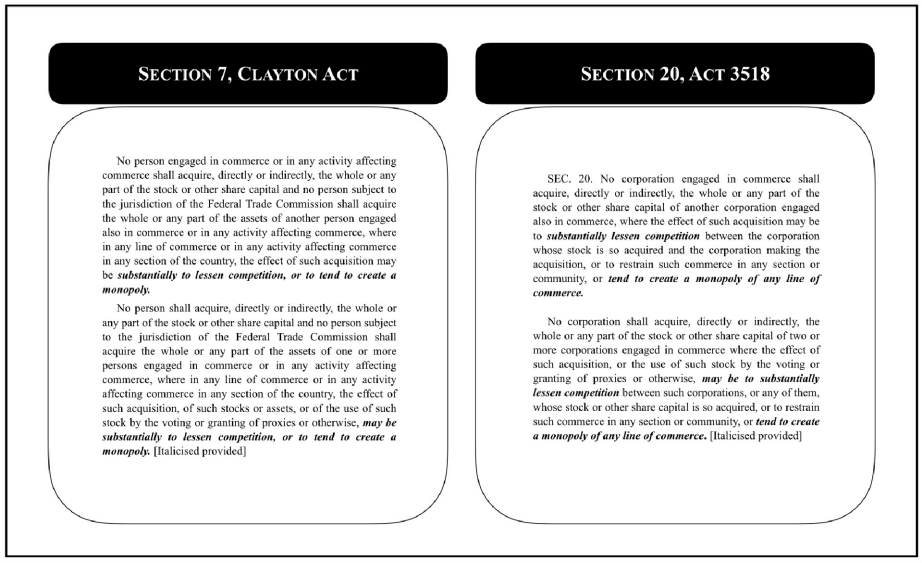


D. What is 'substantial preventing, restricting or lessening competition'?

Evidently, there is no explanation in any of the available congressional records of both houses of Congress of the meaning of "substantial preventing, restricting or lessening competition". The law did not even define it. To recall, the phrase is not present in the text of Article 101 of the TFEU where Section 14 (b) of the PCA was derived and in spite of several references during the deliberation that the provision was modeled from the EU competition law. A closer reference is the similar phrase in Section 7 of the Clayton Act of 1914, one of the earliest frameworks for merger control and in Section 20 of Act 3518, which amended Act 1459,[109] otherwise known as The Corporation Law, the first corporation law enforced in the Philippines [See *Figure 5*.]. This wasn't at all discussed in the deliberation of the Philippine Competition Act. Perhaps, had the experts advising the Congress or any of the members of Congress been aware that Section 7 of Clayton Act was previously enforced in the Philippines, they might have clarified the phrase or even avoided using it in Sections 14 and 15 of the PCA.

109) *See* Act 1459, The Corporation Law, available at https://www.lawphil.net/statutes/acts/act_1459_1906.html.

Figure 5



The Corporation Law (Act 1459) was later repealed by BP 68, known as the Corporation Code of the Philippines. Just last February 21, 2019, Pres. Rodrigo R. Duterte signed into law Republic Act No. 11232 of the Revised Corporation Code of the Philippines repealing BP 68. In both laws, Section 20 of Act 3518 disappeared. Until it disappeared from the Corporation Law, the Supreme Court of the Philippines has never had the occasion to interpret the meaning of 'substantially lessen competition' of Section 20 of Act 3518 in *Philippine Ports Authority v. Mendoza*,[110] the only case that reached the Supreme Court involving Section 20. But given that it was literally copied from the Clayton Act, the Philippine Supreme Court would have likely interpreted it in the same way that the US Supreme Court interpreted the Clayton Act. As in Section 20 of Act 3518, Section 7 of the Clayton Act prohibits mergers where 'the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.' Thus there are two criteria for judging when a merger is anticompetitive: (1) it leads to monopoly or near-monopoly position, or (2) it substantially lessens competition.[111]

110) Philippine Ports Authority v. Mendoza, G.R. No. L-48304, [September 11, 1985], 223 PHIL 95-112.
111) Gunnar Niels, Helen Jenkins, and James Kavanagh, *Economics for Competition Laws*,

It is interesting to note, however, that the Philippine Competition Commission has interpreted the phrase 'that substantially prevent, restrict or lessen competition' in Section 20 of the PCA (incidentally same number with Act 3518) as the equivalence of 'substantial lessening of competition' (SLC) test.[112]

The SLC test is used in a number of jurisdictions, including the United States, Canada, Australia, New Zealand, and the UK in merger analysis.[113] In contrast, EU merger control originally focused on the first criterion, *ie*, it is sought to prevent the creation or strengthening of dominant positions – dominance test.[114] In the 2001 Green Paper,[115] the Commission launched a debate as to whether there should be a move from the dominance standard to the 'substantial lessening competition' (SLC) test. The substantive arguments advanced hinged on the relative flexibility of the SLC test in particular when dealing with mergers in a concentrated market. Eventually, the EUMR was reformed and the new 'significant impediment to effective competition' SIEC test was introduced, but the SLC test was not adopted. This new substantive test sought to meet the arguments of those in both the SLC test and the dominance test. In other words, the SIEC test is broader than the old EUMR test.[116]

As the term 'substantially prevent, restrict or lessen competition' is not defined in the PCA, the PCC explained the concept in the Merger Review Guidelines, which basically copied the UK Merger Assessment Guidelines. Accordingly, a merger gives rise to an SLC when it has a significant effect on competition, and consequently, on the competitive pressure on firms to reduce prices, improve quality, become more efficient or innovative. A merger that gives rise to an SLC is likely to lead to an adverse effect on consumers.[117]

334-335 (Oxford University Press, 2011).

112) *See* Merger Review Guidelines of the Philippine Competition Commission, available at https://phcc.gov.ph/merger-review-guidelines-2/; See also 2017 Rules on Merger Procedure, available at https://phcc.gov.ph/wp-content/uploads/2017/11/PCC-MERGER-PROCEDURE-RULES.pdf

113) *See* Merger Assessment Guidelines (UK) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf.

114) *Id.*, *supra* note 111, 334-335 (Oxford University Press, 2011).

115) 2001 Green Paper on the Review of Council Regulation (EEC) No. 4064/89, COM(2001) 745/6.

116) Alison Jones and Brenda Sufrin, *EU Competition Law: Text Cases, and Materials*, 906,909(Oxford University Press, 2011, Fourth Edition).

117) *See* sub-section4(4.2) of Merger Review Guidelines; See also Part 4, section 4.1(4.1.3.) of UK

The adoption of the PCC of UK Merger Assessment Guidelines is partly meritorious and partly problematic. It is meritorious, on the one hand, because it has correctly interpreted the term 'substantially prevent, restrict or lessen competition.' It is problematic because it further complicated the standard of analysis of Section 14 (anti-competitive agreement) and Section 15 (abuse of dominance) of the PCA, on the other hand by equating the phrase to SLC test.

E. Elaborate Structured Rule of Reason

The complexity of the Section 14 framework is just one side of the problem. The other and bigger part is the bizarre and apparently irreconcilable result of Section 14 and Section 26 taken together or reading them in conjunction. Under Section 26, in determining whether anti-competitive agreement or conduct (regardless of its character) has been committed, the PCC must observe the following steps, which I describe as *elaborate structured rule of reason analysis*. *First*, it must define the relevant market. *Second*, it must determine whether the actual or potential harm to competition in the relevant market outweighs the actual or potential efficiency gains. *Third*, it must adopt a broad and "forward-looking perspective." *Fourth*, it needs to ensure balance enforcement. *Finally*, it must assess the totality of evidence whether anti-competitive agreement or conduct was committed.

Why is the conjunction of Section 14 and Section 26 problematic? The answer is straightforward. If we apply Section 26 as the standard of analysis for Section 14 prohibitions without qualification as the text would clearly provide, this will create an odd situation. Section 26 renders the characterization in Section 14 irrelevant. As much as Section 26 speaks of anti-competitive agreement without distinction, the PCC must first subject the agreement with Section 26 standard , like extensive market analysis, before it can condemn the agreement as anti-competitive regardless of whether an agreement is illegal under *per se* rule or object rule or otherwise, which is irreconcilable with the settled application of *per se* rule and restriction by object. For example, an entit y[118] engaged in price-fixing, price restriction, or bid-rigging, which are already

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Merger Assessment Guidelines.

118) *Entity* refers to any person, natural or juridical, sole proprietorship, partnership, combination or association in any form, whether incorporated or not, domestic or foreign, including those owned or controlled by the government, engaged directly or indirectly in any economic activity (§ 4(h), PCA).

categorized as *per se* illegal under Section 14 (a) may still, at least theoretically, raise the defense of actual or potential 'efficiency' gains which outweigh the harm and that the impact of the anti-competitive agreement is not substantial. The entity can do this by demanding from the Commission to conduct market analysis first before condemning an anti-competitive agreement or conduct. Certainly, this is not in keeping with the understanding of *per se* rule since the *United States v. Socony-Vacuum Oil Co.*[119] The *Socony-Vacuum* flatly ruled in an elaborate dictum that a price-fixing agreement violated Section 1 of the Sherman Act regardless of whether the conspirators possessed power to affect prices or had any effect on the price prevailing in the market.[120]

The tension is even more apparent in Section 14 (b). To recall, Section 14 (b) is the understanding of Congress of the rule of reason, which is not totally correct if we employ the legal meaning of the origin of restriction by object or effect principle. At the most, the generally accepted comparison is that *restriction by object* of EU law is the equivalence of *per* se doctrine in US law, on the one hand; the *restriction by effect* is the counterpart of *rule of reason,* on the other hand. However, the comparison should not be drawn further than that. Let us take for example the case of *market division and production control*. Under Section 14 (b), agreements to divide the market or control production are subject to restriction of competition by object or effect rule *plus* SLC test. We added SLC test in the standard of analysis because the current interpretation of the PCC of the term 'substantially preventing, restricting or lessening competition" is the SLC test used in merger review analysis, like in the US under the Clayton Act and in UK. Under EU law, market division and production control fall under the object category. In European Night Services v Commission,[121] the General Court held that agreements between competitors to share the market or to limit output will *automatically* be held to restrict competition by object. By restriction of competition by object means "by their nature" as they appear to be used in case law.[122] The ECJ held that Article 101(1) applied to an agreement which had as its object the restriction of competition irrespective of its alleged effects.[123] But if we apply the

119) 310 U.S. 150

120) *See* Sullivan, *supra* note 160 at 185.

121) Cases T-374, 375, 384 and 388/94, [1998] ECR II-3141.

122) Pablo Ibañez Colomo, *The Shaping of EU Competition Law*, 89-94 (Cambridge University Press, 2018).

123) Cases 56 and 58/64, Consten and Grundig [1966] ECR 299.

understanding of Congress that Section 14 (b) is the rule of reason, the well-settled EU law characterization of market division and output restriction as restriction by object will not apply. Moreover, such formulation contrasts the EU conceptualization of restriction of competition by object (object category) and restriction of competition by effect (effect category) as alternative conditions, not cumulative, requirements for a finding of infringement of Article 101. As early as in *Société Technique Minière v Maschinenbau Ulm*[124] the ECJ held that the words were to be read disjunctively. Moreover, to further subject market sharing and output restriction agreements by competitors to further SLC test and rigid market analysis as mandated by Section 26 is tantamount to non-liability rule. It is as if Section 14 (b) presumed market sharing and output restriction as pro-competitive.

Anti-competitive agreements involving market division is also problematic under Section 14 (a) (per se rule) and Section 14 (b) (object or effect rule). To illustrate, market division falls under Section 14 (b) and logically it should be categorized as a restriction by object, which is also how EU law categorized market division under Article 101 of the TFEU. But how about when market division is only a modality of control or of fixing the prices? Will this be under Section 14 (a) or Section 14 (b)? Economics tells us that prices can be controlled not only by direct price-fixing agreements but also indirectly by agreements among firms not to compete with one another.[125] When competitors divide the market they are agreeing to create monopolies of a sort for each other. They can do this geographically by agreeing not to compete in defined areas, by dividing up and assigning customers or customer categories, by agreeing not to solicit each other's customers, or by agreeing to divide the product line.[126] In some respects, market division is more anti-competitive or can effect more severely than naked price-fixing. Price-fixing agreements may leave open the possibility of non-price competition, such as on quality, features or service, but dividing markets will generally limit all competition, price and non-price.[127] In other words, by eliminating competitors, a sole remaining market occupant has a monopoly (in a limited area) and is freed of competition not only with respect to prices but also with respect to service, quality, or innovation.[128]

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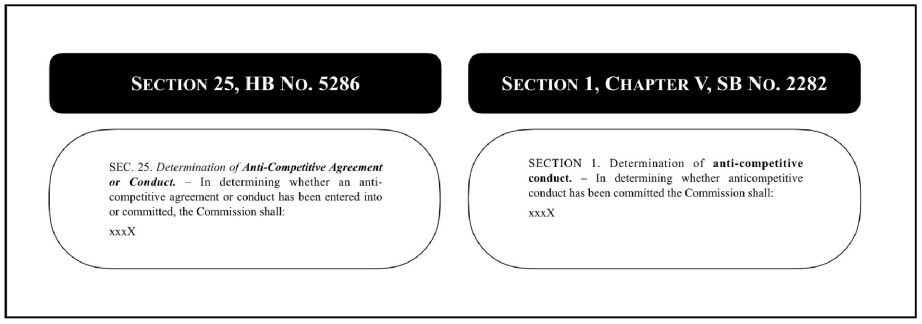
124) Case 56/65 [1966] ECR 235, p 249, [1966] CMLR 357, p 375.
125) *See* Gellhorn, et al., *supra* note 170 at 236-237.
126) *See* Gavil, et al., *supra* note at 128-129.
127) *Id.* at128
128) *See* Gellhorn, et al., *supra* note 170 at 237.

What caused this seemingly irreconcilable provisions? An examination of the approved substitute bills revealed that the two houses of Congress had an actually different version of Section 26 (See *Figure 6*). The Senate version covered only conduct, on the one hand. The House covered both agreement and conduct, on the other hand. To remedy the disagreeing provisions, the Bicameral Conference Committee simply combined the two versions without discussing the ramifications that it may cause to Section 14 framework.[129] Had BCC adopted the Senate version without inserting the term 'anti-competitive agreement' before 'anti-competitive conduct', it would not have been problematic because relevant market definition has been recognized in abuse of dominance conducts.

Figure 6



129) "THE CHAIRMAN (SEN. AQUINO). It's all right. I have a lot of reserves. Okay. Can we go to proposed Section 23, Determination of Anti- Competitive Agreement or Conduct. So, this is our Section 1 of Chapter V and your Section 25. We are proposing to adopt the Senate version with the following amendment, just add "agreement or" before "conduct." So, "in determining whether anti-competitive agreements or conduct has been committed," and then anywhere that there's "conduct" just add "agreement or," and then adopt the Senate version. THE CHAIRMAN (REP. CUA). We accept, Mr. Chairman."

IV. Conclusion

Moving forward: The 'elephant in the room'

How do we move forward from the complexity resulted from the marriage of the EU-US analytical framework and the bizarre result of Section 14 and Section 26 conjunction? At the onset, the idea of combining two legal systems was controversial in competition law designing. It is controversial because it does not jive with what literature is saying about competition law in developing countries – that it should be 'sufficiently lean, simple, transparent and friendly to enforcement'[130] with the country's characteristics in context. The motivations of the adoption of the PCA don't reflect much of the specific characteristics of the Philippines. What came to light, however, with the examinations of Philippine experience is that politics and the lawmaking dynamics can zealously overshadow the norm of contextualism. Trade-offs within and outside the lawmaking process were in play too. Evidently, the *idea* to adopt, than the *need* to adopt, competition law is heavier on the scale. These findings may explain why it took several years for Philippine Congress to pass the competition law bills into law.

Legal transplant benefits the adopting jurisdiction by *learning* from the experience of earlier jurisdictions,[131] but it has bad side effects too. When it is *overdone* in the guise of adopting best practices the ramifications are costlier for enforcement institutions, for the business and businessmen, for the consumers, and for the market, in general, in the long run. Indeed, laws that promote efficiency under certain conditions might instead lead to mistaken decisions.[132]

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130) As suggested by Gal and Fox. See Michal S. Gal and Eleanor M. Fox, *Drafting competition law for developing jurisdictions: learning from experienc*e, 300 (The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law, Michal S. Gal, Mor Bakhoum, Josef Drexl, Eleanor M. Fox, and David J. Gerber, Edward Elgar, 2015).

131) *See*, for e.g., Michal S. Gal & Eleanor M. Fox, *Drafting competition law for developing jurisdictions: learning from experience* (The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law, ed. Michal S. Gal, Mor Bakhoum, Eleanor M. Fox, and David J. Gerber, Edward Elgar, 2015).

132) M. Dutz and M. Vagliasindi, *Competition Policy Implementation in Transition Economies: An Empirical Assessment*, 44 European Econ. R. 767, 770; M Gal, *When the Going Gets Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce*, 41 (3) Loy. Univ. Chi. L. J. 417.

There are two approaches to solve the complexity discussed above. First is legislative amendment. This is more straightforward solution, but it will take stronger lobbying from Congress. The second approach is administrative and judicial interpretation, but this will depend on PCC's enforcement and advocacy initiatives and a final interpretive ruling from the Supreme Court.

In sum, these are the key points that shaped the "complicated" Section 14 of the PCA. *First* and foremost, the idea to combine US and EU models was deliberate, but not well-studied legislative judgment. This is, nonetheless, essentially political question.[133] *Second*, there was an information gap. While some of the members of the Congress studied law, none of them still have solid grasp of competition law and the abundant literature written on the subject. There is just simply no Senator John Sherman or Senator George F. Hoar in the Senate or in the House of Philippine Congress. This is understandable because competition law was never part of the curriculum of Philippine legal education. It was only recently after its passage that some law schools in the Philippines, three or four, started to offer competition law as elective subject. We see however that the ramifications were serious. There was lack of context and, on several occasions during the debates and bicameral conference meetings, some key concepts were erroneously appreciated and applied. Moreover, the decision of mirroring two different models further widened the gap. Unfortunately, the number of consultants or advisers may not have been enough to fill the gaps. These circumstances have rendered, in most part, the legislative history less helpful in interpreting the controversially vague provisions. If the Sherman Act's legislative history is "notoriously tortured and unhelpful",[134] the

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133) The term "political question" connotes what it means in ordinary parlance, namely, a question of policy. It refers to those questions which under the Constitution, are to be decided by the people in their sovereign capacity; or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government. It is concerned with issues dependent upon the wisdom, not legality, of a particular measure"||| *(Casibang v. Aquino, G.R. No. L-38025, [August 20, 1979], 181 PHIL 181-195)*

134) *See* Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement*, Oxford University Press, 2011, p. 3; See generally E. Thomas Sullivan, *The Political Economy of Sherman Act; The First One Hundred Years* 20-160 (1991); Phillip E. Areed & Herbert Hovenkamp, Antitrust Law 59 (2nd ed. 2000); Robert H. Lande, *Wealth Transfer as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 67, 68 (1982); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7 (1996); Albert H. Walker, *History of the Sherman Law*, 2 (Greenwood Press, Publishers, 1910) (1980).

legislative history of the PCA is unhelpful and confusing. As Bok observes "legislative history is chiefly important for the common values and apprehensions which were expressed by so many who stood the bill. As practical guide, however, it fails to yield so much concrete assistance beyond an occasional suggestion of rather vague dimensions."[135] Finally, the *third* factor is the unintended, but forcible, consequence of a bicameral congress. From the inception, the two Houses were developing different models until they finally met in the intersection where they must reconcile. However, the result of the process of fusion, primarily because of the first two factors, was not a beautiful *mestiza.* Rather, it produced a *complicated* offspring.

Perhaps, the Philippine experience paints a different narrative. I concede, it is premature to assess whether it is the "right" model that will change the landscape of Philippine competition law enforcement, but the complexity of the fusion is a major hurdle for the PCA's upward progression.

In hindsight, it would have been more pragmatic and sound (and the result less complicated) for the lawmakers to have singly focused on the US antitrust legal system as model in designing the provisions of the PCA both from institutional and normative considerations. For one, the Philippine competition law norms have always been aligned with the US antitrust law system. The Philippine constitutional foundation for regulating combinations in restraint of trade is clearly a borrowed US legal norm and Philippine Supreme Court's tradition of citing USSC cases is well-entrenched, if not normative. Therefore, altering the wheel further complicates and underpins the error-cost framework of competition law enforcement, which the PCC and the courts must always consider in competition law decision-making. To borrow Heyer, "Antitrust enforcement, notwithstanding many dramatic advances over the past quarter-century, remains a highly imprecise enterprise. Considerable uncertainty persists, even as regulators, both in the United States and abroad, apply increasingly sophisticated techniques to implement an economics-based, welfare-oriented analytical framework. Despite the veneer of certainty suggested by the scientific methods of economics, there continues to be a large degree of potential error in antitrust enforcement, such errors may result in substantial economic costs."[136]

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135) Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 3 J. REPRINTS ANTITRUST L. & ECON. 1, 132 (1971).

136) Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 Antitrust L. J., 375-422 (2005).

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