



Competition law in the Philippines: economic, legal, and institutional context

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ABSTRACT

Where democracy is fragile and institutions function poorly, particularly in a developing country, competition law faces tremendous challenges. Getting a new agency started and getting the traction needed to ensure the successful launch and implementation of a new competition framework cannot be taken for granted. Yet the effort is worthwhile, even if a country has had a history of ‘false dawns’ in this policy field. This article introduces the new competition regime in the Philippines. From a general perspective it recalls that while competition law does not by itself guarantee sustainable and inclusive growth and development, it is a desirable part of a broader ensemble of policies that can promote those aims. In more country-specific terms, the new law discussed here—the Competition Act 2015, fully effective since the summer of 2017—can only be properly considered by understanding the Philippines itself. The article therefore surveys the country’s governance and institutions; its economy; and the roles of the rule of law and the courts. The legal and institutional framework specific to competition law and policy is then analysed at length. The substance of the Act, the enforcement and sanctioning powers of the Philippine Competition Commission, and relevant legal procedures are all examined. Now that the legislator has established a promising statutory framework, it is time to focus on the most difficult tasks of implementation and deep culture change.

KEYWORDS: Philippines, competition law, antitrust, competition law institutions, economic development, developing country

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I. INTRODUCTION

Competition law can help to nurture growth in a developing country

In November of 2007, the 10 countries of the Association of Southeast Asian Nations (ASEAN) signed the blueprint for the ASEAN Economic Community (AEC), one of the three ASEAN Communities—the other two being the Political-Security Community and the Socio-Cultural Community. The AEC blueprint, launched in Jakarta in December 2008, provided for the establishment of the AEC by the end of 2015. As part of the wider initiative of the AEC—which seeks to reduce impediments to the movement of goods, capital, and skilled workers—the members of ASEAN committed themselves to adopting competition laws by the end of 2015.¹ While some of the ASEAN countries have had significant competition laws dating back before the establishment of the AEC blueprint, the 2007 commitments have been important factors behind the adoption of new competition law frameworks in Myanmar and the Philippines. The present article provides a detailed examination of the Philippine competition law regime.²

Since the Philippines is a developing country—with an outlier economy that on the whole got left behind while other Asian economies soared from the late 1970s to the 1990s³—some preliminary remarks about competition law and development are made below. These remarks are relatively brief; a proper discussion of the impact of development concerns on competition law, and of the impact of competition law on development, would require a much longer text. By providing a detailed exploration of the competition law landscape in the Philippines, this article is also partly intended to be an incipient data point, but no more than this, within that broader subject.

If one accepts the category of ‘developing country’—which admittedly paints with a broad brush an extremely diverse array of jurisdictions—a first basic observation is that developing countries begin from severely challenging conditions that may relate to, *inter alia*, resource constraints, vested interests and ‘rent-preserving alliances’,

1 Many works discussing the ASEAN process are available. For overviews of the competition law initiatives, see eg Ameer Ashraf and Andrea Risely, ‘Recent Developments in Competition Law in Southeast Asia’ (2016) 12(2) *Comp L Int'l* 151; Mokhammad Khoiril Huda and others, ‘Harmonizing Competition Law in the ASEAN Economic Community’ (2016) 9(4) *Int'l J Bus Econ L* 48–53. For broader discussions of ASEAN, see Jacques Pelkmans, *The ASEAN Economic Community: A Conceptual Approach* (CUP 2016) (regional economic integration perspective); Christopher Roberts, *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Routledge 2012) (international relations perspective). For an edited collection covering diverse aspects of ASEAN’s trade arrangements as well as competition law, intellectual property, and dispute settlement, see Sanchita Basu Das and others (eds), *The ASEAN Economic Community: A Work in Progress* (ADB and ISEAS 2013).

2 In Myanmar, the Parliament adopted a new competition law on 24 February 2015. The law entered into force on 24 February 2017. It will not be discussed here. For a description of the law’s main provisions, see Farrukh Nawaz Kayani, ‘An Overview of Myanmar’s Forthcoming Competition Law’ (2017) 38 *ECLR* 18–22, 20–22.

3 Since the post-colonial ‘initial conditions’ in the Philippines were to some extent favourable, the failure of the Philippines to achieve sustained and distributionally progressive growth has struck researchers as a ‘puzzle’. See Arsenio Balisacan and Hal Hill, ‘An Introduction to the Key Issues’, in Arsenio Balisacan and Hal Hill (eds), *The Philippine Economy: Development, Policies, and Challenges* (OUP 2003) 3–4 (highlighting the contrast with Thailand in particular). The puzzle is wrapped in an enigma since, as Balisacan and Hill point out, the poorly performing Philippines also withstood the Asian financial crisis better than the Tigers did. See *ibid* 5–7.

corruption, insufficiently embedded rule of law, dysfunctional public administration, clumsy public intervention in the economy and overregulation, anaemic markets across the economy, including weak capital markets, poor physical and business infrastructure, cultural patterns to which open and dynamic markets may seem alien and/or insidious, and the list goes on. Where these impediments hinder the productive functioning and desirable evolution of institutions, they also have important implications for a country's capacity to build a meaningful competition law regime.⁴ We should be careful to acknowledge that developed economies certainly have to face some of the same issues; but in general, they are of a lower intensity, and there is greater systemic capacity to respond to them.

A second pertinent point—a hopeful one—is that, where conditions are favourable there may be important links between competition and growth, and there may be a 'positive correlation' between competition and development.⁵ However, one cannot expect competition law, by protecting and promoting competition, to deliver growth and development automatically. There is, after all, a crucial distinction between the enactment of competition law, on the one hand, and the (more dynamic concept of the) effective implementation and enforcement of competition law on the other;⁶ in order to mitigate or avoid a possible gap between putting a law on the

4 There is an abundant and growing literature that discusses a range of challenges faced by developing countries in the particular field of competition law and policy. See, eg Michal Gal, 'Reality Bites (or Bits): The Political Economy of Antitrust Enforcement' (2006) NYU Law & Economics Working Paper No 06-22, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=901756> accessed 16 May 2017 (focusing on the need to grapple with a political context that may be indifferent or hostile to the promotion of competitive markets); Michal Gal and Eleanor Fox, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' in Michal Gal and others (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar 2015) 296, 304 (discussing a variety of political and institutional challenges for competition law in the context of developing economies); Stephen Weymouth, 'Competition Politics: Interest Groups, Democracy, and Antitrust Reform in Developing Countries' (2016) 61 *Antitrust Bull* 296–316 (emphasizing that those seeking to preserve rents and drive political rejection or emasculation of competition law institutions can form coalitions that cut across classes (capital and labour) due to the converging interest of producers and well-organized workers in sharing rents).

5 See Ioannis Lianos, Abel Mateus and Azza Raslan, 'Is There a Tension Between Development Economics and Competition?' in D Daniel Sokol, Thomas K Cheng and Ioannis Lianos (eds), *Competition Law and Development* (Stanford University Press 2013) 35, 47–9. At page 51, these authors conclude that '[c]ompetition law should nowadays always be part of the instruments of development policy.' See also, among others, RS Khemani, 'Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries' (2007) World Bank Report No 41334 (FIAS Occasional Paper 19), pp 14, 17 <<http://documents.worldbank.org/curated/en/397801468174885108/pdf/413340FIAS1Competition1Policy01PUBLIC1.pdf>> accessed 16 May 2017 (competition policy correlates with intensity of competition in local markets; economies with competitive markets tend to have higher per capita income and higher income growth rates, as well as lower poverty rates, and they tend to attract domestic and foreign investment).

6 Numerous sources recognize the error of focusing simply on whether a jurisdiction has enacted a competition law. See eg Michelle Chowdhury, 'The Political Economy of Competition Law Reform in New Jurisdictions' in Richard Whish and Christopher Townley (eds), *New Competition Jurisdictions: Shaping Policies and Building Institutions* (Edward Elgar 2012) 67, 74 ('Ongoing efforts to improve the effectiveness of competition law enforcement can . . . be seen as part of a "third generation" of reforms that respond to the realization that forming institutions does not inevitably lead to good or effective enforcement.');

Abel Mateus, 'Competition and Development: What Competition Law Regime?' in Sokol, Cheng and Lianos

books and enforcing it effectively, a jurisdiction is well advised to ensure a good fit between the regime it chooses and its level of institutional development.⁷ But even the more prudent statement that ‘Effective competition law enforcement secures growth and development’ would still draw too straight a line between supposed cause and effect. Growth and development⁸ are highly complex phenomena, and they depend on a range of factors, including both internal and global conditions and trajectories; this makes neat assumptions about causation problematic. For example, if one assumes that competition law is applied by an agency with appropriate capacities and a healthy degree of independence, and supposing further that enforcement is carried out rigorously under the control of an independent and well-trained judiciary, it may be that other factors such as, among others, trade-openness, balanced regulatory and procurement policies, good governance, political stability, and the

(n 5) 115; Michal Gal, ‘Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions’ (2009) 33 *Fordham Int’l L J* 1–56.

- 7 For discussion, see eg Andy Chen, ‘Justifications and Limitations for Adopting Divergent Competition Policy and Law in Emerging Economies’ (2015) 43 *Denv J Int’l L & Pol’y* 379–402; Mateus (n 6) 116, 119–20, 128–36. Mateus cites a number of institutional factors bearing on the capacity of a jurisdiction to make a serious commitment to competition law, such as credible checks and balances, relative efficiency in public administration, constraints on corruption, private law institutions and a relatively efficient judicial system. He also describes a ‘ladder’ of institutional development. As a country progresses up the rungs of the ladder, the competition law regime may be (formally and informally) calibrated accordingly. As a simple example, it is likely unwise to empower a competition authority to impose severe fines on business operators unless appellate courts are competent and independent. Obviously, the rungs of the ‘ladder’ are metaphorical and subject to qualification: the difference between, say, the upper range of the second rung (‘Regime II’) and the lower range of the third rung (‘Regime III’) may be fluid and imprecise.
- 8 While growth or lack thereof can be important factors in the pace and direction of a country’s development, it seems clear that the two concepts—growth and development—should be regarded as distinct. For an overview of development, see Amartya Sen, ‘The Concept of Development’ in Hollis Chenery and TN Srinivasan (eds), *Handbook of Development Economics, Vol. I* (Elsevier North-Holland 1988) 9; and see generally Amartya Sen, *Development as Freedom* (OUP 1999) (stressing the importance of the extent to which a society guarantees basic capabilities to citizens). It has been observed that if Sen’s freedom-based approach to development and poverty were to be taken seriously in the competition policy context, special consideration would have to be given to the ‘impact of competitive behaviour on the poor’s access to education, health care, and other essentials in life’. D Daniel Sokol, Thomas K Cheng and Ioannis Lianos, ‘Introduction’ in Sokol, Cheng and Lianos (n 5) 5. The nature and extent of such special consideration would in turn require careful consideration with regard to, for example, whether other effective and more direct policy instruments exist, the policy expertise and practical capacities of a given competition agency, and so on. Drawing on Sen’s writings and Martha Nussbaum’s cognate work on political philosophy and distributive justice, Claassen and Gerbrandy advocate a turn toward (non-resourcist, non-utilitarian) capabilities-based competition law and a rejection of today’s prevailing frame(s) of thinking in Europe. See Rutger Claassen and Anna Gerbrandy, ‘Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach’ (2016) 12 *Utrecht L Rev* 1–15. In transposing the capabilities concept to the competition law sphere, the authors would focus on *market-constituting* capabilities (ie the possibility to participate in systems of property law and contract law), *consumptive* capabilities (food, health, education and other goods and services that support human flourishing) and *third-party* capabilities (such as the capabilities of future generations or of other third parties, which may be affected by the generation of externalities). In a given competition law dispute, tensions between these capabilities (which may coincide with tensions between economic and non-economic interests or indeed potentially between different non-economic interests) may emerge, thus making it necessary to assign different weights to some of those capabilities in order to resolve the conflict. See *ibid* 5–7. Of course, the likelihood of trade-offs between capabilities renders the evaluation more complex. One may suppose that an error-cost superstructure might be applied as a way to try to minimize miscalculations in such a balancing process.

vitality of a range of other institutions can make it difficult to isolate and verify the (positive) effects of competition law enforcement.⁹

One is more likely to be on solid ground when making a much more cautious claim, namely that: when other factors are held constant, effective competition law enforcement¹⁰ by independent institutions—given enough time for the competition regime to make an impact—will generally enhance economic performance (notably in terms of overall investment and innovation;¹¹ possibly in terms of total factor productivity;¹² and hopefully in terms of desirable socioeconomic effects as well, such as increased opportunities and potentially more dynamic social mobility) and will thus contribute to (inclusive) growth and development.¹³ With regard to growth—ie the criterion more amenable to quantification, compared to development—the minimum average time frame necessary for positive GDP-per-capita and economic growth effects to be statistically significant is said by Philipsen to be 10 years, and it is speculated that possibly greater effects may emerge over longer time frames.¹⁴ Kovacic and Lopez-Galdos likewise stress the need for an adequate time horizon in order to conduct a more meaningful evaluation.¹⁵ The point about multi-year time frames is salient in the present context because this article discusses a competition regime which is only now (ie in 2017) taking full effect.

To say that effective competition enforcement tends to be good for economic performance and that this enhanced performance can potentially contribute to development goals is not to say that an effective competition law regime is a *sine qua non*

9 See eg Stefan Voigt, 'The Effects of Competition Policy on Development—Cross-Country Evidence Using Four New Indicators' (2009) 45 J Dev Stud 1225, 1230 (some of the factors mentioned in the main text are not mentioned in this source).

10 The concept of 'effective competition law enforcement' is far from self-explanatory, but extensive elaboration is unnecessary here. Suffice it to say that effective enforcement would ideally include: the proper observance of competitive neutrality; a credible system of (hard and soft, *ex ante* and *ex post*) checks against unjustified or disproportionate distortions of competition arising from the acts of public organs, public policies, regulations and general legislative measures; balanced enforcement activities which comply with due process while avoiding both over-enforcement and under-enforcement; the credible possibility to apply competition law extraterritorially where appropriate; and a system of private enforcement within a well-functioning judicial system that provides effective remedies in a variety of factual contexts (including stand-alone cases) where competition law claims may arise.

11 Empirical work by Gutmann and Voigt suggests that overall investment is generally boosted by (and perceived levels of corruption decline with) the introduction of a competition law regime, above all in developing countries. They do not find an increase in FDI. See Jerg Gutmann and Stefan Voigt, 'Lending a Hand to the Invisible Hand? Assessing the Effects of Newly Enacted Competition Laws?' (2014) pp 15–16, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2392780> accessed 16 May 2017.

12 In the study cited above, Gutmann and Voigt did not observe enhanced TFP, but they 'suspect that it might simply take longer for effects on TFP to materialize and their measurement is more difficult. Gutmann and Voigt, *ibid* 15–16.

13 The importance of the independence of a competition law enforcer as a proxy for meaningful implementation of competition law (as opposed to the mere enactment of such a law) is emphasized by Voigt (n 9). Voigt sensibly takes account of both *de jure* and *de facto* independence and finds that these factors, among others, correlate positively with enhanced economic performance.

14 See Niels Philipsen, 'Antitrust and the Promotion of Democracy and Economic Growth' (2013) 9 J Comp L & Econ 593. In contrast with his findings on economic effects, Philipsen does not find a positive effect on democracy, but he points out that this may reflect the common emphasis of competition laws on economic efficiency.

15 William Kovacic and Marianela Lopez-Galdos, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes' (2016) 79 LCP 85–122.

condition for growth.¹⁶ Several examples would militate against such a claim, such as China in the 1990s and India from 2003 to 2008 (when India's competition law was essentially held in suspension),¹⁷ or Japan from 1953 to 1970 (the 'dark ages' of Japanese competition law¹⁸). Yet these alternative paths to growth and development—through either a thoroughgoing State-led model or, in the case of Japan,¹⁹ through a somewhat more nuanced model where industrial policy was surely important but where space was also allowed for the growth of competitive, high-productivity markets as part of the 'dual' economy—do not necessarily constitute arguments against the effective enforcement of competition law. A first tentative proposition here, which likely eludes verification, is that growth might have been even stronger if competitive markets were cultivated sooner or more comprehensively. Second, while the experiences of these countries and others suggest that exceptionally high and sustained growth can be manufactured from above through (illiberal) 'Developmental State' policies, it has not been well established that such a model is generally transferable, and a decision to rely on State-led economic performance to the exclusion of independently policed competition law seems particularly dubious where public institutions are weak, where rent-seeking and cronyism reigns, where exogenous conditions are less favourable, and so on.²⁰ The latter observation may be relevant to the Philippines: as discussed later in this article, public institutions and governance in this country have often been frail and incapable of delivering strong results for the economy and society. But putting aside the specific case of the Philippines, even in a country where institutions are largely functional and suitable for State-orchestrated growth, the example of Japan suggests that, eventually, there may come a time in a global economy when policies that marginalize competition law and neglect its effective implementation will sputter and outlive their usefulness and logic.²¹

16 For example, the experience of the 'tiger' economies has led to the observation that well-coordinated industrial policy, pursued by effective institutions and complementary policies, may yield strong economic growth. See eg Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton University Press 2007).

17 The point about China and India is raised, for example, by Kathryn McMahon, 'Competition Law and Developing Economies: Between "informed divergence" and International Convergence' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar 2012) 209–37, 213. For discussion of the role of other legal institutions apart from competition law, see Michael Faure and Jan Smits (eds), *Does Law Matter? On Law and Economic Growth* (Intersentia 2011).

18 On the dark ages, see eg David Gerber, *Global Competition: Law, Markets, and Globalization* (OUP 2010) 211–13.

19 See eg Simon Evenett, 'Study on Issues Relating to a Possible Multilateral Framework on Competition Policy' (2003) WT/WGTCP/W/228, pp 32–35, <<https://www.alexandria.unisg.ch/22163>> accessed 19 May 2017 (questioning the assumption sometimes expressed outside Japan that the dramatic economic rise of the country in the 1960s and 1970s was largely due to the primacy of industrial policy and, among other things, a climate of tolerance toward anticompetitive practices).

20 On the institutional characteristics of the Developmental State as exemplified in Japan, South Korea, and Taiwan, see eg Manuel Stark, 'The East Asian Developmental State as a Reference Model for Transition Economies in Central Asia—an Analysis of Institutional Arrangements and Exogenous Constraints' (2010) 10 *Econ & Env Studies* 189–210, 198–204 (discussing the model by reference to: the political sphere, ie governments and bureaucracies; the business sector; and exogenous success factors and constraints).

21 See eg Gerber (n 18) 214, 217–19; Mel Marquis, 'Firebird Suite: Cartel Suppression Reborn in Japan' (2016) 4 *JAE* 84–110, with references.

In sum, the heterogeneous conditions that may be present in a given jurisdiction defy simple notions such as the idea that there is a single path to growth (through liberalization and competition, etc), or that competition law, even rigorously enforced competition law, will guarantee economic prosperity and development. Instead it is more judicious to speak in terms of positive correlations, and in terms of expectations with solid foundations. Formulated with moderation, we can expect that competition law institutions which are well designed and which function effectively within a tolerable margin of error and inefficiency, when rooted by time and wise investments in human and material resources, can be expected to contribute to the economic well-being of an economy, including that of a developing economy.²² Ideally, the development of these institutions will be embedded within a broader ‘policy mix’, that is, an ‘integrated agenda of environmental, social and economic policies and instruments’ which together promote long-term growth and development that is inclusive, equitable, and environmentally responsible.²³ One may hope that, in the specific case of the Philippines, the enhanced long-term economic performance to be gained from the linkages between competition law and the broader development agenda will also contribute to a better distribution of wealth in society.²⁴

The structure of this article

In order to present a meaningful discussion of the new competition law regime in the Philippines, it is necessary to understand relevant contextual factors at play in this country. The Philippine economy, certain features of its legal system, and pertinent law enforcement institutions will therefore be explored.

The fact that the comprehensive Philippine law is still in its infancy imposes limits on the extent to which the effectiveness of the law’s implementation can be assessed. As noted above, it might take 10 years on average for positive economic effects to become observable, and as Kovacic and Lopez-Galdos have explained, ‘it takes roughly twenty to twenty-five years from the adoption of a law to determine whether a new competition law regime is on the path to successful implementation over the longer

22 The relationship between competition law and development is discussed from a range of perspectives in Sokol, Cheng and Lianos (n 5) and in many of the other sources cited above. See also Susan Joekes and Phil Evans, *Competition and Development: The Power of Competitive Markets* (IDRC 2008) 24–31 (recounting case-based success stories where competition policy appears to have contributed to positive results from the point of view of productivity, economic equity, and other parameters). For discussion emphasizing the need for competition law in developing countries ‘cursed’ with significant but undiversified resource endowments that lead to excessive resource dependence (using Nigeria as a case study), see David Oluwadare Adetoro, *Competition Policy and Resource Utilization: An Agenda for Resource-Dependent Developing Countries* (Cambridge Scholars Publishing 2016).

23 UNCTAD Secretariat, ‘The Role of Competition Policy in Promoting Sustainable and Inclusive Growth’ (2015) TD/RBP/CONF.8/6, p 2, <http://unctad.org/meetings/en/SessionalDocuments/trrbpconf8d6_en.pdf> accessed 16 May 2017.

24 As Fox concisely affirms: ‘Distribution and human dignity matter.’ Eleanor Fox, ‘Competition Policy: The Comparative Advantage of Developing Countries’ (2016) 79 LCP 69–84, 74. The relatively brief episodes of poverty reduction in the Philippines in the late 1980s and later in the 1990s were driven by the coincidence of (partly reform-driven) rising growth and declining inflation. See Arsenio Balisacan, ‘Growth, Redistribution and Poverty: Is the Philippines an exception to the standard Asian story?’ (2000) 5 J Asian Pac Econ 125–40.

term'.²⁵ Nevertheless, a close study of the Philippine law will usefully highlight the law's general contours and detailed characteristics; one can thus acquire a fair sense of the trajectory the Philippines has chosen, and an initial reaction is possible. With that aim in mind, the structure of the article follows the scheme below:

- The Philippines: overview of the country; governance and institutions; economy; rule of law and role of courts (II)
- Competition laws and competent institutions (III),
- Competition law enforcement powers (IV),
- Competition law sanctions (V),
- Leniency policy (VI),
- 'Commitments', consent orders, forbearance and other non-adversarial case resolution (VII),
- Advocacy and market studies (VIII),
- International cooperation and international partners (IX),
- Final remarks (X)

Readers whose interests are limited to the discussion of the competition regime as such may choose to pass over Section II (overview of the country, etc) and commence with Section III (Competition law and competent institutions).

Part X, 'Final remarks', offers a tentative assessment of the status quo and an impression of the necessary focal points going forward.

II. THE PHILIPPINES: OVERVIEW OF THE COUNTRY; GOVERNANCE AND INSTITUTIONS; ECONOMY; RULE OF LAW AND ROLE OF COURTS

Overview of the country

The Philippines has well over 7000 islands, an inherent challenge to the functioning of its domestic market and to the matching of resources and opportunities. It had a total population of 103 million in 2016, which makes it the 13th most populated country in the world (and 7th in Asia). Indigenous persons account for 15 per cent of that figure. The population is currently growing at a significant annual rate (1.59 per cent), and if one takes as a reference point 1960, when the population was 26 million, the population has quadrupled. This growth is due to the influence of Catholic principles (83 per cent of the country is Catholic), but also due to the country's uneven economic development and low level of investment in education (2.6 per cent of GDP in 2011).²⁶ The expansion of the population has unfortunately not

25 Kovacic and Lopez-Galdos (n 15) 88. (On this time frame, see also *ibid* 97.) During this typically long gestation period, the various experiences of agencies implementing competition laws can be described, as the case may be, as 'an initial ascent followed by [collapse or] decline', or as a 'flat line', or, more encouragingly, a 'gradual upward progression'. *ibid* 112.

26 On the high-population growth in the Philippines, see Mari Kondo, 'The Philippines: Inequality-Trapped Capitalism' in Michael Witt and Gordon Redding (eds), *Oxford Handbook of Asian Business Systems* (OUP 2014) 169–91, 171. At pages 180–1, the same author discusses the problem of budget-constrained underinvestment in education, particularly in science and technology. Pressure on the national budget has been attributed in part to corrupt state practices, an issue discussed below.

been accompanied by the kind of long, sustained economic growth enjoyed by certain other Asian countries in the post-War period. Despite episodic reform-driven growth which helped the country to achieve poverty reduction in the period of 1985–97, the general inability of the Philippines to sustain high-level growth over long periods and to effectively introduce equity-oriented policies (such as land and agrarian reforms) has left the country today with enduring poverty and a wide wealth gap (Gini index of 46 in 2012).²⁷ To a degree, the expansion of the economy following the Asian financial crisis has had a positive impact on aggregate poverty, but there is an ‘enormous’ diversity in multidimensional deprivation (education, health, sanitation, etc) and poverty across regions and sectors, a sign that development in the Philippines is not inclusive.²⁸

Poverty, inequality, and bleak horizons engender alienation and disaffection while making populist, neo-authoritarian, ‘drain the swamp’ politics alluring to many voters.²⁹ In the current climate, with uneven economic development and a wide variety of interrelated challenges for the Philippines including, among other issues, poor public service delivery, corruption, and the rule of law, the country ranked 54th worst out of 178 countries in the Fragile States Index 2016 published by the Fund for Peace.³⁰

The Philippine economy is worth USD 292 billion, which makes it a top-40 economy worldwide and the third largest economy in ASEAN, next to Indonesia and Thailand. It is a lower-middle income country, with an unadjusted GDP per capita around USD 2900 as of 2015. When adjusted by purchasing power parity, the GDP per capita figure is about USD 6900. The GDP per capita has been rising more or less steadily since 1960. However, these figures fail to reflect the country’s significant inequality of income and excessive wealth concentration—a legacy of colonialism, a highly disparate land distribution at the time of independence and Olsonian collective action obstacles. More than a quarter of the population live below the poverty line. Unemployment in July 2016 stood at 5.4 per cent, a percentage point lower than the year before, and a 10-year low, although underemployment is a significant problem.³¹ Average inflation in 2016 was about 1.6 per cent, with a rate of about 2.5

27 On the close nexus between the Philippines’ failure to achieve sustained growth and the country’s poverty levels, see Balisacan, ‘Growth, Redistribution and Poverty’ (n 24); Arsenio Balisacan, ‘Poverty and Inequality’ in Balisacan and Hill (n 3) 311. At page 339 of the latter paper, Balisacan mentions, in addition to sustained growth and pro-poor institutions and policies, other factors such as: primary and secondary education, the building of infrastructure (to reduce the high transport costs that cause ‘geographic poverty traps’), better terms of trade, agrarian reform and better governance.

28 See Arsenio Balisacan, ‘The Growth-Poverty Nexus: Multidimensional Poverty in the Philippines’ in Arsenio Balisacan and others (eds), *Sustained Economic Development: Resources, Environment, and Institutions* (Elsevier 2015) 445, 463.

29 See eg Julio Teehankee, ‘Weak State, Strong Presidents: Situating the Duterte Presidency in Philippine Political Time’ (2016) 32 *J Dev Soc* 293–321.

30 The Fragile States Index is available at <<http://library.fundforpeace.org/library/fragilestatesindex-2016.pdf>> accessed 16 February 2017. Based on its composite scores, the Philippines is classified as a ‘high warning’ country, in the company of Laos (55th worst) and Papua New Guinea (50th worst). This classification is situated between those of ‘elevated warning’ and ‘alert’, the most dire category being ‘very high alert’.

31 See Salvador Santino F Regilme Jr, ‘Why Asia’s Oldest Democracy is Bound to Fail’ (2016) 32 *J Dev Soc* 220–45, 235.

per cent by the end of that year—the official target rate being 2–4 per cent. The ratio of government debt to GDP in 2015 was about 45 per cent. Foreign debt amounted to just over a third of total government debt.

The Philippine Diaspora amounts to 10 million Filipinos, 40 per cent of whom work in the United States. Driven to emigrate by a lack of attractive domestic opportunities, overseas workers remit a significant part of their income and support consumption back home. In 2016, USD 26.9 billion in foreign earnings were remitted to the Philippines from abroad.³² As noted below, reliance on remittances has both advantages and disadvantages.

In its Global Competitiveness Report, the World Economic Forum ranked the Philippines at number 57 out of 138 countries, similar to Brunei Darussalam (number 58) and Vietnam (number 60).³³ Some of its other neighbours were ranked as follows: Singapore number 2, Japan number 8, Malaysia number 25, Thailand number 34, Indonesia number 41, Cambodia number 89 and Laos number 93.

In the period from 2000 to 2012, the economy grew at an average rate of 4.8 per cent, with some fluctuations. The economy then started to grow rapidly: during the mandate of President Benigno ‘Noynoy’ Aquino III (2010–16), the country recorded 6.2 per cent average annual growth. Four million new jobs were created during that period. Economic expansion has tended to put increasing pressure on the country’s finite natural resources such as mineral deposits and forests. Apart from problems concerning the rule of law and labour flexibility (see below), the Aquino administration in general fared well in improving the country’s performance with regard to its entrepreneurial environment and the freedom of its private sector.³⁴ Although it is still rather early to assess the state of affairs under the incoming administration, there is, so far, relative continuity.³⁵

Following centuries of colonialism, occupation, strife, and conflicts of varying duration with Spain, Britain, the USA and Japan which won’t be recounted here, the Philippines became formally independent in 1946 with the signing of the Treaty of Manila.³⁶ Under the Constitution of 1987, the Philippines is a constitutional republic

32 See Ben O de Vera, ‘OFW Remittances Hit Record High in 2016’ *Philippine Daily Inquirer* (16 February 2017) <<http://business.inquirer.net/224635/ofw-remittances-hit-record-high-2016>> accessed 16 May 2017.

33 See <http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf> accessed 20 January 2017.

34 Based on data from 2014, the Philippines was ranked number 70 worldwide and number 14 among Asia-Pacific countries in the 2016 Index of Economic Freedom (Heritage Foundation and Wall Street Journal). Those numbers improved on the 2012 scores of, respectively, 107 and 19. See <<http://www.heritage.org/index/country/philippines>> accessed 3 February 2017.

35 See eg Mong Palatino, ‘Will Duterteomics Bring Progress to the Philippines?’ *The Diplomat* (1 December 2016) <<http://thediplomat.com/2016/12/will-duterteomics-bring-progress-to-the-philippines/>> accessed 3 February 2017 (“Duterteomics” reaffirms the economic reforms initiated by the Aquino government. The country’s big business groups are generally happy with it, but not Duterte’s leftist allies. Nevertheless, Duterte’s posturing as a nationalist and socialist means there is still opportunity to push for alternative policies that could potentially overhaul the country’s economic profile in the next few years.”).

36 A short history of the Philippines, with references, is provided in Mark Williams and Ruby Ann Jalit, ‘The Philippines’ in Mark Williams (ed), *The Political Economy of Competition Law in Asia* (Edward Elgar 2013) 161–214, 162–8. See also John Larkin, ‘Philippine History Reconsidered: A Socioeconomic Perspective’ (1982) 87 *Am Hist Rev* 595–628.

with US-style executive and legislative branches of government. The Senate has 24 members, the House of Representatives has 292. The electoral process has often been perceived as dysfunctional, degenerating into a politics of celebrity and entertainment, akin to a 'beauty pageant or cock-fight'.³⁷ The country is mostly a unitary state with centralized decision-making but a South-Western part of Mindanao Island, where Islam has been the primary religious and cultural influence since before the arrival of Magellan in 1521, is an autonomous region.³⁸ The country's historical ties to Spain and then the US are reflected in a hybridized Roman-civil law/common law legal culture.³⁹

Governance and institutions

Governance and institutions in the Philippines suffer from a variety of flaws and impediments. Overarching problems that have plagued the country for a long time are corruption and clientelism at all levels of government and administration,⁴⁰ and the related problem of inefficient bureaucracy.⁴¹ These problems, which go hand in hand with abysmal levels of public trust in national and local officials, are illustrated by the kleptocratic rule of Ferdinand Marcos (1965–86), which made the Philippines a global poster child for government corruption and for the 'predatory State'.⁴² Following the 'modest revolution' under Corazón Aquino (1986–92) and the promising

37 See Williams and Jalit, *ibid* 183 (citing David Celdran, 'The Cult of the Celebrity' *The Investigative Reporting Magazine*, p 31 (PCIJ, January–March 2001). The emergence of 'celebritocracy' reflects the public mistrust of more conventional but perennially corrupt political leaders. The theme of corruption in government is reprised below.

38 The population of the Autonomous Region of Muslim Mindanao was about 3.8 million in 2015. For Muslims only, the local applicable law is Shariah law. This legal tradition is a legacy of the immigration of Muslim Malays in the 14th Century.

39 See ASEAN Law Association, 'Legal Systems in ASEAN: Philippines' ch 1 <http://www.aseanlawassociation.org/papers/phil_chp1.pdf> accessed 3 February 2017.

40 See eg World Bank, 'Combating Corruption in the Philippines' (2000) Report 20369-PH <<http://www1.worldbank.org/publicsector/anticorrupt/FlagshipCourse2003/PhiliCombatCorrupt.pdf>> accessed 20 January 2017. See also Williams and Jalit (n 36) 168: 'The constant abuse of power by nearly all of the country's elite, combined with the challenges of the archipelagoical geography, geology and a tropical climate, have made the country difficult to rule. Thus, it has been almost impossible to create the stability or continuity which sustained economic progress requires.' At 175–8 and 202–3, the authors tell the sad tale of public corruption, mistrust of government and dissolution of the 'bonds of community'.

41 See World Economic Forum (n 33) 296. According to the 2016–17 Global Competitiveness Report, respondents to the Executive Opinion survey considered that the most problematic impediments to business in the Philippines were inefficient bureaucracy (a reflection of inadequate salaries), inadequate supply of infrastructure and corruption. Other cited problems included tax rates, tax regulations, political instability and restrictive labour regulations. As Kondo (n 26) 186 states flatly: 'The government is unable to do the following properly: regulate business, enforce laws, collect taxes, invest in infrastructure, or provide services to the people.'

42 See Williams and Jalit (n 36) 167–8. (Kondo (n 26) 172, highlights a dismal food chain effect: the Philippine State has preyed upon weak citizens but the State has been preyed upon by the oligarchic elite. The concept of the predatory state was developed in the work of sociologist Peter Evans, who originally presented the case of Zaire (ie the Congo) as an archetype. See Evans, 'Predatory, Developmental and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State' (1989) 4 Soc Forum 561–87, 569–71.) The (non-violent) People Power Revolution, culminating in February 1986 but triggered in part by the assassination of Senator Benigno Aquino Jr in 1983, led to the exile of Marcos in the comfort of Makiki Heights in Hawaii, where he died in 1989; and to the ascension of Aquino's widow, Corazon, to the Presidency.

liberalization measures and other reforms under Fidel Ramos and his aide Jose Almonte (1992–98), the systematic plunder of the country and the related problems of political and bureaucratic instability continued under the presidencies of Joseph Estrada and Gloria Macagapal-Arroyo.⁴³ In bleak and exaggerated terms, one commentator suggests that Philippine democracy may be dead already but it is also suicidal for the sake of completeness.⁴⁴ Efforts to rein in corruption have done little to overcome the legacy of political scandals and pork-mongering: laws forbidding corrupt practices are indeed on the books,⁴⁵ but their effectiveness is in doubt. In these circumstances it is unsurprising to see a democratic backlash: strong popular approval of a strong-man political leader, Rodrigo Duterte, who prioritizes ‘law and order’ over principles of justice and fundamental rights.

The deficient governance and weak institutions of the Philippines, apart from their other numerous adverse consequences, have been key constraints limiting investment and growth in this country.⁴⁶ That is not to say that the economy has always underperformed: as discussed below, growth since 2012 has ranged from 5 to 8 per cent; and, having withstood the crisis of the late 1990s, the country was also less affected by the more recent global financial crisis than many other countries.⁴⁷

43 See eg Emmanuel de Dios and Paul Hutchcroft, ‘The Philippine Economy: Development, Policies, and Challenges’, in Balisacan and Hill (n 3) 46, 50–67; Nathan Gilbert Quimpo, ‘The Philippines: Predatory Regime, Growing Authoritarian Features’ (2009) 22 *Pac Rev* 335–53.

44 See Regilme (n 31) 234 (‘[T]he life of the new democracy in the country is terminally ill or at the very least, always at high risk of eventual demise—it is a deadman trying to run off the edge of the cliff.’).

45 The Philippine Revised Penal Code, the Anti-Graft and Corrupt Practices Act and the Code of Ethical Conduct for Public Officials all contain provisions to prevent and/or sanction public corruption. The Office of the Ombudsman investigates and prosecutes cases of graft and corruption involving public officials, and the Sandiganbayan (anti-graft court) adjudicates such cases. Burke and others observe that ‘Recent corruption cases . . . indicate an increasing willingness to take on high-profile corruption cases, and these enforcement activities are having a positive impact on corruption. For example, the Ombudsman filed corruption charges against Jejomar Binay, outgoing President Aquino’s Vice President, in relation to the alleged rigging of the procurement process for the 2.28 billion pesos Makati Parking Building II construction project. [. . .] There are still reservations that enforcement of anti-corruption laws is not effective enough and that the Ombudsman is too slow and lacks resources to properly investigate and prosecute corrupt parties. In light of this, President Duterte is planning a raft of anti-corruption policies including the establishment of an anti-graft call center, which reports directly to the Malacañang, the Presidential Palace.’ Maurice Burke, Adam Mickley and Wataru Kawai, ‘Anti-corruption in the ASEAN Region’ (2016) <<http://globalinvestigationsreview.com/insight/the-asia-pacific-investigations-review-2017/1068602/anti-corruption-enforcement-in-the-asean-region>> accessed 3 February 2017.

46 See Asian Development Bank (2007), ‘Philippines: Critical Development Constraints’ <<https://www.adb.org/sites/default/files/publication/29274/cdc-philippines.pdf>> accessed 3 February 2017; Kelly Bird and Hal Hill (2008) ‘Philippine Economic Development: A Turning Point?’, CCAS Working Paper No. 16 <<http://www1.doshisha.ac.jp/~ccas/eng/Epublications/eWP16hill.pdf>> accessed 3 February 2017; World Bank (2013) ‘Philippines Development Report: Creating More and Better Jobs’, Report No. ASC5842 <<http://documents.worldbank.org/curated/en/895661468092965770/pdf/ACS5842WPOP120Box0382112B00PUBLIC0.pdf>> accessed 3 February 2017. As noted below, some reforms have been undertaken to address limitations on foreign investment, subject to constitutional limits.

47 In 2009, growth dropped to 1.1%, partly due to additional disruptions such as severe flooding and global price increases in the food and fuel sectors. But the economy quickly rebounded in 2010 as President Aquino’s term began, growing at a 7.3% clip that year. The return to growth was driven by, first of all, increased exports in electronics products, business process outsourcing (BPO) and, at home, a construction boom. The country had also buffered itself by reducing its fiscal deficit and public debt, and domestic banks had adequate capital. Exposure to foreign toxic assets was limited, domestic consumption remained strong and remittances were substantial. See Williams and Jalit (n 36) 171.

However, growth of the Philippine economy has generally lagged behind that of neighbouring economies, and it has been neither inclusive nor robust and steady, at least prior to 2012.

In the period from 2010 to 2016, President Benigno Aquino III put greater emphasis on transparency and accountability while promoting reforms to reduce bureaucratic exposure to corruption. In glass-half-full terms, the country has made ‘impressive strides’ leading to ‘positive gains, which are apparent in the increase in investor confidence and eventually the expansion of the Philippine economy’.⁴⁸ Relying on the World Bank’s Worldwide Governance Indicators, Mendoza and his co-authors explain that, since 2010, the Philippines’ scores with regard to voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption have been increasing at a faster pace compared to the scores of other ASEAN countries. As another sign of overall improvement (but perhaps unsurprising given the positive growth figures mentioned above), the same commentators point out that three major credit ratings agencies—Fitch, Moody’s, and Standard & Poor’s—all upgraded the country’s credit rating between 2010 and 2014.⁴⁹ Nevertheless, the Philippines continues to score rather poorly with regard to political stability and control of corruption, trailing Singapore, Malaysia, Brunei Darussalam, and Thailand.⁵⁰ As the authors observe:

In addition to creating leakages and misuse of resources, the poor public finance management make the [Philippine] system vulnerable to corrupt practices. For instance, the complex tax payment system opens up avenues for rent-seeking behavior among government personnel. Wide discretion on the use of funds, particularly the ones allocated to lawmakers to [meet] the needs of their constituencies, have been subject to misappropriation, bribery and kickbacks, while the lack of transparency and consistency in reporting of expenditures diminish[es] the space to scrutinize how the resources are used. Hence, while the old system triggered a hollowing out of the state, it also tended to feed more corrupt and traditional relationships and practices.⁵¹

The culture of corruption that has long characterized the Philippine government and bureaucracy has also left its mark on public procurement, where bid-rigging has drained public resources and put additional pressure on the tax system.⁵² Regulatory

48 Ronald Mendoza and others (2017), ‘Governance and Institutions in the Philippines’ ASOG Working Paper 17-002, p 3, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2873942> accessed 3 February 2017.

49 See *ibid* 8-9. For example, Standard & Poor’s raised the Philippines’ credit rating from BB in 2010 to BBB in 2014.

50 See *ibid* 3-5.

51 *Ibid* 12.

52 See *ibid* 14. Legal responses to bid-rigging in the Philippines—notably the Competition Act and the Government Procurement Reform Act and the related Implementing Rules and Regulations—are discussed below. See also World Bank, ‘Philippines – Country Procurement Assessment Report’ (2008) <<http://documents.worldbank.org/curated/en/598131468107676796/pdf/476020REVISED010WB0C PAR0081April020.pdf>> accessed 20 January 2017. However, since the latter report was issued, the Philippine government has taken steps to improve its procurement practices. See Asian Development Bank, ‘Philippines Country Procurement Assessment Report 2012’ (2013) <<https://www.adb.org/sites/>

capture represents yet another self-reinforcing consequence of the country's governance, institutional, and cultural problems.⁵³

It is premature to evaluate how the Philippines' scores on the above indicators will be affected during the tenure of Mr Duterte.⁵⁴ Some of his rhetoric, often laden with threats of withdrawing the Philippines from international institutions, appears to be undermining political stability and investor confidence. The impact of the administration on public corruption is ambiguous, as it is unclear whether Duterte's removal of large numbers of public officials in August 2016 (many on the ground that they accepted money or benefits in exchange for tolerating the activities of drug dealers⁵⁵) was evidence-based or politically motivated, not least given that the purged officials were appointees of Aquino and other previous presidents.⁵⁶ This lack of clarity is exacerbated in an environment where the already-fragile concepts of the rule of law and due process are eroding further.

A final remark about corruption in public institutions is loosely linked to broader discussions about the justifications of informal grey sectors in economies in situations where an economy is to a large degree dysfunctional. It is a reminder that 'corruption' is not a homogenous concept, and depending on the lens through which particular kinds of corruption are perceived they might even be described as desirable from an economic perspective. As John Nye points out, 'while systemic corruption is bad, individual acts of corruption often have utility . . .'.⁵⁷ Yet, in spite of the potential efficiency of illegal conduct where the regulatory and institutional environment is

default/files/institutional-document/34079/files/philippines-country-procurement-assessment-report-2012.pdf> accessed 3 February 2017.

53 See Mendoza and others (n 48) 15.

54 A presidential term in the Philippines is six years. The present term, if fully served, will thus expire in 2022. As of early 2017, and despite rumblings about a possible impeachment, Duterte's supporters control both houses of the Congress, and polls suggest a high level of domestic approval—a reflection of the president's cult of personality. Both within and especially outside the country, he is a controversial figure, to say the very least. See eg Freedom House, 'Philippines Profile 2017' (indicating a downward trend for freedom in the Philippines due to extrajudicial killings as part of the 'drug war' as well as assassinations of civil society activists), <<https://freedomhouse.org/report/freedom-world/2017/philippines>> accessed 16 February 2017. See also the interview of Chito Gascon by Marie Maurisse and Harold Thibault, 'Duterte ne respecte ni les droits de l'homme ni la Constitution' *Le Monde* (31 March 2017), p 4 (expressing concern about insufficiently robust institutional checks on the Executive and an alarming drift toward authoritarianism). One might speculate that new efforts to suppress insurgent terrorist barbarism, including the imposition of martial law in the island of Mindanao, may successfully be politicized—thus causing a majority of the Filipino public to rally in support of the crackdown, and reinforcing the President's popularity for some period of time.

55 See eg Romil Patel, 'Duterte's narco-list contains "about 5,000 to 10,000 government officials"', *International Business Times* (28 November 2016) <<http://www.ibtimes.co.uk/dutertes-narco-list-contains-about-5000-10000-government-officials-1593787>> accessed 3 February 2017.

56 It is equally true, however, that sweeping replacements of bureaucrats occur each time a new president takes office. This recurring upheaval has not only undermined policy consistency (and reduced the attractiveness of jobs that require talent and expertise) but has also made it difficult for a reform-oriented constituency to emerge and consolidate itself within the bureaucracy. See Balisacan and Hill (n 3) 19 ('[R]egime changes have major consequences since, with its U.S. style of government, they percolate right through the system [down through the levels of secretary, under-secretary, often assistant secretary and sometimes even the level of director].').

57 John Nye, 'Taking Institutions Seriously: Rethinking the Political Economy of Development in the Philippines' (2011) 28 *Asian Dev Rev* 1–21, 12 (citing Robert Klitgaard, *Controlling Corruption* (University of California Press 1988)).

seemingly beyond repair, Nye admits that ‘corruption, even if individually efficient, contributes to the [delegitimization] of the entire legal and political system and in so doing, makes it hard for a state to reassert its authority in much needed areas . . .’.⁵⁸

Economic features of the country

Like other Southeast Asian countries, economic performance in the Philippines in the decades following World War II was encouraging, but in the early 1980s, stagnation took hold. While other Asian countries chugged ahead, the Philippines fell behind. Over the years the country has faced a range of obstacles to better economic performance: a separatist insurgency in the south; frequent typhoons and a cascade of related negative effects; droughts caused by El Niño; occasional volcanic eruptions (the country is nestled squarely within the Ring of Fire); chronic public debt; regressive taxation; poor infrastructure; extreme income inequality, with wealth controlled by just a few families; a drastic disparity between urban and rural living conditions; and entrenched interests resisting reform.⁵⁹ The 1997 Asian financial crisis hardly helped the country to cope with these problems although, as alluded to above, the ‘sick man’ was able to avoid ‘pneumonia’.⁶⁰

The Philippines enjoys modest-to-significant endowments in natural resources. In the past it exploited copper, gold, nickel, and chromium mining but its reserves have been increasingly depleted. In 2010, it was still producing 11 per cent of the world’s nickel. Since then, some mining was limited by President Aquino for reasons of environmental protection. In agriculture the main crops include rice, corn, abaca, sugarcane, coconut, and tobacco.⁶¹ While some crops are exported, the Philippines is a net agricultural importer.⁶² The country has only limited domestic oil deposits, and it is largely dependent on imported fuels.⁶³ However, around a quarter of its electricity is based on geothermal energy.⁶⁴ Some of its electricity is also based on indigenous natural gas.⁶⁵

Shipbuilding is an important sector for the Philippines; it is the fourth leading country worldwide in this sector, trailing only South Korea, China, and Japan. Other manufactured exports include semiconductors, electronics products, clothing, and

58 *ibid.*

59 See Mahabub Hossain, ‘Economic development in the Philippines: a frustrated take-off?’ (1996) 33 *Ph Rev Econ & Bus* 88–118, 88–9. For further discussion of some of these issues, see de Dios and Hutchcroft (n 43).

60 See Marcus Noland, ‘The Philippines in the Asian Financial Crisis: How the Sick Man Avoided Pneumonia’ (2000) 40 *Asian Surv* 401–12. See also de Dios and Hutchcroft (n 43) 57 (‘[T]he country’s very lack of extended periods of high growth inhibited the huge surges in foreign indebtedness—and property and stock values—found elsewhere in the region. Since the Philippines never achieved high peaks, neither did it have as far to fall.’).

61 See Roehlano Briones, ‘Philippine Agriculture to 2020: Threats and Opportunities from Global Trade’, (2013) pp 3–5, Discussion Paper No 2013-14, 3–5 <<http://dirp3.pids.gov.ph/ris/dps/pidsdps1314.pdf>> accessed 16 May 2017; Oxford Business Group (2015), *The Report: The Philippines 2015*, p 13.

62 See Briones, *ibid* 5–6.

63 See APEC Energy Demand and Supply Outlook, 6th edition, Vol II (May 2016) 250–51, <http://aperc.iej.or.jp/file/2016/5/10/APEC_Outlook6th_VolumeII_EconomyReviews.pdf> accessed 16 May 2017.

64 See *ibid* 245; Oxford Business Group (n 61) 13 (noting that the Philippines is the number two geothermal energy producer next to the USA).

65 See Oxford Business Group (n 61) 104–05.

transport equipment. About half (52 per cent) of the country's exports go to the US, Europe, Japan, and China, and its economic fortunes are thus affected by demand trends in those areas. In 2015, the poor performance of exports of manufactured goods was a significant drag on GDP growth.⁶⁶

Services, including non-tradables, account for more than half of the Philippine economy,⁶⁷ and in 2015 growth in services accounted for two-thirds of total growth.⁶⁸ Among the services sector, an increasingly big ticket is business process outsourcing, where the Philippines (USD 22 billion in 2015) now rivals India. Call centre services in the Philippines include travel services, technical support, education, customer care, financial services, online business-to-customer support, and online business-to-business support. Besides BPO, tourism (USD 5 billion in 2015) is another important sector.

As mentioned already, the Philippine economy showed high performance especially in 2010 and then from 2012 to 2016, with growth averaging around 6 per cent and with more of the same expected in 2017. This has earned the country the moniker of a 'tiger cub' economy, like Indonesia and Thailand. But focusing on the 6 per cent growth rate alone would paint a deceptively positive picture given that growth has not been inclusive and since, furthermore, growth in itself does not address more structural problems that still hold the country back. Nor does the overall growth rate capture the more fragmented picture across the country's internal regions. The critique often aimed at the structure of the Philippine economy relates to an imbalance between low-productivity industries, where excessive resources are stuck, and more productive sectors whose potential remain largely untapped. This 'extreme dualism' of the economy has persisted notwithstanding the substantial reduction of tariffs. As of 2011, only a quarter of the Philippine workforce was in industry or manufacturing while three quarters of the workforce was in agriculture or forestry, or in (mostly low-productivity and transient-employment) services.⁶⁹ This structural impediment to productivity is largely due to rigid labour laws and high minimum wages in the manufacturing sector, which also explains the paradoxically high rate of unemployment among Filipinos that finished high school (8.6 per cent) and college (10.6 per cent) and low unemployment (3.3 per cent or less) among Filipinos who left school early or never started.⁷⁰ One of the consequences of this skewed labour market structure is brain-and-skill drain—which hampers dynamism and development at home if

66 See Asian Development Bank, 'Asian Development Outlook 2016: Asia's Potential Growth' (2016) p 220 <<https://www.adb.org/sites/default/files/publication/182221/ado2016.pdf>> accessed 3 February 2017.

67 In 2012, services accounted for 55% of the economy's output. See Rafaelita Aldaba, 'Trade Reforms, Competition, and Innovation in the Philippines' (2012) ERIA Discussion Paper DP-2012-05, p 8 (Table 3) <<http://www.eria.org/ERIA-DP-2012-05.pdf>> accessed 20 January 2017.

68 See Asian Development Bank (n 66).

69 See Nye (n 57) 6.

70 See *ibid* 6–8. As Nye observes at page 8: 'This is completely at odds with the research in most highly developed economies where the link between education and unemployment goes the other way. . . . But of course this pattern is consistent with what we would expect from a highly segmented workforce produced by regulatory barriers. In effect, the mix of high minimum wages, combined with regularization rules [which guarantee employment after 6 months on the job] and other policies designed to limit firing of workers in the formal sector, contributes to a formidable barrier to entry into the most highly paid jobs.'

the exit is permanent, as it often is.⁷¹ Contributing to this problem are legal impediments (some of which stem from the Constitution) to foreign investment, which tend to limit both market entry by foreign competitors and, perhaps more importantly, domestic opportunities. Meanwhile, despite significant remittances to the Philippines from the 10 million Filipinos working abroad (amounting to around USD 27 billion in 2016), remittances are a poor substitute for productivity gains in the domestic economy,⁷² and the ‘loss’ of talent is apt to limit the economy’s diversification and the country’s competitiveness.⁷³ One should also not ignore the unquantifiable social and affective impact of significant family separation, such as where parents leave to undertake work abroad while children remain behind.⁷⁴

The Philippines has been given credit for reducing trade barriers since the 1980s, thus wresting the country away from its prior reliance on import substitution policies, and for the above-mentioned success in promoting growth.⁷⁵ However, a:

complex maze of protectionist, investment incentive and regulatory policies left a legacy characterized not only by high levels of industrial concentration, and the concentration of wealth among a small number of families and groups but also by the lack of a culture of competition and a weak competition policy framework⁷⁶

—although, as we will see, an improvement in the country’s commitment to competition policy may now be discerned. Following several rounds of tariff reductions largely attributable to the Philippines’ participation in ASEAN and the WTO, the average tariff rate for all industries in 2012 was 6.82 per cent. The average tariff rate in agriculture was 11.3 per cent, while the average rate in manufacturing was 6.76 per cent.⁷⁷ Most tariffs for products imported from ASEAN countries have been eliminated altogether; progress on NTBs and services has been more modest.⁷⁸

The trade liberalization policy of the 1980s and 1990s gradually produced, according to Aldaba, a less concentrated manufacturing sector by 2003. In most manufacturing industries, the CR4 concentration ratio decreased to around 30–45 per cent.⁷⁹ However, some industries resisted this trend: the CR4 ratio for cement, coke, refined

71 See *ibid* 10. The ‘export’ of people from the Philippines—coined as ‘exodus capitalism’—has become highly institutionalized. See Kondo (n 26) 185. See also “‘Brain drain’ holding back growth – study”, *The Manila Times* (11 March 2015), <<http://www.manilatimes.net/brain-drain-holding-back-growth-study/168710>> accessed 16 January 2017.

72 See “‘Brain drain’ holding back growth’ (n 38): ‘[W]hile the Philippine economy is partly compensated through remittances, most of the productivity gains accrue to the developed economies in which these emigrants live.’

73 See Williams and Jalit (n 36) 173.

74 See Regilme (n 31) 236.

75 See Aldaba (n 67). A succession of tariff reform programs (TRPs) implemented between 1981 and 2003 are described by Aldaba at 3–5.

76 *ibid* 3.

77 See *ibid* 5. Of course, as Aldaba acknowledges, average tariff rates are not decisive, as there may be wide dispersion and hence potentially significant distortions among particular products, most notably where special interests are prevalent.

78 See eg Pelkmans (n 1).

79 See *ibid* 10–13 (and Tables 6–7).

petroleum and other fuel products, tobacco products, beverages, flat glass, motor vehicles, food, and cement was maintained at levels of around 50–80 per cent. By 2008, and as one might expect, trends in concentration levels in these sectors were generally matched by trends in price-cost margins, with margins in selected products eroding to 22–38 per cent while high margins—45–62 per cent—were observed in the industries that were still highly concentrated.⁸⁰

With regard to foreign investment, the Foreign Investment Act, as amended in 1996, allows 100 per cent foreign equity; however, the Foreign Investment Act is subject to the Constitution and other laws which reserve ownership for Filipino citizens or for corporations with at least 60 per cent Filipino equity. The latter restrictions on foreign investment, which apply in particular to public utilities such as energy, transport, and telecommunications, are counter-factors apt to obstruct the above-mentioned de-concentration of certain industries.⁸¹ In telecommunications, for example, the Philippine market is a duopoly composed of the Philippine Long Distance Telephone Company (PLDT) (the former State monopoly) and Globe Telecom. These incumbents are currently facing allegations that they unlawfully took steps to pre-empt new entry.⁸² Predictably, the duopolistic market has been characterized by suboptimal quality of service and high rates.⁸³ On the other hand, some reforms have relaxed restrictions on entry by foreign enterprises, including the 2014 reform liberalizing the Philippine banking sector⁸⁴ and the 2015 reform liberalizing cabotage services in domestic shipping.⁸⁵

It should be added that trends toward at least modest improvements in the competitiveness of particular sectors do not necessarily translate into gains in economic democracy. The oligarchic-dynastic power and economic structure in the Philippines has been resilient, with seven family-controlled conglomerate groups (San Miguel Corp, Ayala Corp, First Pacific, SM Investments Corp, JG Summit, DM Consunji, and Aboitiz) still dominating capital-intensive sectors of the economy.⁸⁶

80 See *ibid* 13–4 (and Table 8).

81 cf UNCTAD, *Voluntary Peer Review of Competition Law and Policy, Philippines*, Full Report, (2014) p 5 <http://unctad.org/en/PublicationsLibrary/ditclp2014d1_en.pdf> accessed 15 December 2016.

82 See below note 129 and accompanying text.

83 See Edgardo Manuel Miguel Jopson and Rose Ann Camille Casilo (2016), 'Increasing Competition in the Telecommunications Sector of the Philippines' RSN-PCC Working Paper 16-003 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882313> accessed 16 May 2017.

84 Following the 2014 reform, foreign banks may own 100% of an existing bank's voting shares, and foreign banks may be treated no less favourably than domestic banks. See Rene Ofreneo, 'An Assessment of the Philippine Financial Services Sector' (2015) <http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-jakarta/documents/meetingdocument/wcms_396169.pdf> accessed 19 May 2017. See also World Bank, 'Philippine Economic Update—Moving Full Speed Ahead: Accelerating Reforms to Create More and Better Jobs' (2016) Report No 104611, p 25, <<http://documents.worldbank.org/curated/en/845151468185031838/pdf/104611-WP-P149001-PUBLIC-Philippine-Economic-Update-PEU-April-2016-edition-final-for-release.pdf>> accessed 16 May 2016 (noting that six foreign banks had been approved for market entry, and that further approvals were under discussion).

85 The above-mentioned constitutional constraints preclude full liberalization, however, as cabotage is regarded as a public utility. For a summary of the 2015 reform and other developments in the shipping sector, see World Bank (n 84) 26.

86 See Williams and Jalit (n 36) 178–80. See also Kondo (n 26) 173 (noting that powerful oligarch families have often hijacked government institutions, thereby raising entry barriers and extracting rents in a self-propelled cycle).

The economy, and with it the Philippine social and political systems, are still stuck in an ‘inequality trap’ rooted in a long and turbulent colonial past.⁸⁷

The enduring impediments to market dynamism and socioeconomic progress in the Philippines seem to underline the importance of promoting effective competition law enforcement in general, and merger control in particular. Some of the factors and special interests that explain those impediments also suggest reasons why the development of competition law instruments and institutions, including a competition culture, has been and will continue to be resisted.

Rule of law and role of courts

As mentioned earlier, the Philippine legal system descends from both civil law and common law origins. It is also clear from the discussion so far that the rule of law in the Philippines has been weak. According to the World Justice Project’s Rule of Law Index 2016, the country’s rankings for ‘constraints on government powers’, ‘fundamental rights’ and ‘open government’ are all relatively low: 51, 83, and 63, respectively, out of 113 countries assessed.⁸⁸ The country has a history of corruption at all levels of government, and for several years the country has been trying, with mixed success, to leave this legacy behind.

The courts have not escaped the taint of scandal and incidents of political influence over judicial proceedings. As observed by Gatmaytan, the Philippines has been ‘attempting to rebuild the judiciary’s reputation since the post-Marcos era’.⁸⁹ As he argues, weak legitimacy of judicial decision-making reflects, among other factors, the politicized process by which judges are appointed to their posts, which itself may be a response to the increased relative power of the judiciary under the 1987 Constitution.⁹⁰ The impeachment and conviction of judges even at the most senior level is perhaps symptomatic of broader political struggles.⁹¹

But the judiciary and the administration of justice in the Philippines have been criticized for other shortcomings as well, including inefficiency and lack of expertise and competence.⁹² The enforcement of contracts was unpredictable, and bloated

87 See Kondo (n 26) 184 (‘An inequality trap is a phenomenon whereby inequalities instigate more inequalities. When large power differences exist as an initial condition, they tend to shape political, economic, and socio-cultural institutions in directions that allow the current power structure to flourish or be maintained. . . . Once trapped, inequalities persist even when the economy grows.’).

88 See World Justice Project <<http://data.worldjusticeproject.org/#groups/PHL>> accessed 3 February 2017.

89 Dante Gatmayan, ‘Politicisation and Judicial Accountability in the Philippines’ (2012) 87 PhLJ 21–50, 22. Sceptical attitudes to the Supreme Court may be traced to, among other things, the Court’s support of the Marcos regime in the 1970s, during which time the 1973 Constitution left the Justices exposed to removal by Marcos at any time. See *ibid* 46.

90 See *ibid* 30.

91 See Floyd Whaley, ‘Philippine Chief Justice Removed Over Omission in Report on Assets’, *New York Times* (29 May 2012) <<http://www.nytimes.com/2012/05/30/world/asia/philippines-chief-justice-removed-over-finances.html>> accessed 16 May 2017. A decade prior to the successful impeachment of Chief Justice Corona, Philippine lawmakers made two abortive attempts to impeach then-Chief Justice Davide. See Raul Pangalangan, ‘The Philippines’ post-Marcos Judiciary: The Institutional Turn and the Populist Backlash’ in Jiunn-rong Yeh and Wen-Chen Chang (eds), *Asian Courts in Context* (CUP 2015) 356, 366–7.

92 See Williams and Jalit (n 36) 200.

dockets have created ‘interminable’ delays—which in some cases sets the stage for dismissals for breach of the right to a speedy trial. As a consequence, investment and new market entry suffer. A ‘widespread perception of corruption’, partly due to issues of patronage and venality, has undermined public confidence, especially with regard to lower courts.⁹³ Some efforts have been made to address these issues, and an ‘e-courts’ system has been progressively implemented, now reaching about 30 per cent of the Philippine courts, with the aim of improving efficiency and transparency, quality control and simplification while making manipulation of justice more difficult. Nevertheless there have been ‘pockets of resistance’ to such efforts, and it is unknown at present whether judicial reform will be fully supported by the new administration that took office in 2016.⁹⁴

III. COMPETITION LAWS AND COMPETENT INSTITUTIONS

Background

The history of formal competition law provisions in the Philippines goes back to 1887 under the Old Penal Code (ie the Spanish Penal Code of 1870 as applied to the Philippines), and to 1925 when the Sherman Act provisions were replicated under American influence.⁹⁵ The 1925 Act was superseded in 1932 with the entry into force of the Revised Penal Code of 1930. The paragraphs of Article 186 of the Revised Penal Code then served as the basic Philippine competition provisions for more than 80 years before they were repealed by section 55 of the 2015 Competition Act (discussed below). However, those provisions were never effectively enforced. Some of the main obstacles were: the criminal-law burden of proof, according to which ‘knowing’ culpability had to be proven beyond reasonable doubt; the lack of criminal liability for corporations under Article 186; the narrow scope of the administrative sanctions allowed under the Price Law, which only applied where the prices for basic necessities or prime commodities were manipulated; and the general unawareness in the Philippines about competition law. But beyond those challenges were other fundamental issues: the political will for effective enforcement of Article 186 was lacking—a reflection of opposition from special interests—and there was no independent and well-resourced competition authority to enforce it.⁹⁶ Nor has private enforcement ever developed to any significant degree—notwithstanding Article 28 of the Civil Code of 1950 (Republic Act No 386), which provides for damages actions for unfair competition through the use of any unjust, oppressive, or ‘highhanded’ method.⁹⁷

93 See *ibid.* (citing an undated USAID report). See also Kondo (n 26) 173 (citing earlier findings of at least perceived venality of judges as well as ineffective law enforcement and criminal connections within the police force).

94 See UN Development Programme (2016), Final Report: ‘A Transparent and Accountable Judiciary to Deliver Justice for All’ pp 34–37 <http://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/transparent-n-accountable-judiciary.html> accessed 3 February 2017.

95 For historical details, see eg Tristan Catindig, ‘The ASEAN Competition Law Project: The Philippines Report’ (2001) <http://www.jftc.go.jp/eacpf/02/philippines_r.pdf> accessed 28 December 2016.

96 See UNCTAD (n 81) 6. See also Williams and Jalit (n 36) 191–3.

97 In addition, s 6 of Act No 3247 of 1 December 1925, drawing on the Sherman Act, authorizes treble damages and costs including reasonable attorney fees. As will be seen below, s 45 of the Competition Act

The failure of the Philippine competition law system was not rectified even when the 1973 Constitution and then the 1987 Constitution declared that the state was to ‘regulate or prohibit monopolies when the public interest so requires’, and that ‘no combinations in restraint of trade or unfair competition’ were to be allowed.⁹⁸ These constitutional clauses—which failed to address merger control altogether and failed to address the abuse of dominance insofar as it differs from monopoly control—were part of a wider patchwork of provisions of Philippine law targeting specific sectors, and they were supposed to be enforced by different agencies.⁹⁹ No competition case was ever brought before the Philippine courts under those provisions, although a number of cases were investigated.¹⁰⁰ A move in the late 1980s to adopt a competition act stalled when opposed by business lobbies; ultimately, it went nowhere.¹⁰¹

However, the need for a comprehensive law was difficult to ignore. Apart from internal exasperation at anticompetitive activities in the food industry and other sectors shifting income away from consumers, the participation of the Philippines in ASEAN was clearly a major impetus behind the drive to get a law on the books. In August 2007, the ASEAN Economic Ministers endorsed the establishment of the ASEAN Experts Group on Competition for discussion and cooperation, and, as noted in the introduction to this article, the ASEAN nations later the same year signed the AEC blueprint, which provided for the establishment of the AEC by the end of 2015.¹⁰² While these international commitments were significant, domestic considerations also played a role, as signs of the necessary political will for progress on competition law finally emerged in the first state of the nation address by President Aquino on 26 July 2010. In that speech, Aquino expressly noted the need for such a law, linking it to prospects for growth and opportunities for small and medium-sized enterprises.¹⁰³

of 2015 also provides for private claims against violators of the Act. This provision appears to apply cumulatively with art 28 of the Civil Code. No case has yet been brought under s 45, but this might change now that the main antitrust provisions of the Act are taking effect.

98 See Philippine Constitution, art XII, s 19. In the 1990s the Philippine Supreme Court remarked that art XII, s 19 can ‘release the creative forces of the market’. See Supreme Court judgment of 5 November 1997, *Tatad v Secretary of the Department of Energy*, <http://www.lawphil.net/judjuris/juri1997/nov1997/gr_124360_1997.html> accessed 16 May 2017. See also Supreme Court judgment of 5 May 2003, *Agan, Jr et al v Philippine International Air Terminals Co*, <<http://sc.judiciary.gov.ph/jurisprudence/2003/may2003/155001.htm>> accessed 16 May 2017 (‘The 1987 Constitution strictly regulates monopolies, whether private or public, and even provides for their prohibition if public interest so requires.’).

99 These provisions are summarized in UNCTAD (n 81) 7–13. See also Catindig (n 95) 8–23; Williams and Jalit (n 36) 190–1; and the Philippine Tariff Commission (2016), ‘Competition Policy: Primer’ pp 8–9 <<https://drive.google.com/file/d/0B6XF3AhfubONZ2JjC311cTR2bWc/view>> accessed 3 February 2017.

100 See UNCTAD (n 81) 5, 14, 20–1 and 27.

101 See World Bank (n 84) 25 (a genuine competition law ‘was always successfully opposed by large business conglomerates’).

102 An AEC blueprint for 2025, which builds on the 2015 blueprint, has now been adopted. See <<http://www.asean.org/wp-content/uploads/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf>> accessed 3 February 2017.

103 The speech is available at <<http://www.gov.ph/2010/07/26/state-of-the-nation-address-2010>> accessed 20 January 2017. Aquino stated: ‘According 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. This will provide opportunities for small- and medium-sized enterprises to participate in, and contribute to, the growth of our economy.’

In August of 2010 the ASEAN Regional Guidelines on Competition Policy invited the ASEAN countries to consider adopting competition laws with the standard ‘pillars’; and by the following year, Aquino had issued Executive Order No 45,¹⁰⁴ establishing an Office for Competition (OFC) within the Department of Justice (leaving it up to the OFC to manage issues of concurrent jurisdiction with dozens of sectoral regulators¹⁰⁵).

That Executive Order was not, however, a comprehensive solution; and it did not address certain fundamental difficulties such as the criminal-law nature of competition law violations under Article 186 of the Revised Penal Code. Against that background, the new competition law (Republic Act No 10667) was ratified in June of 2015 by the 16th Congress, signed by President Aquino on 21 July 2015, and it entered into force on 8 August 2015.¹⁰⁶ Merger review procedures have been in place since early 2016; the remainder of the Act was subject to a two-year transition and advocacy/education period (section 53 of the Act). As from 8 August 2017, the transitional period is over and the Act is fully effective.

The Competition Act did not abolish the OFC. Rather, it clarified—in sections 5 and 13—that the OFC will conduct preliminary investigations and will prosecute all criminal offences under the Act and under other competition-related laws. Undoubtedly the Philippine legislator was cognizant of a rough analogy with the dual enforcement system at the federal level in the USA; however, as will be seen, the allocation of responsibilities is significantly different in the case of the Philippines. Compared to the Department of Justice (DOJ) of the USA, the mandate of the OFC as defined in Executive Order No 45 is more limited, as it has no role in non-criminal actions for infringement, and no role in merger review procedures.¹⁰⁷ The future of the OFC’s activities will be shaped in part by the government’s present intention to reorganize and restructure the OFC in light of the adoption of the Philippine Competition Authority (PCA) and the establishment of the Philippine Competition Commission.

104 The Order, dated 9 June 2011, is available at <<http://www.gov.ph/downloads/2011/06jun/20110609-EO-0045-BSA.pdf>> accessed 6 January 2017. The Order was based on Republic Act 4152 of 1964, which assigned certain antitrust-related responsibilities to the Secretary of Justice such as the review of relevant laws, the drafting of revised legislation, case investigations and so on.

105 For discussion, see Rafaelita Aldaba and Geronimo Sy, ‘Designing a Competition Framework for Philippine Competition and Regulatory Agencies’ (2014) PIDS Discussion Paper Series No 2014-31. See also Geronimo Sy, ‘ASEAN Competition Law: The Philippines’ CPI Antitrust Chron, August 2015 (2), pp 3 and 8–10 (referring to 60 sectoral regulators).

106 The Act is available at <<http://www.gov.ph/2015/07/21/republic-act-no-10667>> accessed 28 December 2016.

107 The situation was different prior to the adoption of the PCA: pursuant to a 2014 Memorandum of Agreement with the Securities and Exchange Commission (SEC), the OFC was responsible for conducting a competition analysis of merger applications referred to it by the SEC. (See DOJ Press Release of 4 July 2014, <<http://www.doj.gov.ph/news.html?title=DOJ%20and%20SEC%20establishes%20merger%20control%20regime&newsid=295>> accessed 3 February 2017.)

Statutory objectives of the Philippine Competition Act 2015

Section 2 of the PCA indicates the Act's objectives:

Pursuant to the constitutional goals for the national economy to attain a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged . . . , the State shall:

- a. Enhance economic efficiency and promote free and fair competition in trade, industry and all commercial economic activities, as well as establish a National Competition Policy to be implemented by the Government of the Republic of the Philippines and all of its political agencies as a whole;
- b. Prevent economic concentration which will control the production, distribution, trade, or industry that will unduly stifle competition, lessen, manipulate or constrict the discipline of free markets; and
- c. Penalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.

The aims expressed in section 2 are consistent with the goal of promoting inclusive growth. Section 2 also recognizes that, insofar as it promotes equal opportunities, the Act will facilitate entrepreneurialism, private investment, the development and transfer of technology, resource productivity, and consumer choice. The National Competition Policy referred to in section 2(a) is an idea originally inspired by the Australian process that began with the 1993 Hilmer report and has now spread to a few other countries.¹⁰⁸ The Philippine Competition Commission (PCC) has conducted an initial review of the nationwide competitive landscape in order to assist the government (ie the National Economic and Development Authority, or NEDA¹⁰⁹) in formulating a National Competition Policy that is outlined in chapter 16 of the Philippine Development Plan 2017–22, approved by NEDA on 20 February 2017.¹¹⁰ The PCA and its effective enforcement are of course part of that National Competition Policy, but the Development Plan also mentions the following non-exhaustive and 'equally essential components': policies relating to competitive

108 With regard to the Philippines, see Erlinda Medalla (ed), *Toward a National Competition Policy for the Philippines* (PACSN and PIDS 2002) 9. For a summary of the Australian experience—with emphasis on policy design, appropriate sequencing and, crucially, political commitment and broad governmental and industrial participation—see Allan Fels and Wendy Ng, 'Rethinking Competition Advocacy in Developing Countries' in Sokol, Cheng and Lianos (n 5) 182, 193–6. See also Simon Corden (2009), 'Australia's National Competition Policy: Possible Implications for Mexico' <<https://www.oecd.org/daf/competition/45048033.pdf>> accessed 19 May 2017 (recounting in detail the implementation of the NCP in Australia).

109 NEDA has been described as 'perhaps the most reform-oriented' but 'not the most financially powerful' department of the government. See Balisacan and Hill (n 3) 19.

110 See chapter 16 ('Leveling the Playing Field through a National Competition Policy') of the National Development Plan, <<http://pdp.neda.gov.ph/wp-content/uploads/2017/01/Chapter-16.pdf>> accessed 16 May 2017.

neutrality, consumer protection, government regulations that do not impede competition, and removal of structural barriers.¹¹¹ Furthermore, on the basis of a whole-of-government approach, the Plan contemplates the establishment of an inter-agency institutional mechanism, or an ‘air traffic control tower’, so to speak, in order to ‘coordinate and oversee the implementation of these inter-related components’.¹¹²

The rather ambitious objective of the Philippine Development Plan 2017–22 is to create the conditions for achieving inclusive growth, restoring public trust in government institutions (which might be interpreted as at least mitigating the trust gap) and becoming a globally-competitive knowledge economy. The National Competition Policy contributes to this project by pursuing, through coordinated government action, a number of strategic supporting tasks. In brief—and apart from the obvious task of stopping anticompetitive business conduct—these supporting responsibilities are the following:¹¹³

- Reviews of potentially anticompetitive legislation and policies, with appropriate follow-up (essentially retention, reform or removal);
- Analysis of competition issues in priority sectors following a comprehensive prioritization exercise that identifies goods and services essential to poverty reduction or conducive to new livelihood and employment opportunities or positive externalities, or where competition is lacking;
- Promotion of competition-related policies and best practices, which includes the promotion of a competition culture;
- Capacity-building activities for government agencies and other institutions, which includes sustained support for enhancements of the institutional and technical capacities of the PCC and of other government organs that are mandated to promote competition; and
- as noted above, the establishment of a mechanism for implementing the National Competition Policy and for coordinating actions within the outlined framework.

Prohibition of anticompetitive agreements

Section 14 of the PCA prohibits certain anticompetitive agreements. It should be read together with section 26 (‘Determination of Anti-Competitive Agreement or Conduct’). It appears to create three categories of agreements: a *per se* category; a horizontal ‘object or effect’ category which admits of no exception; and an ‘object or effect’ category of agreements that may be justified. This articulation is expressed in the following manner.

The first category (agreements prohibited *per se*) pertains to agreements where parties: restrict competition as to price or other terms of trade; or where they fix prices in any auction or bid, including cover bidding, bid suppression, bid rotation and

111 See *ibid* 245.

112 *ibid*. See also *ibid* 253 (indicating that the envisaged oversight and coordination mechanism will involve NEDA, DTI, PCC, DOJ and the GCG, ie the Governance Commission for Government Owned and Controlled Corporations).

113 See *ibid* 250–53.

market allocation, or other similar bidding practices. Such agreements *ipso facto* infringe section 14.

The second category (certain horizontal ‘object or effect’ agreements) pertains to agreements between or among competitors which have the object or effect of substantially lessening competition¹¹⁴ and which either: set, limit, or control production, markets, technical development, or investment; or divide or share markets. Among other distinctions with the first category, the hybrid requirement of a showing of an object or effect of substantially lessening competition seems to mean that the burden of proof for a market-sharing cartel is higher than it is for a price-fixing cartel.

The third category (other ‘object or effect’ agreements) pertains to agreements which have the object or effect of substantially lessening competition; except that agreements in this category are ‘not necessarily’ prohibited if they contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits. There is no explicit indispensability or proportionality test.

As explained below in Section V, agreements falling within the first two categories can trigger both administrative and criminal sanctions, while agreements of the third type can trigger administrative sanctions only. With regard to bid-rigging, while market operators will trigger the *per se* prohibition against agreements of the first category above and therefore could be subject to the administrative or criminal sanctions prescribed under the PCA (see below), a separate statute, the Government Procurement Reform Act of 2002 (GPRA), may also apply.¹¹⁵ The GPRA was adopted to reduce opportunities for corruption, and to promote transparency and accountability and the participation of foreign bidders. As will be seen, the 2016 Implementing Rules and Regulations that correspond to the GPRA provide for criminal and administrative sanctions as well as civil liability in case of collusive tendering.

Prohibition of the abuse of dominance

Section 15 prohibits the abuse of dominance, thus going beyond the insufficiently nuanced concept of ‘monopolies’ referenced in the Constitution. The prohibition also appears, with a few additional details, in Rule 3 (sections 2 and 3) of the PCC’s Implementing Rules and Regulations (IRRs).¹¹⁶ Section 27 of the Act and Rule 8 of the IRRs set out the factors for assessing dominance. A rebuttable presumption of dominance applies, under section 27 of the Act and section 3 of Rule 8, where an

114 Throughout the following discussion, the term ‘substantially lessening competition’ is shorthand for ‘substantially preventing, restricting or lessening competition’. The terms ‘preventing’ and ‘restricting’ do not add any significant shades of meaning. Details regarding the PCC’s assessment when considering whether this standard has been met are given in s 26 of the Act and in Rule 7 of the IRRs adopted by the PCC in 2016. The IRRs are available at <<http://phcc.gov.ph/implementing-rules-regulations-philippine-competition-act>> accessed 26 January 2017.

115 The Act is available at <http://www.gppb.gov.ph/laws/laws/RA_9184.pdf> accessed 3 February 2017. For the 2016 Revised Implementing Rules and Regulations, see <<http://www.gppb.gov.ph/laws/laws/RevisedIRR.RA9184.pdf>> accessed 3 February 2017.

116 Cited in n 114, above.

entity has a market share of 50 per cent or more; the PCC can adjust that threshold in particular sectors (section 27 of the Act and section 4 of Rule 8).

The prohibition under section 15 of the Act applies where one or more entities, through illegitimate means, engage in conduct that would substantially lessen competition and where the behaviour is not justified. A specific list of abusive conduct is then given, and while no indication is given as to whether the list is exhaustive, it seems likely that the list is open-ended and may be expanded through case law. The listed practices are as follows.

- a. Selling goods or services below cost with the object of driving out competition unless the PCC concludes that the price was set in good faith to meet or compete with the lower price of a competitor selling the same or comparable product or service of like quality;
- b. Imposing barriers to entry or preventing competitors from growing except insofar as the impediment/conduct arises as a clearly indispensable result of a superior product or process, business acumen, or legal rights or laws;
- c. Making a transaction subject to acceptance of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;
- d. Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to substantially lessen competition, subject to exceptions;¹¹⁷
- e. Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebates, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent or lessen competition substantially, subject to exceptions for licensing, distribution, franchising, intellectual property rights, and secret information;¹¹⁸
- f. Making the supply of goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or services to be supplied;
- g. Directly or indirectly imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisherfolk,

117 The exceptions are: (i) socialized pricing for the less fortunate sectors of the economy; (ii) price differentials which reflect differences in the cost of manufacture, sale, or delivery resulting from differing methods, technical conditions, or quantities in which the goods or services are sold or delivered to the buyers or sellers; (iii) price differentials or terms of sale offered in response to the offers of a competitor; and (iv) price changes in response to changing market conditions, marketability of goods or services, or volume.

118 The Act does not prohibit either (i) permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements, such as those giving each party the right to unilaterally terminate the agreement; or (ii) agreements protecting IPRs, confidential information or trade secrets.

- micro-, small-, medium-scale enterprises, and other marginalized service providers and producers;
- h. Directly or indirectly imposing unfair purchase or selling prices on competitors, customers, suppliers or consumers, except that prices are not considered unfair if they develop as a clearly indispensable result of the superiority of a product or process, or business acumen or legal rights or laws; and
 - i. Limiting production, markets or technical development to the prejudice of consumers, unless such limitations develop as a clearly indispensable result of the superiority of the product or process, or business acumen or legal rights or laws.

Notwithstanding the above list, section 15 of the PCA envisages the possibility of justification. The criteria for such a justification are parallel to those already seen (in the previous sub-section) in relation to the third category of restrictive agreements under section 14. Thus, any conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit may not necessarily be considered an abuse of dominant position. Again, there is no explicit requirement of indispensability or proportionality.

Merger control

Chapter IV of the PCA (sections 16–23), as supplemented by Rule 4 of the 2016 IRRs and (so far) two Clarificatory Notes,¹¹⁹ establishes the first comprehensive merger control system for the Philippines. According to section 17, a merger or acquisition as defined in section 4 must be notified to the PCC if the value of the transaction exceeds a billion pesos (just over USD 20 million).¹²⁰ The IRRs clarify that the figure of a billion pesos refers to the value of the target's assets located in the Philippines or to the gross revenues generated by those assets in or into the Philippines.¹²¹ In addition, the IRRs require that at least one of the acquiring or acquired parties must have consolidated sales or assets in the Philippines exceeding the same amount, a billion pesos. The IRRs thus restrict the apparently broad scope of the notification trigger in section 17 and ensure that, although foreign-to-foreign

119 The IRRs are cited in n 114, above. The Clarificatory Notes (on internal restructuring, which is not notifiable absent a change of control, and on binding preliminary merger agreements versus definitive agreements) are available at <<http://phcc.gov.ph/category/resources/clarificatory-notes>> accessed 20 January 2017.

120 Additional details for determining whether the value of the transaction meets the threshold are given in Rule 4, s 3(b) of the IRRs. In brief, where voting shares (or an interest in a non-corporate entity) are being acquired, a threshold of 35% of the voting shares (or of the profits/assets of the non-corporate entity) applies. In a scenario where an entity already holds 35% of the voting shares (or of profits/assets) of another entity, another notification will be necessary if a new transaction would result in the acquiring entity crossing a 50% threshold.

121 In the case of a joint venture, the transaction may be subject to notification if the value of the assets contributed to the joint venture or the sales derived from them exceed a billion pesos. See IRRs (n 114, above), Rule 4, s 3(d).

operations may be subject to compulsory notification,¹²² a transaction will only have to be notified if it has a significant local nexus.

Where the notification obligation is triggered, section 17 requires the parties to wait until 30 days after they notify the PCC, in accordance with the PCC's forms and procedures, before they proceed with their transaction.¹²³ The details regarding determination of control for acquisitions, pre-notification contacts, the notification procedure, information requirements and confidentiality, timing and deadlines are all provided in the IRRs. Where the PCC considers that a 'Phase II' is necessary, this phase will take 60 days running from the parties' receipt of notice that more information is required. If the parties provide the required information but the PCC fails to take a decision within its deadlines, the transaction will be deemed to be approved.

If the parties fail to respect the notification requirement and proceed to consummate their transaction, then under section 17 the operation is considered void and the PCC will impose on the parties a fine of between 1 and 5 per cent of the value of that transaction. In February 2017, the PCC adopted a memorandum circular that explains how fines are determined where parties fail to comply with merger notification requirements.¹²⁴

Section 20 establishes the substantive test applied by the PCC. It provides that the PCC must prohibit merger or acquisition agreements that substantially lessen competition in the relevant market or in the market for such goods or services as the PCC may determine. The factors taken into account in the PCC's assessment are standard and described in Rule 4, section 1 of the IRRs.

Section 21 of the Act then establishes exemptions from the prohibition. A merger or acquisition agreement that would otherwise be prohibited will be exempt if the parties show that either: the concentration is likely to bring about efficiency gains that are greater than the actual or likely anticompetitive effects of the transaction; or a party to the agreement is faced with actual or imminent financial failure and the agreement is the least anticompetitive of the known alternative uses for that party's assets.¹²⁵

By the end of January 2017, 80 transactions affecting a variety of sectors (eg electricity, petroleum and gas, internet services, air conditioning supply, manufacturing, health and insurance, business process outsourcing) and collectively valued at 1.7 trillion pesos (USD 34 billion) had been notified to the PCC.¹²⁶ The Chairman of

122 See eg Case 10-M-065/2016, JX Holdings / Tonengeneral Sekiyu <<http://phcc.gov.ph/commission-decision-no-10-m-0652016-acquisition-jx-holdings-inc-tonengeneral-sekiyu-k-k-m-065201>> accessed 22 January 2017.

123 The PCC's merger notification form (valid from 1 September 2016) is available at <<http://phcc.gov.ph/phcc-merger-notification-form>> accessed 25 January 2017.

124 See <<http://phcc.gov.ph/wp-content/uploads/2017/02/PCC-Memorandum-Circular-No.-17-001.pdf>> accessed 19 May 2017.

125 In the failing firm scenario, the relevant entity is not to 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 the Act or acquiring or maintaining its market share in a relevant market by such means without violating the Act's provisions. Nor are purely passive investments prohibited.

126 As reported at the nine-minute mark of Chairman Balisacan's press briefing of 31 January 2017. A video of the briefing is available at <<https://www.youtube.com/watch?v=Xce0A2tmocc>>. As of early February 2017, 11 of the PCC's merger decisions had been published on its website. See <<http://phcc.gov.ph/category/resources/phcc-decisions>> accessed 3 February 2017.

the PCC has indicated that there is no backlog of applications.¹²⁷ This suggests that the PCC worked rapidly in 2016 to recover from an initial period in which the agency was inundated with filings.¹²⁸ The situation seems to have improved once the temporary filing procedures that applied in early 2016 were superseded by the IRRs in June of that year.

So far, the merger case that has attracted the most attention is the pending telecoms case involving a proposed joint acquisition by the two major incumbents, PLDT and Globe Telecom, of a new entrant, the telecoms unit of San Miguel. When the PCC asserted jurisdiction to review the transaction, the two incumbents separately filed court petitions, in two different Divisions of the Court of Appeals, seeking temporary restraining orders and injunctions against the PCC. In July 2016, Globe's petition was denied. Subsequently, the PCC on 25 August 2016 issued a Preliminary Statement of Concern regarding the competitive effects of the transaction. The next day, PLDT's petition for a preliminary injunction was granted by the (12th Division of) the Court of Appeals. In effect, this ruling allowed the transaction to proceed. Given the apparently significant anticompetitive effects of the transaction (whereby a duopoly squelched a possible maverick-type competitive threat¹²⁹), if the Court of Appeals rules against the PCC on the merits this would appear, on the surface, to be a serious setback for the young agency. However, the IRRs, which entered into force in June 2016, had not yet become effective at the time the merger was notified the month before; the applicable notification regime at that time consisted of temporary 'circulars' that will be immaterial for future transactions.¹³⁰ In the meantime, in a petition to the Supreme Court, the PCC has asked the court to lift the injunction of the Court of Appeals; the petition criticizes the appellate court for failing to give due weight to the public interest inherent in the PCC's mandate of protecting competition through the application of merger control.¹³¹

127 See press briefing, *ibid.* See also PCC Press Release 2017-004 of 21 February 2017, where the PCC decides, for now, to refrain from modifying the current notification threshold of 1 billion pesos).

128 It is reported that in the first few months the PCC struggled to catch up with the notifications. See Kovacic and Lopez-Galdos (n 15) 103 n 107 (based on an interview of August 2016 with PCC Commissioner Butuyan).

129 The PCC found several horizontal and vertical issues in mobile and other internet services and identified several theories of harm, including the elimination of a potential maverick. See Case M-037/2016, PLDT and Globe Telecom / Vega, Bow Arken and Brightshare, Preliminary Statement of Concern, 25 August 2016 <<http://phcc.gov.ph/preliminary-statement-concerns>> accessed 20 January 2017. For further preliminary discussion (prior to the issuance of the PCC's Statement), see Raymond Pasillao (2016), Comment <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834033> accessed 20 January 2017.

130 Kovacic has underlined on several occasions the challenges newly established agencies face when defending their decisions before judges who have not been acculturated to competition law concepts, and who may cleave to procedural technicalities. See eg Kovacic and Lopez-Galdos (n 15) 107 n 127 and accompanying text ('In most jurisdictions, courts in the early implementation period are likely to regard the competition law with wariness or ambivalence.'). This is not to say that agencies should be given a free pass if they breach essential procedural requirements. The early implementation period may be a learning process for them as well—for example, this may be the case in non-merger antitrust investigations if the scope and nuances of the rights of defence have not yet been clarified.

131 See PCC Press Release 2017-012 of 19 April 2017, <<http://phcc.gov.ph/pcc-asks-sc-lift-ca-injunction-blocking-review-p69-1-b-telco-deal>> accessed 19 May 2017.

The Philippine Competition Commission

With the adoption of the PCA 2015, the main competition law enforcer today is the Philippines Competition Commission (PCC), a quasi-judicial authority attached to the Office of the President. The five Commissioners are appointed by the President and must have the requisite professional experience, probity and independence to discharge their responsibilities. The PCC is led by a Chairman with the rank equivalent to cabinet secretary.¹³² The Chairman is joined by four other Commissioners who have the rank of under-secretaries. Each of the five serves a non-renewable seven-year term, during which they may not hold any other (non-teaching) office or appointment.¹³³ They can only be suspended or removed for just cause. The organization has an Executive Director and it currently has six Offices: the Administrative and Legal Office (corporate services such as human resources and legal); Communication and Knowledge Management; a Competition Enforcement Office (which has a Monitoring and Investigation Division and a Litigation Division); an Economics Office (which has a Policy and Markets Division and an Economic Investigation Division); Financial Planning and Management; and a Mergers and Acquisitions Office. The initial budget of the organization is 300 million pesos (USD 6 million). As of 31 January 2017, the number of employees working at the PCC was 111, a figure which may grow to 200 by the end or 2017.¹³⁴ Among these staffers are seven individuals with advanced economics training: three are PhD-qualified economists, while the other four have obtained Masters degrees in the field.

A workforce of 111 and soon up to 200 employees makes the PCC a 'medium sized' agency.¹³⁵ It remains to be seen whether this range of up to 200 employees is adequate given the size of the Philippine economy. In 2012, a review by the Organisation for Economic Co-operation and Development (OECD) of regulatory reform in Indonesia indicated, with regard to the Komisi Pengawas Persaingan Usaha (KPPU), that a staff of 426 employees was still insufficient given that country's size and population.¹³⁶ In the OECD's view this staff size imposed overly strict resource

132 The current Chairman is Arsenio Balisacan, who had previously served as Director-General of the National Economic and Development Authority, the public socioeconomic planning body of the Philippines. In addition to a number of government appointments, Professor Balisacan has expertise in development economics and has been a Dean and Professor of the University of the Philippines School of Economics.

133 To facilitate continuity, two of the initial Commissioners will serve a term of only five years, thus giving their successors two years of experience by the time the mandate of the three remaining Commissioners expires. See s 7 of the PCA.

134 See Arsenio Balisacan, Welcome Speech, Pasig City, 1 February 2017, p 2, <https://docs.google.com/viewerng/viewer?url=http://phcc.gov.ph/wp-content/uploads/2017/02/First-Year-Anniv-Speech-1Feb2017.docx&hl=en_US> accessed 19 May 2017.

135 While purely quantitative categories are problematic, it is said that medium-sized agencies are those with between 50 and 200 employees. An agency with fewer than 50 employees is 'small'. An agency with more than 200 employees is 'large'. See eg ICN (2014), Agency Effectiveness Practice Manual, Chapter 4 ('Human Resources Management in Competition Agencies'), p 15, <<http://www.internationalcompetitionnetwork.org/uploads/library/doc969.pdf>> accessed 7 February 2017.

136 See OECD (2012), Indonesia: Competition Law and Policy, p 46, <<https://www.oecd.org/indonesia/chap%203%20-%20competition%20law%20and%20policy.pdf>> accessed 7 February 2017. Ironically, the KPPU was later trimmed down, as Indonesia reported a staff of 358 in its 2014 Annual Report on Competition Developments submitted to the OECD (p 10), available at <<http://www.oecd.org/officialdo>

constraints on the KPPU, although part of the problem was mandatory investigation of complaints. It must be pointed out that comparisons and assessments of the appropriateness of agency size are hardly an exact science.¹³⁷ Nevertheless, one may suggest that, in the Philippines, considering the foreseeable growth of the PCC's tasks and operations as the organization gradually matures, future budget adjustments that enable the agency to grow its staff beyond the currently authorized 200 employees may prove to be sensible.¹³⁸

Section 12 of the Act enumerates the powers and functions of the PCC. These include most notably the following:

- (a) Investigate, hear and decide cases involving any violation of this Act and other existing competition laws *motu proprio* or upon receipt of a complaint from an interested party or upon referral from a regulator, and institute appropriate civil or criminal proceedings;
- (b) Review proposed mergers and acquisitions, and prohibit mergers and acquisitions if they would substantially prevent or lessen competition in the relevant market;
- (d) Upon finding, based on substantial evidence, that an entity has entered into an anticompetitive agreement or abused its dominant position, stop or redress that conduct by applying remedies such as issuing injunctions, ordering divestment and/or requiring disgorgement;
- (e) Conduct administrative proceedings and impose sanctions, fines or penalties for any breach of the Act or any breach of its implementing rules and regulations (IRRs);
- (f) Issue subpoenas *duces tecum* and subpoenas *ad testificandum* to require the production of books, records, or other relevant documents or data, or to require personal appearances and summon witnesses;
- (g) Subject to court order, undertake inspections of business premises and other offices, land and vehicles used by the entity if the PCC reasonably suspects that books, tax records, or other relevant documents are kept there, in order to preserve any evidence;
- (h) Issue adjustment or divestiture orders, including orders for corporate reorganization, provided either that there is no equally effective behavioural

ments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2015)41&docLanguage=En> accessed 7 February 2017.

137 See Vivek Ghosal, 'Resource Constraints and Competition Law Enforcement' in Sokol, Cheng and Lianos (n 5) 90, 107–12 (engaging in a multi-variable benchmarking of 10 agencies, taking account of the size and sophistication of the relevant economies, but highlighting uncertainties in data and the precarious nature of comparing agencies given the potentially very different circumstances in which they operate).

138 As put in words to which everyone can relate, 'budgets and capacity are never sufficient'. Annetje Ottow, *Market and Competition Authorities: Good Agency Principles* 241 (OUP 2015). At the same time, however, on the assumption that the growing expertise and versatility of staffers will yield economies of scope and enhanced efficiency, the rate of increase in the number of needed officials will be tempered over time. See Ghosal (n 137) 111–12.

remedy, or that any equally effective behavioural remedy would be more burdensome for the enterprise concerned than the structural remedy;

(k) Issue advisory opinions and guidelines on competition matters for the effective enforcement of the Act, and submit annual and special reports to Congress, including proposed legislation for the regulation of commerce, trade, or industry;

(m) Conduct, publish, and disseminate studies and reports on anticompetitive conduct and agreements to inform and guide the industry and consumers;

(n) Intervene or participate in administrative and regulatory proceedings requiring consideration of the provisions of the Act that are initiated by government agencies such as the Securities and Exchange Commission, the Energy Regulatory Commission and the National Telecommunications Commission; and

(r) Advocate pro-competitive policies by reviewing economic and administrative regulations, *motu proprio* or upon request, to assess whether they adversely affect competition—and counselling the concerned agencies against such regulations—and by advising the Executive on the competitive implications of government actions, policies and programmes.

The PCC's enforcement powers are further specified in provisions contained in Chapter VII of the Act (sections 31 et seq.), for example with regard to fact-finding and investigations. Several of the provisions in Chapter VII are discussed below. Under section 3 of the Act, the PCC is competent to enforce the act extraterritorially if the misconduct has a direct, substantial and reasonably foreseeable effect on trade, industry or commerce in the Philippines.

Finally, with regard to accountability, section 49 of the Act provides that the PCC's work is to be overseen by the Congressional Oversight Committee on Competition. The Committee is jointly chaired by the Chairpersons of the Senate Committee on Trade and Commerce and the House of Representatives Committee on Economic Affairs. The Secretariat of the Committee is drawn from personnel of the committees comprising the Congressional Oversight Committee. The Act does not provide details regarding the means by which oversight is to be carried out; it can however be surmised that the Committee will establish procedural rules in consultation with the PCC.

Other competent institutions: The OFC, sectoral regulators and the Philippine courts

The OFC, which is attached to the Secretary of Justice, continues to carry out certain tasks relating to competition, consumer protection and advocacy, although some its activities have been scaled back.¹³⁹ As noted earlier, additional changes are expected, as the government envisages that the OFC will be reorganized and restructured to

139 See the OFC's announcements at <<https://www.doj.gov.ph/office-for-competition.html>> accessed 3 February 2017. The OFC prioritizes certain sectors—namely telecoms, energy, commodities and transportation—where competition and consumer protection continue to face challenges.

further accommodate the new institutional architecture. Some of the OFC's tasks have been transferred to the PCC, such as those relating to the implementation of the principles of the 'CLIP' (Competition Law Implementation Project) programme of the ASEAN-Australia-New Zealand Free Trade Area Competition Committee. In addition to its other past advocacy efforts, the OFC has published a brochure explaining the benefits of compliance and describing desirable elements in a corporate compliance programme.¹⁴⁰ However, apart from advocacy (which the OFC has pursued in coordination with the Tariff Commission¹⁴¹), now that the PCA is in full effect, the primary relevance of the OFC will be in the context of preliminary investigations and criminal cartel and bid-rigging prosecutions, and presumably this will be a factor in the OFC's restructuring. In cartel and bid-rigging cases the OFC works closely with sister departments internal to the Department of Justice—specifically, the National Bureau of Investigation and the National Prosecution Service.¹⁴²

Many authorities also clearly remain relevant with regard to technical and economic regulation. These authorities include the Energy Regulatory Commission (historically more active than the other regulators in competition matters), the Department of Energy, the National Telecommunications Commission, the Insurance Commission, the Philippine Ports Authority, and many others. However, section 32 of the Act provides that the PCC has original and primary jurisdiction over all competition-related issues. It also has jurisdiction over all other issues that involve both competition and non-competition issues, although the regulator in question must be consulted and must be given a reasonable opportunity to submit its own opinions and recommendations before the PCA takes a decision.

Finally, the PCA and other market-related laws can be applied by the Philippine courts, whether in the context of a challenge to the quasi-judicial decisions of the PCC, or in criminal or civil law actions. In the case of an appeal against a decision (or order or ruling) of the PCC, section 39 of the PCA provides that the competent court is the Court of Appeals. An appeal does not normally have suspensory effect with regard to the challenged act, but the Court can exceptionally choose to stay its application. Decisions of the Court of Appeals may be challenged before the Supreme Court. Where a criminal law action is brought by the Department of Justice, or where civil claims are filed under section 45 of the PCA, section 44 specifies that the 'Regional Trial Court of the city or province where the entity or any of the entities whose business act or conduct constitutes the subject matter of a case, conducts its principal place of business, shall have original and exclusive jurisdiction, regardless of the penalties and fines herein imposed, of all criminal and civil cases involving violations of this Act and other competition-related laws'. This broad language also implicitly recognizes the jurisdiction of the applicable Regional Trial Court where a (stand-alone) claim is brought under Article 28 of the Civil Code of

140 See <<https://www.doj.gov.ph/files/ofc/Biz%20Comply%20Brochure%20DL.pdf>> accessed 3 February 2017.

141 The Tariff Commission's advocacy work is summarized in its Primer (n 99, above) 15–7.

142 See UNCTAD (n 81) 23–24.

1950, which in this context may be considered a ‘competition-related law’. Section 44 also provides that:

[i]f the defendant or anyone is charged in the capacity of a director, officer, shareholder, employee, or agent of a corporation or other juridical entity who knowingly and willfully authorized the commission of the offense charged, the Regional Trial Court of the city or province where such corporation or juridical entity conducts its principal place of business, shall have jurisdiction.

To the author’s knowledge, Article 28 of the Civil Code, which allows, as noted above, damages claims in unfair competition cases involving unjust, oppressive or ‘highhanded’ methods, has not led to significant litigation in the field of competition law *stricto sensu*. The criteria embodied in the provision are difficult to satisfy, as convincing proof must show that the defendant has used force, intimidation, deceit, or other oppressive methods. In the past, it has been suggested that the Civil Code should be amended to facilitate private actions in this context,¹⁴³ but so far nothing has come of this.

IV. COMPETITION LAW ENFORCEMENT POWERS

Section 31 of the PCA establishes the enforcement powers of the PCC. It grants exclusive authority to the PCC to initiate and conduct a fact-finding inquiry with a view to enforcing the Act on the basis of reasonable grounds and either at its own initiative or upon receipt of complaint from an interested party or from a regulatory agency.¹⁴⁴ Within a 90-day window, and after considering the evidence it uncovers through its fact-finding or preliminary inquiry, the PCC either issues a resolution ordering the closure of the case if it finds no infringement of the Act, or, if it has reasonable grounds to suspect an infringement, it proceeds with a full administrative investigation. After due notice and a hearing, the PCC can order the respondent to temporarily cease or desist from acts that would result in a material and adverse effect on consumers or competition in the relevant market. Following a full investigation, sanctions and/or remedies are possible (see Sections V and VII).

With regard to criminal charges, the PCC can file criminal complaints with the Department of Justice for violations of the Act or other relevant laws, which the DOJ may then preliminarily investigate and prosecute in court. At this early stage, no such case has been filed. Given that competition law in the Philippines is ‘new’ despite being on the books for many decades prior to the Act, one may speculate that the use of criminal law sanctions, if it does develop, would be gradual and tentative until the gap is bridged between the country’s social and legal norms.

143 See Anthony Abad, ‘Recommendations for Philippine Antitrust Policy and Regulation’ in Medalla (n 108) 339–402, 381, 401.

144 According to s 33, the PCC conducts inquiries by administering oaths, issuing subpoena *duces tecum* and summoning witnesses, and by commissioning consultants or experts. It enforces its orders and carries out its resolutions by all lawful means, by contempt orders and by imposing fines.

V. COMPETITION LAW SANCTIONS

Sections 29 and 30 of the PCA provide for administrative and criminal sanctions. As concerns administrative sanctions, which are general and may be applied in cases involving either anticompetitive agreements or the abuse of dominance, section 29(a) empowers the PCC, after due notice and a hearing, to impose a fine of up to 100 million pesos (USD 2 million). For a repeat offender, the fine must be between 100 million and 250 million pesos. In fixing the fine, the PCC is required to consider the gravity and the duration of the violation. Section 41 of the Act establishes an uplift in the specific scenario where the violation involves the trade or movement of basic necessities or prime commodities. In the latter case, the fine imposed by the Commission (or by the courts) is multiplied by three. This generally means the maximum fine in such circumstances will be up to 300 million pesos.

While fines of modest levels are quite understandable in a developing country, the above maxima manifestly seem to lack flexibility in a case where only larger fines could have any deterrent effect, whether the circumstances involve domestic or multinational infringers. Conceivably, the Act's criminal penalties could pick up some of that slack, but one may have doubts in this regard. Globally, and with some exceptions, few criminal sanction systems in the antitrust context work particularly well. There are a variety of reasons for this, some of which are interrelated. To mention briefly only three factors, there are long time frames of the trial process; a particularly rigorous standard of proof; and often, significant public and judicial scepticism about whether competition law infractions warrant the opprobrium of penal convictions and custodial sanctions.¹⁴⁵

In any event, section 30 provides for such criminal penalties with regard to two specific types of infringements, namely, the first two categories of anticompetitive agreements described above. As will be recalled, the first category encompasses agreements prohibited *per se*, where the parties fix prices or rig bids. In the case of bid-rigging, Rule XXI of the 2016 revised Implementing Rules and Regulations for the application of the Government Procurement Reform Act of 2002 (GPRA)¹⁴⁶ provides an additional and serious basis for criminal liability: the penalty for a bidder's director, officer or employee who engages in bid-rigging is a prison sentence of 6–15 years. Furthermore, Rule XXII allows the government to proceed against the bidder in civil proceedings to obtain restitution or illegal profits or both, at the discretion of the court. Rule XXIII adds the possibility of administrative suspension orders for bidders, barring them from participating in tender procedures for one or two years depending on whether it is a first or repeated offence. Additional sanctions apply to punish any public official who participates in such conspiracies.

Agreements of the second category are those between competitors which have the object or effect of substantially lessening competition and which either share markets or limit production, markets, technical development or investment. Where

145 Among many other contributions, see Christine Parker and Caron Beaton-Wells, 'Justifying Criminal Cartel Conduct: A Hard Case' (2012) 1 JAE 198–219; Caron Beaton-Wells, 'Criminal Sanctions for Cartels—The Jury is Still Out' in Ariel Ezrachi (ed), *International Research Handbook in Competition Law* (Edward Elgar 2012) 266–90; Peter O'Loughlin, 'The Criminal Enforcement of Antitrust Law—The Importance of Building an Enforcement Culture and How to Create It' (2016) 5 UCLJLJ 116–45.

146 The GPRA and its Implementing Rules and Regulations are cited above in n 115.

the parties have concluded agreements of either of the two mentioned categories (per se illegal agreements or ‘object or effect’ agreements), each violation will be punished by imprisonment from 2 to 7 years, and a fine of at least 50 million pesos but no more than 250 million pesos. The penalty of imprisonment is imposed upon the responsible officers and directors of the entity. Section 30 also specifies that, where the defendant is a legal person, the custodial sanction will be imposed on its officers, directors or employees that hold managerial positions, provided they are ‘knowingly and willfully responsible’ for the violation.

Sanctions can be avoided or mitigated by virtue of the statutory leniency programme (see Section VI below).

In addition to sanctions, and as noted earlier, the PCC is authorized under sections 12(d) and 12(h) to impose remedies such as disgorgement or (where the above-discussed criteria are met) divestment. Although section 12 does not explicitly empower the PCC to impose behavioural remedies, section 12(d) is sufficiently expansive to include this power, and section 12(h) clearly corroborates this interpretation when read *a contrario*. According to section 37, behavioural remedies may also be agreed in the non-adversarial contexts discussed below in Section VII.

VI. LENIENCY POLICY

In the Philippines, the leniency programme is established by section 35 of the PCA. The benefits are immunity from suit or a reduction of any fine that would otherwise be imposed on a party to an anticompetitive agreement of the first two categories discussed above (‘Section 14(a)’ and ‘Section 14(b)’ agreements). The PCC will grant such benefits to reward the voluntary disclosure of information regarding agreements of those types if that information satisfies specific criteria prior to or during the fact-finding or preliminary inquiry stage of the case.

To qualify for immunity, the applicant must come forward before a fact-finding or preliminary inquiry has begun, and the following conditions must be met:

- a. At the time the applicant comes forward, the PCC must not already have received information about the activity from any other source;
- b. When the applicant discovered the illegal activity it must have acted promptly to terminate its participation;
- c. The applicant must report the wrongdoing with candor and completeness and must provide full, continuing, and complete cooperation throughout the investigation; and
- d. The applicant must not have coerced another party to participate in the activity and must clearly not have been the leader or originator of the activity.

Even where the PCC has already gained information about the illegal activity following the commencement of a fact-finding or preliminary inquiry, the applicant will be granted leniency if the above conditions (b) and (c) are satisfied and if the following additional requirements are also met: (i) the applicant is the first to come forward; (ii) the PCC does not already have evidence against the applicant that is likely to

result in a conviction; and (iii) the PCC determines that granting leniency would not be unfair to others.

Section 35 of the Act also states that the Office for Competition may grant immunity or leniency in accordance with the conditions described above if there is a preliminary investigation pending before it.

The bare bones of section 35 will be supplemented by future PCC Rules and Regulations, likely by the end of 2017. The more precisely formulated Rules may be expected to provide the security needed to encourage applications for leniency.

VII. 'COMMITMENTS', CONSENT ORDERS, FORBEARANCE, AND OTHER NON-ADVERSARIAL CASE RESOLUTION

An investigation can be closed in the Philippines by way of non-adversarial remedies, including consent orders, or the PCC may choose to forbear from pursuing the case for a period of time. The two key provisions governing these means of resolving cases are sections 37 and 28 of the PCA.

Section 37 allows the PCC to employ non-adversarial administrative remedies. Under this provision the PCC, in order to encourage voluntary compliance, allows parties to take advantage of the following remedies before the institution of administrative, civil or criminal actions.

- i. *Binding Ruling.* Where no prior complaint or investigation has been initiated, any entity in doubt about whether a contemplated act, agreement or decision is unlawful or qualifies for an exemption may ask the PCC to make a binding ruling.¹⁴⁷ If the PCA finds an infringement, the applicant will have a reasonable period up to 90 days to comply with the ruling. Apart from legal certainty, a significant benefit is that the applicant will not be subject to administrative, civil, or criminal action. Although Section 37 does not say so, the binding ruling is a decision of the PCC and thus should be appealable under Section 39 of the Act.
- ii. *Order to Show Cause.* If the PCC makes a preliminary finding that any entity is conducting its business in a manner that may infringe the Act or other competition laws, and if it also finds that an order to show cause would be in the public interest, it will provide the entity a written description of the material conduct, a statement of facts and information as well as a summary of the supporting evidence, and will order the entity to show why it should not be required to stop the infringing conduct, or pay an administrative fine or adjust its practices.
- iii. *Consent Order.* Prior to the conclusion of the PCC's inquiry, an investigated entity may propose to the PCC that it should adopt a consent order on proposed terms and conditions.¹⁴⁸ At a minimum, the final consent order must specify:

147 Such a ruling is for a specified period, which may be extended by the PCC.

148 Such a consent order does not bar any inquiry for the same or similar acts if they are continued or repeated.

- a. The payment of an amount within the range of fines described above;
- b. The required compliance report;
- c. Payment of damages to any injured private party; and
- d. Other terms the PCC deems appropriate for effective application of the Act or of other competition laws.

To avoid a chilling effect, section 37(e) provides that requests for a binding ruling or for an order to show cause, and proposals for a consent order, as well as the facts, information or statements provided in that context and the resulting ruling or order itself will all be inadmissible as evidence in any criminal proceedings (arising from the same act concerned) against the relevant entity or against its officers, employees, or agents.

The Act also provides, in section 28, for the possibility of ‘forbearance’ by the PCC, at its discretion. Forbearance entails a one-year (extensible) exemption. Specifically, according to section 28 of the Act and Rule 9, section 1 of the IRRs, the PCC—either on its own motion or upon application, and prior to the time it initiates an inquiry—can decide not to apply the provisions of the Act or the IRRs (in whole or in part, and in all cases or only specific cases) for a limited time if it determines that:

- a. Enforcement is unnecessary to attain the policy objectives of the Act;
- b. Forbearance will not impede competition;
- c. Forbearance is consistent with the public interest and consumer welfare;
and
- d. Forbearance is justified in economic terms.

If the above criteria are satisfied it would indeed be sensible to show forbearance; but in those circumstances one may also wonder whether there is conduct incompatible with the Act at all. In any event, before it adopts such a forbearance order, the PCC has to organize a public hearing under section 28 of the Act and Rule 9, section 2 of the IRRs. The PCC can attach conditions to the order to ensure the long-term interests of consumers. The order must be duly published.

VIII. ADVOCACY AND MARKET STUDIES

Once the Office for Competition was established in 2011, it soon began to lay the foundation for strong advocacy efforts. It undertook important education, outreach and culture-building efforts, and it developed its own capacities and its relationships with other government organs and sector-specific agencies—often in cooperation with international organizations and in cooperation, domestically, with the Tariff Commission.¹⁴⁹

Those advocacy efforts continue, but the PCC now also has a role to play. This potentially implies an expansion of the role of advocacy in the Philippines. Among other provisions, the PCA notably specifies, in section 12(r), that the PCC will:

149 For a summary of the OFC’s advocacy, outreach and capacity-building efforts between 2012 and 2014, see UNCTAD (n 81) 27–9.

[a]dvocate pro-competitive policies of the government by: (1) Reviewing economic and administrative regulations, *motu proprio* or upon request, as to whether or not they adversely affect relevant market competition, and advising the concerned agencies against such regulations; and (2) Advising the Executive Branch on the competitive implications of government actions, policies and programs.

There is also a specific provision that contemplates the involvement of the PCC in pending administrative or regulatory cases. As section 12(n) states, the PCC will '[i]ntervene or participate in administrative and regulatory proceedings requiring consideration of the provisions of this Act that are initiated by government agencies such as the Securities and Exchange Commission, the Energy Regulatory Commission and the National Telecommunications Commission'. With regard to generally applicable legislation, section 12(k) states that the PCC will submit 'special reports' to Congress, reports which one may presume could be prepared with a view either to influence legislation in the pipeline or to highlight unnecessary distortive effects of existing legislation. As already noted, under section 12(o) the PCC plays an important role in the development of a National Competition Policy for the Philippines.¹⁵⁰ Furthermore, pursuant to its mandate to advocate pro-competitive policies, the PCC has set a promising precedent by intervening in litigation as *amicus curiae*¹⁵¹ in order to underline the restrictive effects of barriers to investment arising from licensing restrictions, specifically in the context of the construction industry.¹⁵²

The PCC has recognized that one of its immediate advocacy challenges is to embed within the Philippines the principle of competitive neutrality, a crucial element of a competition culture.¹⁵³ In December of 2016, it held a two-day consultation

150 See nn 110–13 and accompanying text.

151 *Amicus* intervention is permitted by Rule 138 (at s 36) of the Rules of Court, <http://www.lawphil.net/courts/rules/rc_138_bar.html> accessed 3 February 2017. According to this provision, experienced and impartial attorneys may be invited by the court to appear as *amici*. While the Rule refers only to an invitation, it appears that a motion to appear as *amicus* may be filed with the court without prior invitation. See eg *Ang Ladlad LGBT Party v COMELEC*, GR No 190582, 8 April 2010 (motion to intervene filed by the Commission on Human Rights granted by the Supreme Court).

152 See PCC Press Release 2017-001 of 6 January 2017. The case in question, between Manila Water Company, Inc (MWCI) and the government-created Philippine Contractors Accreditation Board (PCAB), is on appeal before the Supreme Court. In a brief filed with the Court in December 2016 (and in a letter to the Solicitor General, the PCAB's legal representative), the PCC argued that the 'nationality' distinction in the PCAB's current licensing scheme for construction contractors—which disfavours foreign contractors, inhibits licence applications and keeps prices for construction high—should be eliminated. See also Raadee Sausa, 'PCC asks SC: Scrap Nationality Requirement for Contractors' *Manila Times* (7 January 2017) <<http://www.manilatimes.net/pcc-asks-sc-scrap-nationality-requirement-contractors/305589>> accessed 19 May 2017.

153 Historically, the Philippines has struggled to achieve a level playing field between public and private enterprises, one of several problems posed by the prevalence of SOEs. See GCG, 'The Legacy Report' (2016) <http://gcg.gov.ph/site/public_files/gcg1468227890.pdf> accessed 20 January 2017. Johann Carlos Barcena and Ronald Chua, 'Philippine Government Corporate Sector: Quo Vadis?' (2014) 87 *PhLJ* 667–737; Jinkee Bantung, 'A Critique of Recent Governance Reforms of State-Owned Enterprises in the Philippines and their Proposed Improvements' (2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373049> accessed 20 January 2017. The 2011 Government Owned and Controlled Corporate Governance Act (among other things) created a five-member Commission (the GCG) to determine whether existing SOEs required reorganization, streamlining, liquidation or privatization. (See

with certain stakeholders (congressional leaders, other agencies, and international speakers) to discuss this issue. In a press release describing that event, the PCC explained that competitive neutrality is relevant in connection with government-owned public monopolies, government-authorized private monopolies, government control of entry and expansion, and government provision of products that compete with the private sector.¹⁵⁴ In the newly issued Philippine Development Plan 2017–2022, the government (ie NEDA), in collaboration with the PCC, has recognized the need to move closer to competitive neutrality and to reform tax and other policies that currently favour government-owned and controlled corporations; the National Competition Policy explicitly makes competitive neutrality an important part of the government’s pro-competitive agenda.¹⁵⁵

With regard to market studies and other reports, section 12(m) of the PCA provides that the PCC will conduct and publish studies and reports on anticompetitive conduct and agreements in order to provide guidance to industry and to consumers. The PCC is also expected, per section 12(l), to monitor and analyse markets, which may lead to enforcement actions and the imposition of remedies. At this early stage, the PCC has not yet published extensive market studies but in February 2017 it issued a Policy Note on Anti-Competitive Regulatory Restrictions which pertains to the construction sector, ie the object of the PCC’s above-mentioned *amicus* intervention.¹⁵⁶

The OFC, established in 2011, is required to prepare and publish studies and reports by section 1 of Executive Order 45, and it has carried out studies (and adopted advisory opinions) concerning competition and consumer protection topics such as the government’s suggested retail price policy (basic necessities and prime commodities), the food sector (onions and garlic) and the transport sector (airlines, harbour pilotage, and tug assistance services), with corresponding recommendations.

the GCG strategic roadmap at p 22 of the above-cited Legacy Report.) Depending on how the number is tallied, around 40–50 SOEs have been abolished, privatized or deactivated since 2011. See GCG, 2014 Annual Report, p 1 <http://gcg.gov.ph/site/public_files/gcg1446800039.pdf> accessed 20 January 2017; Francisco Lim, ‘The GCG Act and the Philippine Competition Act’ (2015) <<http://www.acralaw.com/publications/gcg-act-and-philippine-competition-act>> accessed 20 January 2017.

154 PCC press release of 16 December 2016 <<http://phcc.gov.ph/pcc-pushes-equal-footing-private-public-businesses>> accessed 20 January 2017.

155 See *Levelling the Playing Field* (ch 16 of the PDP), n 110.

156 See PCC, Policy Note No 1 of 2017, <http://phcc.gov.ph/wp-content/uploads/2017/03/PolicyNote_20170316.pdf> accessed 19 May 2017. Consistent with its *amicus* brief to the Supreme Court, the PCC at page 4 of the Policy Note sets forth its advocacy position *vis-à-vis* government organs: ‘The Government must ensure a level playing field where no market participant is given undue advantages that would allow it to gain market share over otherwise more effective and efficient competitors. This should apply to all players regardless of whether these players are controlled by the private sector or the State. Economically sound policies should not give incumbents competitive advantages for tenuous reasons such as nationality alone. Claims of protecting the interest of the public through regulatory action should be evaluated in terms of the resulting incentive distortions that reduce competition and the countervailing efficiencies arising from the regulation. Discriminating in favor of certain market participants without valid economic basis or policy rationale tends to reward poor performance, reduce competitive pressure, and distort incentives to innovate.’

IX. INTERNATIONAL COOPERATION AND INTERNATIONAL PARTNERS

From the time the Philippines got more serious about competition law with the adoption of Executive Order 45 in 2011 there have been ample opportunities for international cooperation—not so much on specific cases, although that type of cooperation will develop with time; but in relation to a range of activities critical to the early growth of a young competition law jurisdiction. These opportunities are largely due to two factors. First, it's clear that the competition law community is densely interconnected at various levels, with participants that include global-scale organizations such as the International Competition Network (ICN) and regional initiatives like the ASEAN Experts Group on Competition (AEGC), not to mention throngs of private experts who typically represent major (multinational) industrial interests. Second, a number of relatively well-resourced competition agencies are often happy to function as transnational policy entrepreneurs, helping young agencies to build their capacity while at the same time grooming them, as it were, with conceptual and analytical frameworks reflecting their own histories, preferences, and beliefs. On the other hand, young agencies—in the case of the Philippines, the Office for Competition and now the PCC, which by virtue of section 12(p) of the Act is the official representative of the government in international competition matters—are in general pleased to benefit from the largesse, experience and expertise of their benefactors and interlocutors. Their work products often leave distinct traces of this process of exchange.

Reference was already made above to the activities of the OFC in this regard. Key international partners and donors facilitating technical assistance or other capacity-building initiatives have included the Japan International Cooperation Agency, Germany's Deutsche Gesellschaft für Internationale Zusammenarbeit, Consumer Unity and Trust Society (CUTS), the Asian Pacific Economic Cooperation, and not least, the EU (Trade Related Technical Assistance) and the US (DOJ, FTC, and USAID).¹⁵⁷ But there have been several other partners as well: the American Bar Association (Rule of Law Initiative), the Asian Development Bank, the Australian Department of Foreign Affairs and Trade, the OECD and the International Finance Corporation of the World Bank Group. The OFC was as active as its resources allowed, and among many other initiatives it served as Chair of the AEGC in 2013–14 and convenor of the APEC Competition Policy and Law Group in 2015. It is a member of the International Competition Network. And in 2012 it volunteered to participate in the Peer Review programme of the United Nations Conference on Trade and Development (UNCTAD), which culminated in a report in the summer of 2014 that enabled the OFC and the Philippine Permanent Representative in Geneva to dialogue with and learn from other UNCTAD members while helping the OFC to engage with stakeholders back home on salient issues and market impediments.¹⁵⁸

157 See eg Department of Justice, 2015 Annual Report, p 12 <https://www.doj.gov.ph/files/Annual_Reports/2015%20Annual%20Report%20approved.pdf> accessed 3 February 2017.

158 See UNCTAD (n 81). The Peer Review process is described at <<http://unctad.org/en/Pages/DITC/CompetitionLaw/Voluntary-Peer-Review-of-Competition-Law-and-Policy.aspx>> accessed 6 January 2017. The then-Assistant Secretary of Justice, Geronimo Sy, welcomed the Report in his 'Opening Statement', speech of 9 July 2014 at the 14th Session of the UNCTAD Intergovernmental Group of

As for the PCC (which, again, is the main actor today in international matters), in its first year-plus of existence it pursued its activities related to international cooperation and capacity-building in much the same vein. Its international partners are essentially the same as the ones the OFC has been dealing with since its inception, and the PCC has prepared a three-year plan for managing the resources those partners provide. Since 2016, the PCC's officials have been participating in the activities of the ICN, UNCTAD, the OECD, and ASEAN. In addition to its international engagement, it has developed a very active business and media outreach profile. One may expect that an international affairs unit within the PCC will quickly become institutionalized and that the agency will become as integrated within the international competition community as similarly resourced and situated enforcers.

X. FINAL REMARKS

Although a fragmentary set of competition laws existed in the Philippines for a long time—with some of them dating back (barely) to the pre-Sherman Act days—there was not really any coherent and convincing regime in place before the Competition Act 2015. But a more fully-fledged and consumer-regarding statute is now in place—and with it an authority at least formally buffered against ministerial interference, an example certain other ASEAN countries would be wise to emulate.¹⁵⁹ This emerging environment in the Philippines presents important new opportunities for the defence and promotion of competition. Attention now must shift to realistic but rising expectations in the effectiveness of implementation of the Competition Act.

Effective implementation certainly cannot be taken for granted. In the Philippines, one of the most basic challenges will be to instil a competition culture in an environment where rule-based governance has been weak, where institutions have often functioned poorly and where the roots of corruption and clientelism run deep. As noted in the introduction to this article, competition law can potentially contribute in some measure to a country's growth and development, and by loosening up rigid economic structures it can support the goals of increasing inclusiveness and equity. In the Philippines, these are all dimensions that would benefit from stronger foundations and greater sustainability.

It will likely take several years to be able to fully assess the nature and extent of the impact of the new competition regime on the Philippine economy and society. Nevertheless, the early advocacy and outreach efforts of the main agency, the PCC, and those of the OFC as well, have been encouraging. And for its part, the Philippine legislator is to be commended for signalling that it intends to take competition policy seriously, not just by adopting the Competition Act itself but also by calling (in section 2(a) of the Act) for a National Competition Policy as part of the

Experts <<https://www.doj.gov.ph/files/ofc/PH%20Peer%20Review%20Opening%20Statement%20by%20Asec%20Sy.pdf>> accessed 6 January 2017.

159 At this stage it is difficult to predict whether the PCC's formal independence will be matched, through thick and thin, by actual independence. In a country such as the Philippines where public institutions and the rule of law have been weak, it is conceivable that the agency sooner or later may face tough challenges to its independence, whether by frontal assault or more insidious means. For recent discussion of the difference between formal and actual independence, see 'Agency Effectiveness Study' (2016) 4 JAE 229-73, 260-5.

Development Plan 2017–22. The National Competition Policy pursues a multi-faceted and multi-stakeholder approach with a view to, among other objectives, reducing unnecessary government restrictions, promoting competitive neutrality and achieving structural reforms. The country is thus at least seemingly committed to expanding its efforts beyond the important but ultimately limited confines of the enforcement and advocacy framework established by the Act and by other competition-specific instruments such as Executive Order No 45.

The Philippine National Competition Policy appears positive and ambitious. At the same time, and as already mentioned, these are ‘early days’ and it is not yet entirely clear how far this commitment goes. A proper ‘National Competition Policy’, as exemplified by Australia in the 1990s, requires a comprehensive screening and reform exercise supported across multiple levels and organs of government. In varying degrees, some countries such as Finland, Sweden, and Taiwan have carried out major screening exercises; certain others (Mexico, Greece, Romania, and now Portugal) have partnered with the OECD to review regulatory blockages in priority sectors. Screening has been facilitated thanks partly to guidance documents such as the OECD’s Competition Assessment Toolkit and similar work products (issued by international organizations but also by individual competition agencies¹⁶⁰), and the increasing use around the world of competition impact assessments. In the Philippines, a full-blown National Competition Policy is indeed an idea whose time has come. To be sure, realizing the project will require extraordinary political will and serious investments in time, expertise and other resources. But it is encouraging that the PCC has already done significant preparatory work with NEDA to construct a framework for the National Competition Policy and to identify strategic lines of action to support it. The PCC, together with NEDA, with the yet-to-be-launched inter-agency mechanism described above and with other stakeholders, appears to be in a good position to promote the pro-competitive policy orientations and action agenda of the National Competition Policy during the implementation period of 2017–22. The degree of success that may be achieved with this challenging initiative cannot be predicted with certainty. But even if political obstacles and vested interests were to prevent or bog down more ambitious changes, the Philippines at least has an important opportunity to take meaningful incremental steps forward. Whether change comes fast or slow, the process requires relevant government organs to support the competition agencies and to facilitate the screening exercises. In the context of these efforts, priority should be assigned, as far as possible, to the most distortive regulations and barriers to investment.

Meanwhile, as momentum builds over time in support of a holistic policy of competition for the Philippine economy, the PCC must lead the way by proactively and conscientiously pursuing its tasks. The PCC should avoid the common temptation of bringing numerous cases, racking up fines and being ‘busy’. Clearly, these are not reliable reflectors of agency effectiveness.¹⁶¹ On the other hand, while an excessively

160 See eg UK Competition and Markets Authority, CIA Guidelines 2015 Parts 1 and 2, <<https://www.gov.uk/government/publications/competition-impact-assessment-guidelines-for-policymakers>> accessed 19 May 2017.

161 Professor Kovacic has consistently reminded us that, while some minimum level of activity is necessary (eg to establish image and to store up political capital), high levels of activity tend to be overvalued; if

narrow focus on pursuing cases would be counterproductive for an institution entrusted with a mission as technically and socially complex as competition policy, it is equally clear that fair and transparent enforcement of the law—in a manner commensurate with its growing capacities—is a core component of what the PCC should be doing. In addition, it should be engaging in activities such as these:

- developing its internal cross-checks and procedures¹⁶² and its talent search and retention strategies;
- building a positive agency culture;
- issuing guidelines; and
- pursuing a variety of activities related to advocacy and public education, capacity-building (legal and economic analysis, investigation and case management techniques, etc), strategic vision and planning, self-scouting and benchmarking, the promotion of judicial expertise, and the gradual strengthening of ties with domestic, regional and global partners, and of ties with other relevant institutions such as universities and civil society, and the strengthening of their links with the PCC.

By making sustained investments in these interrelated points of focus, the PCC will establish strong institutional foundations—the key to good long-term agency performance and impact on the Philippine economy and people. The need for sustained investments in the foregoing tasks will always lead back to the crucial ‘external’ issue of political will, the prospects for which are difficult to anticipate given the many challenges facing the Philippines that have been discussed. All else being equal, good agency performance will promote auspicious conditions that favour stronger political will to further support the agency—a positive loop. But signs of agency ineptness (or decline) and the erosion of political commitment would be just as mutually reinforcing in the other direction.

too much emphasis is put on activity levels, this will perversely reduce commitment to a long-term vision and long-term investments, which may be more invisible and may defy precise interim assessments. For recent discussion, see William Kovacic, ‘Creating a Respected Brand: How Competition Agencies Signal Quality’ in Philip Lowe and others (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (Hart Publishing 2016) 393–410, 401–2, 404. See also Kovacic and Lopez-Galdos (n 15) 95 (warning against the ‘sirens of activity’).

162 Following the completion of this article, the PCC published draft Rules of Procedure for public review. The Rules of Procedure will provide further details regarding the PCC’s investigations, hearings and adjudication, enforcement and sanctions, and other significant procedural matters. The final Rules of Procedure are scheduled to be adopted in August 2017, essentially coinciding with the entry into force of the main antitrust prohibitions of the Competition Act.