

WIPO ROUNDTABLE ON INTELLECTUAL PROPERTY AND  
COMPETITION POLICY FOR CERTAIN ASIAN AND  
PACIFIC MEMBER STATES

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INTERACTION BETWEEN IP AND  
COMPETITION LAW IN  
PHILIPPINES

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# OUTLINE

- I. Overview of Competition Law
- II. Competition Policy and Intellectual Property Law (Technology Transfer Agreements, Compulsory Licensing, Exhaustion of IPRs and Regulatory Review Exception)
- III. Recent Developments on IP and Competition Law (Jurisprudence and Legislative Initiatives)

## PART I

# OVERVIEW OF COMPETITION LAW IN THE PHILIPPINES

General framework on competition policy:

The state shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed. (Article XI, Section 19, Philippine Constitution)

# Interpretation

- ▣ Monopolies are not prohibited as such (rule of reason) and it is only when the public interest is affected that monopolies may be regulated.
- ▣ Combinations in restraint of trade or unfair competition are prohibited as such.
- ▣ The terms are couched in general terms; their definitions are articulated in the decisions of the Supreme Court (judicial branch) and in legislation enacted by the Upper and Lower Houses of Congress (legislative branch).

Judicial Interpretation: The most recent jurisprudence on competition policy consists of the decision of the Supreme Court in two (2) related cases dealing with the constitutionality of a law that deregulated the Philippine oil industry

First Case [*Tatad vs. Lagman*, G.R. No. 124360 and G.R. No. 127687, November 5, 1997]

Involved a suit filed by a taxpayer seeking the nullification of Republic Act 8180, a law that sought to deregulate the downstream oil industry by allowing any person or industry to import crude oil and petroleum products from a foreign or domestic source.

Law was held unconstitutional because its provisions on tariff differential, inventory reserves and predatory prices were found to inhibit the formation of a competitive market. The law imposed substantial barriers to the entry and exit of new players and widened the balance of advantage of existing players in the industry.

# Definitions

The Supreme Court defined and articulated the following:

MONOPOLY is an advantage vested in one or more persons or companies, consisting in the exclusive right or power to carry on a particular business or trade, manufacture a particular article, or control the sale or the whole supply of a particular commodity.

COMBINATION IN RESTRAINT OF TRADE is an agreement between two or more persons, in the form of contract, trust, pool, holding company, or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce in a certain commodity, controlling its production, distribution and price, or otherwise interfering with freedom of trade without statutory authority. Combination in restraint of trade refers to the means while the monopoly refers to the end.

*Second Case : [Garcia vs. Secretary of the Department of Energy, G.R. No. 157584, April 2, 2009]*

The declaration of unconstitutionality of Republic Act 8180 prompted the Philippine Government to enact another law, Republic Act 8479, which bore similarity to the first law except that the second law had been fine-tuned in order to traverse the earlier ruling of the Supreme Court.

Several years after the enactment of Republic Act 8479, the same taxpayer in the first case filed suit questioning the constitutionality of the second law. This time, the Supreme Court held that the law was valid, and confirmed that monopolies are not prohibited outright. Rather, it simply allows the state to act when public interest so requires; even then, no outright prohibition is mandated, as the State may choose to regulate rather than to prohibit.

Two elements must concur before a monopoly may be regulated or prohibited: (1) there exists a monopoly or an oligopoly; and (2) public interest so requires its regulation or prohibition.

Whether a monopoly exists is a question of fact. On the other hand, the questions of what public interest requires and what the state reaction shall essentially require the exercise of discretion of the state.

# Statutes and Legislation that Address Competition Policy

- Revised Penal Code (Republic Act 3815): penalizes monopolies and combinations in restraint of trade.
- The Civil Code of the Philippines (Republic Act 386): allows claims for damages arising from unlawful competition in commercial and industrial enterprises
- Intellectual Property Code of the Philippines (Republic Act 8293), as amended by the Cheaper Medicines Law (Republic Act 9502): contains provisions that address anti-competitive behavior in the exercise of intellectual property rights
- Corporation Code of the Philippines (Batas Pambansa Blg. 68): provides for rules on mergers and consolidations
- Revised Securities Act, as amended by the Securities Regulation Code (Republic Act 8799): contains rules prohibiting insider trading
- Price Act (Republic Act 7581): contains rules on price manipulation, profiteering and cartel



## Agencies that Enforce Competition Laws

- ❑ Tariff Commission: conducts formal investigation of dumping and subsidization cases
- ❑ Bureau of Import Services: monitors import quantities and conducts preliminary investigation of dumping cases
- ❑ Bureau of Trade Regulation and Consumer Protection (BTRCP): formulates and monitors the registration of business names and evaluates consumer complaints and product utility failures
- ❑ Securities and Exchange Commission (SEC): administers corporate governance laws such as approval and registration of mergers and combinations
- ❑ Intellectual Property Office: regulates anti-competitive behavior in the exercise of intellectual property rights

## Issues on Enforcement of Competition Laws

- 1) Inadequate legal framework to prevent anti-competitive structures and behavior in the market.
- 2) No central authority that oversees the implementation of competition policy resulting to poor coordination and even conflicting policies.
- 3) Lack of expertise in the appreciation and implementation of competition laws.
- 4) Existing penalties are minimal and do not serve as deterrent in the commission of anti-competitive behavior

## PART II

### COMPETITION POLICY AND ITS INTERFACE WITH INTELLECTUAL PROPERTY

Competition policy is addressed in the Intellectual Property Code through the following mechanisms:

- (A) Prohibition on anti-competitive clauses in technology transfer agreements
- (B) Compulsory licensing
- (C) Exhaustion of rights and regulatory review exception

## (A) TECHNOLOGY TRANSFER AGREEMENTS

Must meet certain requirements aimed at preventing practices that may constitute an abuse of intellectual property rights having an adverse effect on competition and trade:

(1) No prohibited clauses that are deemed *prima facie* to have an adverse effect on competition (Section 87, Intellectual Property Code)

(2) Should contain certain mandatory clauses (Section 88, Intellectual Property Code)

## Prohibited Clauses

(1) tying arrangements; (2) price restraints; (3) restrictions on volume and production; (4) exclusive dealing arrangements; (5) purchase option in favor of licensor; (6) exclusive grantback conditions; (7) royalty payments for unused patents;

(8) export restrictions; (9) restriction on technology use upon expiry of agreement; (10) royalty payments for expired intellectual property rights; (11) non-challenges to patent validity; (12) restrictions to adaptations of the technology; (13) non-liability clause or exemption from liability arising from non-fulfillment of obligations;

and (14) other clauses with similar effects.

## Mandatory Clauses

- 1) Philippine laws shall govern the interpretation of TTAs
- 2) Access to improvements in techniques and processes for the duration of the TTA
- 3) Arbitration rules shall follow Philippine law or UNCITRAL or ICC
- 4) Licensor pays all local taxes relating to the TTA

## Implications when a TTA fails to comply with Sections 87 and 88:

General Rule: TTA that shall be rendered unenforceable.

Exception: When TTA is registered with IPOPHL pursuant to the provisions of Section 91 on exceptional or meritorious cases:

- (1) high technology content
- (2) increase in foreign exchange earnings
- (3) employment generation
- (4) regional dispersal of industries
- (5) substitution with or use of local raw materials
- (6) investment companies with pioneer status

TTAs that contain any of the prohibited clauses may be allowed and registered where any of the exceptional or meritorious cases are present.

## Statistics on Technology Transfer Agreements (Based on 2004 TTAs)

SUBJECT MATTER	PERCENTAGE (%)
Patents, Trademarks, Know-How	25
Patents, Know-How	13
Trademarks, Know-How	13
Patents	1
Trademarks	21
Consultancy	21
Software	3
Management	3



## Statistics on Technology Transfer Agreements (Nationality of Licensor, 2004-2005 TTAs)

- ▣ Japan (38% in 2004; 44% in 2005)
- ▣ United States (19% in 2004; 16% in 2005)
- ▣ Philippines (11% in 2004; 22% in 2005)
- ▣ Netherlands (8% in 2004; 6% in 2005)
- ▣ Singapore (4% in 2004; 6% in 2005)
- ▣ Other Nationalities: Germany, Switzerland, United Kingdom, China, Korea, France

## (B) COMPULSORY LICENSING

Apart from regulation of TTAs, compulsory licensing is also one of the mechanisms that address anti-competitive behavior. Several types of compulsory licenses may be issued under the Intellectual Property Code:

- i. government-use and government contractor-use compulsory license (Section 74, IP Code)
- ii. third party-use compulsory license (Section 93, IP Code)
- iii. a special compulsory license (Section 93-A, IP Code)
- iv. compulsory licensing based on interdependence of patents (Section 97, IP Code)

(i) Government-Use and Government Contractor-Use Compulsory License  
(Section 74, IP Code)

A government agency or third party contractor authorized by the Government may exploit the invention even without the agreement of the patent holder in any of the following circumstances:

XXX

A judicial or administrative body has determined that the manner of exploitation by the owner of the patent or his licensee, is anti-competitive;

XXX

## (ii) Third-Party Use Compulsory License (Section 93, IP Code)

A compulsory license may also be granted to any person who has shown his capability to exploit the invention, under any of the following circumstances:

xxx

Where a judicial or administrative body has determined that the manner of exploitation by the owner of the patent or his licensee is anti-competitive; or

xxx

### (iii) Special Compulsory Licenses for the Import or Export of Patented Drugs (Section 93-A, IP Code)

IMPORTATION: A compulsory license for the importation of patented medicines may also be granted upon the written recommendation of the Secretary of the Department of Health.

This is an additional special alternative procedure to ensure access to quality affordable medicines and shall be primarily used for domestic consumption, provided that adequate remuneration shall be paid to the patent owner either by the exporting or importing country.

EXPORTATION: A compulsory license may also be granted for the manufacture and export of patented drugs to any country having insufficient or no manufacturing capacity in the pharmaceutical sector.

This requires that a separate compulsory license has been granted by the importing country or such country has, by notification or otherwise, allowed importation into its jurisdiction of the patented drugs and medicines from the Philippines in compliance with the TRIPS Agreement.

#### (iv) Compulsory License Based on Interdependence of Patents (Section 97, IP Code)

If an invention protected by a patent (“the second patent”) within the country cannot be worked without infringing an earlier patent (“the first patent”) granted on a prior application, a compulsory license may be granted to the owner of the second patent to the extent necessary for the working of his invention.

The invention claimed in the second patent should involve an important technical advance of considerable economic significance in relation to the first patent.

Allows some form of patent pool through the mechanism of a compulsory license based on interdependence of patents.

## PRE-TRIPS SCENARIO

(Old Patent Law, Republic Act 165, effective until end of 1997)

▣ 120 petitions for compulsory licensing of drugs and medicines were filed; of this number, 51 compulsory licenses were issued by IPOPHL

## POST-TRIPS SCENARIO

(Intellectual Property Code, Republic Act 8293, effective January 1998)

▣ No petition for compulsory license has been filed with IPOPHL.

## (C) EXHAUSTION OF IPRs and REGULATORY REVIEW EXCEPTION

Exhaustion of Patent Rights:

International exhaustion rule applies to patents on drugs and medicines (Section 72.1 IP Code, as amended by the Cheaper Medicines Act)

National exhaustion rule applies to patents on all other products. (Section 72.1, IP Code)



## Exhaustion of Trademark Rights

International exhaustion rule applies to trademarks on drugs and medicines, whether patented or off-patent. (Section 147.1, IP Code, as amended by the Cheaper Medicines Act)

No infringement of trademarks of imported or sold patented drugs and medicines allowed under Section 72.1, as well as imported or sold off-patent drugs and medicines.

But the drugs and medicines must bear the registered marks that have not been tampered or modified. (Section 159.4, IP Code, as amended by the Cheaper Medicines Act)

Regulatory Review Exception  
(Section 72.4, IP Code, as amended by the Cheaper Medicines Act)

Patent owner cannot prevent third parties from testing, using, making or selling the invention (drugs and medicines) including any data related thereto.

The acts must be done for purposes related to the development and submission of information and issuance of approvals by the Food and Drug Authority.

## PART III

### RECENT DEVELOPMENTS ON IP AND COMPETITION LAW

**Jurisprudence in the Context of Public Health:** (*Roma Drug vs. Glaxo SmithKline*, G.R. No. 149907, 16 April 2009)

- ▣ Enforcement authorities raided a local drugstore (Roma Drug) and seized imported medicines whose trademarks (Augmentin, Orbenin, Amoxil, and Ampiclox) were held by SmithKline.
- ▣ Medicines were manufactured by SmithKline but imported directly from abroad and not purchased through SmithKline's Philippine distributor.
- ▣ Case was filed against the drugstore for violation of the law on counterfeit drugs. Medicines were classified as counterfeit because they were imported abroad and not purchased from the Philippine-registered owner of the patent or trademark for the drug.
- ▣ Supreme Court dismissed the case filed by SmithKline and held that the enactment of the Cheaper Medicines Law in 2008 granted third persons, such as the local drugstore, the unqualified right to import medicines. The provision on international exhaustion was applied retroactively (medicines were imported in 2000, but the Cheaper Medicines Law was enacted in 2008.)

Legislative Initiatives on Competition  
*(Pending Bills in the Lower and Upper Houses of Congress)*

Clauses or provisions relating to IP and Competition Law :

- ▣ Proposes to expand the term “cartelization” to cover an agreement among firms to exchange patent rights and standardize products with the intent of preventing or distorting competition.
- ▣ Classifies the act of “boycott” as an abuse of monopoly of power, except when it is done for a legitimate purpose such as refusal by manufacturers or sellers to have any commercial dealings with firms who violate intellectual property rights.
- ▣ Exempts intellectual property monopoly from the coverage of cartels, when such intellectual property monopoly is acquired or maintained in exploitation of one’s registered patent, trademark or copyright.

*Thank you for your attention.*