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# IPBA JOURNAL

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IPBA NEWS AND LEGAL UPDATE

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**Antitrust/Competition Law**



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# IPBA JOURNAL

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# The President's Message



Dear Colleagues,

From the 2nd to the 5th of May of this year, the Inter-Pacific Bar Association will be holding its 20th Annual Meeting and Conference in Singapore, the Garden City. The IPBA has

been holding or co-sponsoring conferences and seminars in the region and elsewhere since the Manila Conference last year, and all these lead to the Annual Meeting and Conference, the central event of the Association each year.

I urge each and every one of you to attend the Singapore Conference, principally because the Host Committee (chaired by IPBA President-Elect Lee Suet Fern) has put in place an excellent educational program that revolves around the theme "Climate Change and Legal Practice". The conference will feature a special question-and-answer session with Minister Mentor Lee Kuan Yew, a keynote address from former United States Vice President Al Gore, as well as a plenary session on climate change and the economy, with Professor Tommy Koh as moderator. Singapore President S R Nathan will also personally host a welcome dinner for the delegates and accompanying persons at the Istana, his official residence.

Aside from the committee sessions on various interesting subjects, there will be a special

judiciary session (to be moderated by Justice V K Rajah of the Singapore Court of Appeal) where chief justices and justices from various jurisdictions (notably Delaware, New South Wales, New Delhi, New Zealand, Japan and Singapore) will tackle trans-national issues confronting judges in the new global financial and business climate.

In addition, a number of entertaining and surprising social programs await the accompanying persons, not to mention the local tours that they can opt to take.

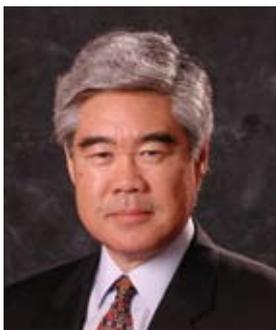
The conference venue is the newly constructed Marina Bay Sands Integrated Resorts located in the central business district of the city. Golf games will be played at Tanah Merah Country Club (pre-conference) and at Sentosa Golf Club (post-conference).

Even though the Singapore Conference has yet to take place, preparations are already under way for the 21st Annual Conference in Kyoto/Osaka and the 22nd Annual Conference in Mumbai. With its unique atmosphere of camaraderie, each conference will be an invaluable opportunity for one and all not only to meet new friends and renew acquaintances but also to keep abreast of developments concerning the legal profession in the Asia-Pacific region.

Let us all go to Singapore and attend the 20th IPBA Annual Conference there!

*Rafael A Morales*  
President

# The Secretary-General's Message



Dear IPBA Members,

From May 2-5, 2010, the IPBA will hold its Annual Meeting and Conference in Singapore under the theme “Climate Change and Legal Practice”, which will be the first time in Asia

that business lawyers will be addressing this set of critical global issues in Asia. The conference program with its impressive list of speakers who are leaders in these matters will be a substantial contribution to the discussion and analysis of the legal dimensions of climate change and their implications for the Pacific and Asian Region. The Copenhagen international conference on climate change in December 2009 was a great disappointment to many who had hoped that definitive action would be taken for a successor to the Kyoto Protocol, which expires in 2012. Yet, despite the outcome of that meeting, the impacts of climate change continue unabated and how countries must respond remains a major challenge that our IPBA Conference will address.

The IPBA Annual Meeting and Conference is the most visible and well-known program that the IPBA holds. But there are also many programs and initiatives that the IPBA undertakes that involve, *and* support, our members in their professional interests and legal practice. These include regional seminars and programs, including substantive programs held in conjunction with the mid-year meeting of the IPBA Council, which is generally held in late October in different IPBA jurisdictions. Equally key are the substantive and organisational opportunities that the IPBA provides for its members to contribute to the development and strengthening of the IPBA, while at the same time furthering their professional knowledge and expertise, expanding and deepening professional and personal relationships, promoting the rule of law in business in general, and enjoying and

enhancing the collegiality among members which is one of the hallmarks of the IPBA.

The IPBA was originally established to have as members practicing lawyers involved in transnational business activities within the Pacific and Asian Region. Its membership therefore does not include legal organisations or law firms. As such, the IPBA's strength and inspiration have always been drawn from its members, and the personal relationships and friendships that emanate from this membership continue to distinguish the IPBA from other organisations. Members therefore, can take advantage of opportunities and contribute to the IPBA's, and their own development in several ways. These include:

- **IPBA Committees** – This is where much of the substantive work of the IPBA occurs. Most IPBA Committees deal with legal practice areas and develop and conduct programs at the IPBA Annual Conference and the Mid-Year Council Meetings, as well as in other venues. Other Committees administer special programs, like the IPBA Scholarship Committee and Legal Training and Development Committee, or provide special networking fora, like the Women Business Lawyers Committee. In addition, the Publications Committee prepares the *IPBA Journal*, which is the official publication of the IPBA. Opportunities include serving as speakers as well as Committee Chairs, Vice-Chairs and members.
- **IPBA Council** – This is the administrative body of the IPBA and is responsible for its direction and acts on behalf of the IPBA on matters not specifically reserved to the Annual Meeting of the IPBA members. It comprises Council Members from each of the IPBA jurisdictions (ie, a jurisdiction with an autonomous and distinctive legal system which has at least 25 IPBA members; these are the Jurisdictional Council Members), six At-Large Council Members (who represent regions that are not jurisdictions but wish to contribute to, and

benefit from, the IPBA), the IPBA Officers and Deputy Officers, the Committee Chairs, and the IPBA Regional Coordinators.

The IPBA members elect the Council members at the IPBA Annual Meeting, which is held in conjunction with the IPBA Annual Conference. There is a nomination process set forth in the *IPBA Constitution* which seeks to ensure the highest quality of the IPBA leadership. Serving on the Council provides unique opportunities not only to be part of the leadership of an important and influential international legal organisation but also to gain experience in the governance of the organisation, develop close working relationships with colleague Council members, and contribute to the promotion of the rule of law and the institutionalisation of legal institutions within the Asian and Pacific Region.

- **IPBA Jurisdictional Leadership Committees**

– The IPBA has recently organised several Jurisdictional Leadership Committees within several key jurisdictions. Each Committee has IPBA members who are prominent leaders within that jurisdiction and work with the IPBA Jurisdictional Council Member to promote IPBA programs and activities within that jurisdiction and on a regional basis. This is particularly important and valuable for geographically large jurisdictions. Serving on such a Committee can also provide important opportunities to work with leading members of the legal profession, contribute to IPBA programs within that jurisdiction and beyond, develop lasting collegial professional and personal relationships, and lead to other opportunities to serve in leadership positions within the IPBA.

From its founding in 1991, the IPBA has grown and flourished because of the quality, dedication and spirit of lawyers from, and otherwise committed to, the Pacific and Asian Region, and has uniquely benefited from a strong, diverse, supportive and forward-looking leadership on all levels of the organisation. In 2006, the IPBA adopted its Strategic Plan after a lengthy and inclusive process that reaffirmed the IPBA's founding principles and its commitment to be the leading association for business lawyers who share an interest in this region. The Strategic Plan at the same time underscored the systematic development of successive generations of new leaders within this region and how the IPBA could continue to provide such leaders.

To this important end, we invite all IPBA members to become actively engaged in the IPBA's programs and to express your desire to take advantage of the opportunities for growth and development, strengthening of our spirit of collegiality, and participation as a leader within the IPBA. We also strongly encourage all IPBA members to invite their business lawyer colleagues, friends and associates to join the IPBA and be part of this important initiative. As we approach the 20th anniversary of the founding of the IPBA in 2011, we look forward with confidence to a strong and vigorous IPBA with a dedicated membership that continues to provide a visionary leadership in the Pacific and Asian Region.

With all best wishes,

*Gerald A Sumida*  
Secretary-General

## Publications Committee Guidelines for Publication of Articles in the IPBA Journal

The IPBA Publications Committee is soliciting quality articles for the Legal Update section of the June 2010 issue of the IPBA Journal. If you are interested in contributing an article, please contact **Mr Kap-You (Kevin) Kim**, Publications Committee Chair, at [kyk@bkl.co.kr](mailto:kyk@bkl.co.kr) or **Mr Hideki Kojima**, Publications Committee Vice-Chair, at [kojima@kojimalaw.jp](mailto:kojima@kojimalaw.jp) and/or submit articles by email to Mr Kim or Mr Kojima at the foregoing addresses.

### Proposed theme for upcoming edition:

- Environmental Law/Annual Conference Review (June 2010)  
*Deadline for submissions: May 25, 2010*

The requirements for publication of an article in the IPBA Journal are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicize the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2,500 to 3,000 words) and, in any event, does not exceed 3,000 words; and
5. The article is written by an IPBA member.

## IPBA Event Calendar

Event	Location	Date
<b>Annual Meeting and Conference</b>		
20th Annual Meeting and Conference	Singapore	May 2-5, 2010
21st Annual Meeting and Conference	Kyoto/Osaka, Japan	April 21-24, 2011
22nd Annual Meeting and Conference	Mumbai, India	Feb/March, 2012
<b>Mid-Year Meeting and Conference</b>		
2010 Mid-Year Meeting and Conference	Germany	October 15-18, 2010
<b>Regional and Local Events</b>		
Annual Dinner at the Senate: Corporate Social Responsibility and Globalization	Paris, France	April 14, 2010
<b>Supporting Events</b>		
IFLR Asia M&A Forum	Hong Kong	March 3-4, 2010
International Dispute Resolution Conference	Kuala Lumpur, Malaysia	May 7, 2010
Corporate Governance Asia	Singapore	June 21-24, 2010

Details can be found at [www.ipba.org](http://www.ipba.org), or contact the IPBA Secretariat at [ipba@tga.co.jp](mailto:ipba@tga.co.jp).

# Introduction to the Competition Law of Vietnam



This article provides an overview of certain key elements of the Competition Law of Vietnam, which came into effect in July 2005, including provisions regarding practices in restraint of competition and provisions concerning “unhealthy” business practices. A brief introduction to relevant competition law authorities and competition legal proceedings is also provided.

**Tran Anh Hung**

Managing Partner, BROSS & Partners Law Firm,  
Hanoi, Vietnam

## Overview of the Competition Law

The Competition Law of Vietnam was enacted for the first time on 9 November 2004 and came into effect on 1 July 2005.

Implementing legislation has subsequently been promulgated, dealing with various issues of the Competition Law in greater detail, notably:

- Government Decree 116/2005/ND-CP dated 15 September 2005 on detailed provisions for implementation of the Law on Competition;
- Government Decree 120/2005/ND-CP dated 30 September 2005 on dealing with breaches of competition law and regulations;
- Government Decree 05/2006/ND-CP dated 1 September 2006 on establishment, functions, duties, powers and organisational structure of the Competition Council; and
- Government Decree 06/2006/ND-CP dated 1 September 2006 on functions, duties, powers and organisational structure of the Competition Management Department under the Ministry of Trade.

The Competition Law recognises the right of businesses to freely compete with each other. However, competition practices must be within the legal framework and not infringe the national interest, public interest or the legitimate rights and interests of other businesses and consumers.

The Competition Law deals with two categories of competition practices: practices in restraining competition – including agreements in restraint of competition, abuses of dominant market position or monopoly position and economic concentration, and unfair competitive practices. It also regulates the establishment, functions and powers of administrative bodies for competition and competition legal proceedings.

The Competition Law is applicable to organisations and individuals conducting business in all economic sectors, including domestic private enterprises, State-owned enterprises, foreign-invested enterprises and overseas enterprises operating in Vietnam. It is to be noted that under the laws of Vietnam, “foreign-invested enterprises” comprises joint venture enterprises and wholly foreign-owned enterprises that are considered to be Vietnamese legal entities, while “overseas enterprises” are understood to encompass branch office, representative office and other forms

of commercial presence of foreign entities in Vietnam.

Industry associations (comprising trade associations and professional associations) are also subject to the Competition Law.

The Competition Law also applies to State administrative bodies, but only in so far as they are prohibited from the following proscribed practices aimed at hindering competition in the market:

- forcing an enterprise, organisation or individual to buy or sell goods or services to or from an enterprise appointed by such State administrative body, except for goods and services belonging to sectors deemed by law to be State monopoly sectors;
- discriminating between an enterprise in the industry or locality which the State administrative body manages and any other enterprise;
- forcing industry associations or enterprises to collude with each other for the purpose of excluding, restricting or hindering other enterprises from competing in the market;
- other practices which hinder the lawful business activities of enterprises.

### Practices in Restraint of Competition

Practices in restraint of competition are defined as practices that reduce, distort or hinder competition in the market. They include agreements in restraint of competition, abuse of dominant market position and monopoly position, and economic concentrations.

#### *Agreements in Restraint of Competition*

Regulation of agreements in restraint of competition in Vietnam appears to be limited to horizontal agreements (i.e., agreements between competitors, often referred to as “cartels”), with vertical arrangements being regulated solely under the abuse of dominant market position provisions.

Under the Competition Law, the following agreements in restraint of competition are strictly prohibited with no exemptions:

1. Agreements which prevent, impede or do not allow other enterprises to participate in a market or to develop business;
2. Agreements which exclude from a market other enterprises not being parties to the agreement; and
3. Collusion to allow one or more parties to win a tender for supply of goods or services.

The following agreements in restraint of competition are prohibited only where the participating parties have a combined market share

of 30 per cent or more of the relevant market:

1. Price-fixing (direct or indirect) agreements;
2. Agreements to divide markets or sources of supply of goods and services;
3. Agreements to restrain or control quantity or volume of production, purchase or sale of goods or supply of services;
4. Agreements to restrain technical or technological development or to restrain investment; and
5. Agreements to impose on other enterprises conditions for entering into contracts for purchase/sale of goods or services or to force other enterprises to accept unrelated obligations.

However, enterprises with 30 per cent or more of combined market share may be entitled to exemptions for the above activities if such agreement (i) rationalises organisational structure or business scale and increases efficiency, (ii) promotes technical or technological progress, improving the quality of goods and services, (iii) promotes uniform applicability of quality standards and technical norms of certain types of products, (iv) unifies conditions on trading, delivery of goods and payment but not those relating to price or any pricing factors, (v) increases the competitiveness of medium- and small-sized enterprises; or (vi) increases the competitiveness of Vietnamese enterprises in the international market. The Ministry of Trade will decide whether or not an exemption is to be granted. An exemption must be obtained before execution of the agreement and the exemption may only be enjoyed during a certain period of time as decided by the Ministry of Trade.

Where the participating parties have less than a 30 per cent combined share of the relevant market, the above agreements are not prohibited even if the agreements have the effect of substantially restraining competition.

As the issue of whether an agreement in restraint of competition is prohibited depends heavily on the combined share of the relevant market held by the participating parties, determination of the combined share of the relevant market will be critical. The Competition Law defines the terms as follows:

“Relevant market” is the market containing the goods and services that are substitutable in respect of characteristics, usage and price (relevant product market) or a specific geographical area in which goods and services are substitutable in similar competitive conditions and that is significantly distinct from the adjacent areas (relevant geographical market).

“Market share” is the percentage of the sales turnover of an enterprise over the total sales turnover of all enterprises trading the same goods

or services in the relevant market or the percentage of the purchase turnover of an enterprise over the total purchase turnover of all enterprises trading the same goods or services in the relevant market, as calculated in a month, quarter or year.

These definitions seem vague and not sufficiently clear. Though Decree 116 provides more detail on how to determine the “relevant market” and “market share,” how these provisions are applied in practice will depend on how these concepts are interpreted by the competition authorities.

#### *Abuse of Dominant Market Position or Monopoly Position*

Market dominance and monopoly themselves are not prohibited. But abuse of those positions is unlawful and strictly prohibited by law.

An enterprise will be deemed to hold a dominant market position if it (i) holds a market share of 30 per cent or more of the relevant market or (ii) is capable of significantly restraining competition. A group of enterprises acting together will be deemed to hold a dominant market position if they hold a combined market share of 50 per cent or more (for two enterprises), 65 per cent or more (for three enterprises) or 75 per cent or more (for four enterprises) in the relevant market. It appears that parallel action by the group of enterprises is sufficient to constitute action together, without need for an agreement.

An enterprise or group of enterprises holding dominant market position is prohibited from engaging in any of the following activities, which are considered to be abuse of dominant market position or monopoly:

1. Selling goods or providing services below total prime cost of the goods with the aim of excluding competitors;
2. Fixing an unreasonable selling/purchasing price or fixing a minimum reselling price for goods/services, thereby causing loss to customers;
3. Restraining production or distribution of goods and services, limiting the market, or impeding technical or technological development, thereby causing loss to customers;
4. Applying different commercial conditions to the same transactions with the aim of creating inequality in competition;
5. Imposing on other enterprises conditions precedent prior to signing contract for purchase/sale of goods or services, or forcing other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract; and

6. Preventing market participation by new competitors.

An enterprise will be deemed to be in a monopoly market position if there are no other enterprises competing in the relevant market for the goods that it trades or the services it provides. An enterprise in a monopoly market position is subject to the same prohibitions on its competitive practices as enterprises holding dominant market positions. In addition, it may not impose disadvantageous conditions on customers or abuse its monopoly position to unilaterally change or rescind a signed contract without a legitimate reason.

#### **Economic concentration**

Under the Competition Law, economic concentration includes mergers, consolidations, acquisitions, and joint ventures and other forms (undefined) of economic concentration.

Any economic concentration in which the participating parties have a combined share above 50 per cent of the relevant market is prohibited unless the economic concentration results in a small- or medium-sized enterprise (“SME”) or an exemption is granted. However, the parties may apply for an exemption from such prohibition if



Photo: Richard Mirro

one or more of the participating parties is at risk of being dissolved or becoming insolvent (as decided by the Minister of Trade) or where the economic concentration enhances export, socio-economic development or technical progress (as decided by the Prime Minister).

Any economic concentration where the participating parties have a combined market share of 30-50 per cent must be notified to the Vietnam Competition Administration Department ("VCAD") under the Ministry of Trade, unless the economic concentration results in an SME. VCAD must confirm in writing whether the proposed economic concentration can proceed without exemption or requires prior exemption. At this notification stage, VCAD is not entitled to exercise any *discretion*; its role is simply to confirm how the proposed economic concentration may proceed under the Competition Law.

The proposed economic concentration can only be carried out after written confirmation has been received from VCAD that the economic concentration is not prohibited.

Notification is not required in cases where the participating parties have a combined market share of less than 30 per cent, or where the economic concentration results in an SME.

### Unhealthy Competitive Practices

Unhealthy competitive practices are defined by the Competition Law as business practices that are contrary to the conventional norms of business ethics and that cause, or might cause, detriment to the interests of the state or the legitimate rights and interests of other enterprises or consumers.

Unhealthy competitive practices consist of such unethical practices as falsifying product information, infringing business secrets, coercing or defaming another enterprise, disrupting the business activities of another enterprise, using misleading advertisements and promotions, discriminating within an industry association, engaging in illegal multi-level selling of goods, and other acts of unhealthy competition as prescribed by the government. All such practices are prohibited and no exemptions will be granted for such activities.

### Competition Authorities

Competition authorities consist of VCAD and Competition Council.

#### *Vietnam Competition Administration Department*

VCAD was established under the MOT with the power and duty to control economic concentrations, accept applications for exemptions and make recommendations to the MOT or the Prime Minister on such requests, investigate cases concerning practices in restraint of competition and unhealthy competitive practices and impose fines for unhealthy competitive practices. One of the main issues with the new law is whether this body will be truly independent given that numerous businesses have been established by the MOT itself.

#### *Competition Council*

The Competition Council is an independent executive body that is responsible for dealing with competition cases and resolving complaints with respect to practices in restraint of competition. The Competition Council has 11 to 15 members appointed by the Prime Minister at the recommendation of the MOT.

### Competition Legal Proceedings

Any organisation or individual believing that their rights and interests have been infringed by a breach of the Competition Law has the right to lodge a complaint with VCAD. VCAD can also initiate an investigation if it discovers a breach of the Competition Law.

VCAD will conduct a preliminary investigation of the competitive practice. Then, if the preliminary investigation indicates the existence of an offence,



an official investigation will be conducted.

During the investigation stage, the head of VCAD may impose administrative preventive measures (such as temporary detention of persons and material evidence, searches) on the recommendation of the investigator or at the request of the complainant.

If indications of a criminal offence are identified during competition investigations, the matter will be referred for criminal investigation. If there are no grounds for criminal prosecution, the case will be returned to VCAD and the official investigation will be resumed.

After the official investigation, if an unfair competitive practice is proved, the head of VCAD will make a decision on dealing with the case. A fine must be imposed.

According to Government Decree 120/2005/ND-CP dated 30 September 2005, on dealing with breaches of the Competition Law and regulations, there are three bands of fines:

- Band 1 is subject to a VND5-10 million fine.
- Band 2 is subject to a VND15-25 million fine.
- Band 3 is subject to a VND50-70 million fine.

Depending on the seriousness of the offence, additional sanctions, such as confiscation of the facilities used to commit the offence, or public retraction, may be imposed.

After official investigation, if a prohibited practice in restraint of competition is proved, the case is transferred to the Competition Council and a panel will be established to consider whether an investigative hearing is required. All concerned parties are entitled to present arguments at a hearing. During the hearing stage, the Competition Council Chairman may impose administrative preventive measures.

The sanctions and penalties for a breach of the Competition Law's provisions on practices in restraint of competition are very severe and based on a percentage of the total turnover for the preceding financial year. A fine must be imposed. For a "first-level" offence, fines of up to five per cent may be imposed. For a "second-level" offence (e.g., where the relevant goods are food), fines of 5-10 per cent may be imposed. Depending on the seriousness of the offence, additional sanctions may also be imposed, such as contract amendment, corporate restructuring or divestiture.

Compensation may also be payable by a party in breach of the Competition Law where such breach causes loss to the interests of the State, an individual or an organisation.

A warning or fine may be imposed on individuals committing "other acts in breach of the laws on competition," such as failure to supply information upon request by the competition authorities or disruption of a competition investigation.

Any concerned party disagreeing with all or part of a decision on dealing with a competition case (or a decision on exemption) may lodge a complaint, but only within 30 days of signing of the decision. In the case of decisions on dealing with unfair competitive practices, complaints are lodged with VCAD and resolved by the Minister of Trade. In the case of decisions dealing with practices in restraint of competition, complaints are lodged with the panel and resolved by Competition Council. Complaints must be resolved within 30 days of receipt, extendable in (undefined) complex cases but for not more than another 30 days.

Any concerned party disagreeing with all or part of a decision resolving a complaint has the right to institute administrative proceedings at the provincial-level people's court.

# Competition Aspects of Foreign Investment in Russia



Maxim Alekseyev



Anna Numerova

The clarification of antitrust aspects of forms of foreign investment can have crucial meaning when the final decision on investing is made. In Russia, antitrust legislation has been significantly amended during the past few years.

Today, if a foreign citizen or

company decides to invest in a company located in or connected in any other way with Russia, the antitrust aspects of such deal should be certainly analyzed. This article aims at bringing to the attention of potential investors the main practical issues arising when one of the forms of investments described below is chosen.

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In the past few years the Russian Government has been arranging favorable conditions to encourage foreign investment. Along with investment incentives, the legal framework for foreign investments has also been determined. This framework encompasses a range of procedures that a foreign investor should be concerned with and undertake while planning and structuring investment activity. In this article we would like to emphasise the competition issues of foreign investment to Russia as competition regulation is one of the most essential aspects in this area.

Federal Law №160-FZ of July 9, 1999 “On Foreign Investments in the Russian Federation” (the “Law on Foreign Investments”) defines “foreign investors” as:

- a) individuals or legal entities, the legal capacity of which is determined by the laws of the jurisdiction of its incorporation, including

those controlled by foreign investors and incorporated in the Russian Federation, ie, *private foreign investors*;

- b) foreign states or international organizations and the legal entities under their control, incorporated inside or outside the Russian Federation, ie, *public foreign investors*.

As a general rule, a foreign investor is entitled to invest in Russia in any form not forbidden by Russian law. In practice a wide range of forms of foreign investment to the national economy is used, but in analyzing the competition aspects we will specify only three principal forms:

1. Acquisition of stocks/shares or control over a target company (the “Target”);
2. Establishment of a joint venture; and
3. Business operations on the basis of a joint venture agreement.

Antitrust regulation and control (including merger control, etc), in particular, control over the activity of natural monopolies, observance of antitrust requirements in tenders, enforcement of laws on advertising and control over foreign

investments in companies having strategic importance for the national security and defense of Russia, is exercised by the **Federal Antimonopoly Service** (“FAS”).

All of the above listed forms of investment are under governmental antitrust control. The principal law regulating antitrust control in Russia is Federal Law № 135-FZ “On Protection of Competition” (the “Competition Law”). The Competition Law has been developed during the past two years to provide the most efficient measures for competition protection in Russia. Currently, the Competition Law has the most notable influence on foreign investment regulation than ever before. The Competition Law applies to agreements between Russian and foreign persons or companies outside Russia, as well as actions performed by them if such agreements are concluded and include the fixed production of tangible and/or intangible assets located in Russia or shares of commercial organisations operating in Russia and rights regarding their activity, or have other effects on competition in Russia. This means that the Competition Law is currently broadly applied to completely foreign transactions if they affect competition in Russia.

The following transactions between foreign companies will be subjected to antitrust control in Russia under the Competition Law:

- Acquisition of shares of a company operating in Russia;
- Acquisition of tangible and/or intangible assets located in Russia; or
- Transactions having any other affect on the state of competition in Russia.

In practice, a foreign company is recognized by the FAS Russia as operating in Russia if:

1. it has a representative office in Russia (a separate subdivision of the legal entity which represents and protects its interests);
2. it has a branch conducting business of the parent company in Russia; or
3. it legally supplies goods produced beyond the boundaries of Russia in Russia in any way (regardless of the supply rate).

It should also be noted that the definition of “effect on competition” is not provided by the Competition Law. Therefore, “effect on competition” can be interpreted broadly and depends on such factors as the increase of the market share of one market participant, reduction in the number of participants on a particular commodity market or any other factors that may also affect the state of competition in Russia.

Therefore, the FAS determines the effect on competition based on market data analysis and other methods available.

FAS Russia has not issued any official guidelines related to the application of the current edition of the Competition law and the practice is still forming. Therefore, we assume that at present the FAS considers the applicability of the Competition Law on a case-by-case basis. This implicates possible difficulties requiring a thorough and timely planning and structuring of the investment activity and support of experienced lawyers.

The main antitrust regulation requirements applied to the principal forms of foreign investing to Russia are described below.

### Acquisition of Stocks/Shares or Control of a Target

According to the Competition Law, the following transactions are subject to antitrust control:

1. acquisition of more than 25 per cent, 50 per cent and 75 per cent of voting stocks (applicable to joint stock companies);
2. acquisition of more than 1/3, 1/2 and 2/3 of the shares in the authorised capital (applicable to limited liability companies);
3. obtaining fixed production assets (except for land plots and non-industrial buildings, structures, installations, premises and parts of



- premises, incomplete construction facilities) and (or) non-material assets if certain conditions exist; and
4. acquisition of rights enabling the determination of the conditions of activity of the Target (so called indirect control) or exercise of the functions of its executive body.

One of the most widely applicable ways that a foreign investment will be subject to antitrust control is the acquisition of the majority of stocks of a Target holding a Russian subsidiary directly or indirectly. According to current antitrust laws, transactions based on the acquisition of shares of a foreign company operating in the territory of Russia are also subject to antitrust control.

It should be taken into consideration that for the purposes of antitrust control, *turnover and assets of the parties of a transaction should be calculated on a worldwide basis including all the companies from the group*. Therefore, the acquisition of stocks/shares of a foreign company that conducts business in Russia can become subject to antitrust control irrespective of the volume of sales or value of assets of a Target in Russia if the worldwide thresholds are met. The thresholds concerning financial organizations differ and are calculated in accordance with the Government Decree.<sup>1</sup>

Additionally, the Shareholders' Agreement (the "SHA"), which often accompany M&A deals and contain the additional rights and obligations

of the shareholders regarding the Target, should be analyzed by the FAS together with the deals accomplished. Thus, for example, the acquisition of a minor interest in a Target may be followed by an assignment of rights to block decisions on basic issues of business activity, to appoint the majority of the members of the Board of Directors, etc. These provisions of the SHA may also become a ground requiring an antitrust filing in Russia.

While structuring acquisition transactions, a possible foreign investor often does not take into consideration, important aspects such as the sphere of the business activity of a Target. However, according to Russian laws the access of foreign investors to specific spheres of business activity is limited.

For example, Art 7 of Federal law No 69-FZ of March 31, 1999 "On Gas Supply in the Russian Federation" stipulates that in the case of a purchase and sale of shares held by the owners of the regional gas supply systems and gas distribution systems, the stake of foreign citizens or foreign organisations shall not exceed 20 per cent of the total amount of the ordinary shares of the said systems. Similar restrictions are settled in the spheres of banking, insurance, mass media, communication, agriculture, etc. The control over enforcement of these requirements is exercised by a number of state authorities including the FAS.

Federal Law No 57-FZ of April 29, 2008 "On Procedure for Foreign investments in Companies Having Strategic Importance for National Defense and State Security" (the "Strategic Investments Law") identifies 42 spheres of business activity that are of strategic importance for the national security and defense of Russia. These are activities related to the:

1. *national defense* sector (eg, working with nuclear materials, activities related to weapons and other military equipment, aviation and space, coding and encryption equipment);
2. *natural resources* sector (eg, exploitation of subsoil areas of federal importance);
3. activity of *natural monopolies* (eg, energy sector);
4. *mass media* sector (eg, television, radio broadcasting and print media if it complies with the conditions specified in the Law); and
5. *telecommunications* (eg, activities of the major telecom providers).

If a company is involved in one or more of the following activities:

1. The acquisition of shares (stocks) resulting in the direct or indirect control of more than 50 per cent of the total voting shares (stocks) of a



Photo: Mark Wragg

- business entity of strategic importance; or
2. The acquisition of shares (stocks) of a business entity of strategic importance that exploits subsurface areas with federal status, if the right to control directly or indirectly 10 per cent or more of the total voting shares (stock) of such a business entity is acquired,

the proposed activity will require the preliminary approval of the Governmental Committee headed by the Prime Minister. Generally, consideration of the filing in accordance with the Strategic Investments Law takes approximately six to nine months because the Committee holds its sessions on an irregular basis.

FAS Russia is one of the bodies authorized to exercise control over foreign investments in strategic economic areas, its functions include, *inter alia*, the receipt of filings, review of the transactions with regard to a determination of control (direct or indirect) over the company having strategic importance and requests for information from the state authorities, transfer of the applications to the Governmental Commission for resolution.

As the FAS is responsible for the consideration of the transaction in accordance with the Competition Law and Strategic Investments Law, it has the right to suspend the consideration of an antitrust filing until the Governmental Committee approves the transaction. Therefore, revising the transaction to comply with the Strategic Investments Law is recommended. In most cases the conclusion of whether the Target is of strategic importance or not can be made based on an analysis of the internal documents of the Target (eg, certificates, licenses, etc).

### Establishment of a Joint Venture

Establishment of a joint venture company itself is a separate reason that may require obtaining clearance in Russia. However, it rarely becomes a ground for an antitrust filing due to the latest amendments to the Competition Law. Antitrust clearance in Russia may be required for a foreign investor if the authorized capital of a new company is paid by stocks (shares) and/or property, including trademarks, of another commercial organization located in Russia. The merger and takeover of companies are also subject to antitrust control if certain thresholds are met.

Therefore, the incorporation of a joint venture company outside Russia without a transfer of Russian assets will be excluded from antitrust control. The contribution to a JV (joint venture) by way of transfer of shares in Russian companies is considered in the order described above (please see “Acquisition of stocks/shares or control of a Target”).

### Liability for Violation of Antitrust Laws

Acquisition of stocks/shares or control of a Target and establishment of a JV are considered **deals of economic concentration**. The liability for violation of antitrust laws while implementing these deals is the same and is specified in a number of legal acts.

Violation of a duty to submit a filing (such as by submitting misleading information to the FAS, failure to notify within the required time limits, failure to provide required information and failure to comply with a FAS ruling) as well as closing the transaction without a requisite FAS clearance may result in the imposition of an administrative fine in an amount up to RUR 500 000 (approximately USD 16,700) on the acquirer. The CEO of the acquirer is also subject to administrative liability in the form of a fine (from RUR 5 000 (approximately USD 180) to RUR 50 000 (approximately USD 1,700)) or disqualification from holding the position of CEO in the subject or other companies for a certain period of time (up to three years). The limitation period is one year from the date the violation is committed (namely, signing of an agreement between the parties to the transaction).

If the FAS establishes that a transaction was implemented without the FAS approval and that it has resulted or may result in the restriction of competition in Russia, the FAS may file a lawsuit to declare the transaction void and as a result “reverse” it. The limitation period is one year from the moment the FAS finds out, or should have found out about the transaction. However, the practice of invalidation of the transactions by Russian courts is rare. Taking into account that global transactions are implemented abroad, the problem of execution of Russian court decisions in the territory of another country can arise.

Therefore, the consequences of a breach of antitrust laws are quite severe. However, to date, the mechanism of their assignment to a foreign person or legal entity is not adequately developed. Yet, the FAS is actively involved in cooperating with antitrust authorities of other countries aimed at the development of an efficient system for the execution of their decisions.

### Business Operations on the Basis of a Joint Venture Agreement

One of the popular forms for foreign investment to Russia is via business operations based on a joint venture agreement without an incorporation of a JV. In particular, the agreements concluded for the purposes of the promotion and sale of new products (services or works) by a combination of economic and/or technical capacities of the parties are widely used. The Competition Law is applied to agreements concluded outside of Russia if they affect the state of competition in Russia. Therefore,

the FAS can recognize them as an anticompetitive collaboration if these agreements contain provisions prohibited by Russian antitrust laws.

Thus, an agreement between competitive foreign and/or Russian companies aimed at cooperation in the form of market-sharing according to territorial principles, volume of sales/purchases, range of products or types of sellers or buyers, price-fixing, etc, in Russia is prohibited as **restrictive**. The list of prohibited conditions is determined by the Competition Law and includes, *inter alia*, economically or technologically unjustified refusals to conclude a contract with a particular buyer or seller, fixing different prices on the same commodity where it is not economically or technologically justifiable, creating barriers to the entry to a commodity market or exit from a commodity market. Once the aforementioned conditions are established, an irrefutable presumption of a restriction on competition will arise and agreements creating such conditions will be prohibited *per se*. The FAS does not have to prove the negative consequences of the execution of such agreements or the affect on competition in Russia as the inclusion of such conditions in the agreements itself is a violation of the Competition Law.

“Vertical” agreements do not fall under prohibitions *per se* except (i) agreements that lead to fixing of the price for resale and/or (ii) agreements that prohibit selling competitor’s goods. The above provision related to price-fixing is interpreted by the FAS broadly and includes, *inter alia*, the setting of minimum/maximum prices and recommended prices. Even providing distributors with informational materials where resale prices are indicated can be considered price-fixing if the FAS reveals that most of the distributors follow such prices. Depending on the market share of the legal entities participating in the agreement certain legal entities may be exempt from provisions (i) and (ii).

#### *Liability for Violation of Antitrust Laws*

The liability for violation of antitrust laws regulating anticompetitive agreements differs from the liability for deals of economic concentration. A company which entered into an agreement prohibited under antitrust laws in force is subject to administrative liability; its CEO will also be liable for the offence. The “*turnover fines*” in the amount of 0,003 per cent to 15 per cent of the violator’s turnover on the market where the violation occurred may be imposed on the company-wrongdoer. The amount of the fine cannot be less than RUR 100 000 (approximately USD 3300). The limitation period is one year from the issuance of the FAS decision on the matter

upon a result of an investigation. At the same time, the FAS has the right to initiate an investigation within three years from the date a violation is committed or the time at which the FAS finds out that the violation is continuing (namely, conducting the business in accordance with agreements). Therefore, the limitations period for liability based on anticompetitive agreements is rather long.

Further, since October 2009, the CEO of a company-wrongdoer can be subject to criminal liability for certain violations. The Criminal Code of Russia has introduced fines in the amount of up to RUR 1 million (approximately USD 34,000) and/or imprisonment up to seven years. In cooperation with the FAS the law enforcement authorities determine the *corpus delicti* and grounds for initiation of a criminal case in respect of the CEO, regardless of the CEO’s citizenship. However, if the CEO is a foreign citizen and does not have income and/or assets in Russia, the execution of the sentence seems to be complicated.

#### **Conclusion**

Today, Russian antitrust laws are one of the most dynamic branches of Russian law. Thus, provisions regulating foreign investments are constantly being developed. This is caused by the necessity to provide foreign investment regulation that encourages the development of a competitive market and at the same time allows for exercise of control over its participants, without a negative impact on competition.

For the past several years, foreign investors did not pay attention to the antitrust aspects of investing in Russian companies or companies owning assets in Russia. However, current laws and practice will force them to take into account the antitrust aspects of their investments to avoid possible negative consequences arising from the powers bestowed on the Russian authorities.

#### *Note:*

- 1 Decree of the Government of the Russian Federation No. 334 of May 30, 2007 on Establishment of the Values of the Assets of Financial Organizations (Except for Credit Organizations) and of the Aggregate Share of Financial Organizations (Except for Credit Organizations) on the Commodity Market for the Purpose of Exercising Antitrust Control; Decree of the Government of the Russian Federation No. 335 of May 30, 2007 on Establishment of the Values of the Assets of Credit Organizations for the Purpose of Exercising Antitrust Control.

# Abuse of Dominance Under the New Competition Regime in India



Atul Dua



Rahul Goel

The Indian Competition Act, which was amended in 2009, strives to promote and create a conducive business environment which prohibits abuse of dominant position by enterprises apart from other anti-competitive practices, etc. The Competition Commission of India (“CCI”) has been vested with powers to direct division of enterprises, impose penalties, direct modification of agreements, order restructuring and partial asset sale, etc for preventing abuse of dominance. However, whether the CCI will be able to stand up to such a momentous task is for time to tell, the CCI to introspect, and us to analyse.

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*“Life is nothing but a competition to be a criminal rather than the victim”*

– Bertrand Russel

Although India’s liberalisation policy is not entirely supportive of the quote above, it has made consistent efforts to augment and catapult the growth graph of India by maintaining a balance between the requirements and requests of

the industrialists and the welfare of the consumers. It is only coherent and consequential of the quote above that “*Competition*” is now universally acknowledged as the best means of ensuring that consumers have access to the broadest range of services at the most competitive prices<sup>1</sup> along with the elimination of monopolies and prevention of abuse of a dominant position by market players.

“The supplier often has a dominant position vis-à-vis the buyer who has little or no bargaining power in the market. There has been a growing realisation for not depending on the old doctrine of *Caveat Emptor* – “let the buyer beware.” The consumer, therefore, needs and deserves legal protection against certain trade practices, business methods and unscrupulous forces.”<sup>2</sup>

The enactment of the new Competition Act,

2002 (the “Act”), and its several amendments with the latest one being in 2009, has been a major step towards framing a well-designed and effective competition law in India. The Act strives to promote and create a conducive business environment with efficient resource allocation, preventing abuse of market power and stimulating competition.<sup>3</sup> The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and tries to regulate combinations in the nature of mergers, amalgamations and acquisitions of control (through shares/voting rights). Further, the Act contains provisions to address concerns relating to market access.

Before we commence our specific discussion on several aspects of the “abuse of dominant position” in the market, it would be significant and relevant to examine the legal connotations behind a couple of vital phrases.

### Legal Implications of “Dominant Market Position” and Related Concepts under the Act

The Act in itself does not prohibit a “Dominant Position” – what is prohibited is its misuse/abuse. Therefore, mere dominance is not a violation of the law.<sup>4</sup> Dominance in a particular sector or market which is on account of innovation or effective and efficient services (entrepreneurial efforts) is legitimate. Dominance has significance for competition only when the relevant market has been defined<sup>5</sup> and is largely dependent on economic considerations. This is indeed a welcome step, a step towards a truly global and liberal economy.<sup>6</sup>

The Act has defined “Dominant Position” to “mean a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to:

- (i) Operate independently of competitive forces prevailing in the relevant market; or
- (ii) Affect its competitors or consumers or the relevant market in its favour.”<sup>7</sup>

The determination of dominance in itself is based on several factors enunciated by the law, though the Act has also been provisioned with an inclusive, though not possibly an exhaustive list. Before moving ahead, it is important to understand the various factors that the CCI is required to take into consideration in determining whether an enterprise enjoys a dominant position or not. A few have been enumerated herein below:

1. Market share though no threshold has been prescribed;
2. Size and resources of the enterprise illustrating

- the size and capacity of the enterprise;
3. Size and importance of competitors;
4. Economic power of the enterprises reflecting brand value and distribution network;
5. Vertical integration of the enterprises;
6. Entry barriers that can be owing to a public sector monopoly;
7. Dependence of consumers, depending on habit and inelastic demand;
8. Countervailing buyer power;
9. Social obligations and costs;
10. Market structure.<sup>8</sup>

The above criteria for deciding the dominant position is wider than what was included under the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (“MRTP”). The CCI is vested with the powers of analysing abuse of a dominant position by an individual enterprise or a group either on:

1. its own motion;
2. information received from any person, consumer or their association or any trade association; or
3. on a reference received from the central government, state government or a statutory authority.<sup>9</sup>

Abuse of the dominant position of an enterprise can be understood after assessing the relevant market depending on the relevant product/geographical market followed by determining whether the particular enterprise exercises a dominant position in the market or not and if so, whether it has resorted to abusing such dominance. Further, to determine whether a market constitutes a “relevant market” for the purposes of this Act, the CCI shall have to give due regard to the *relevant product market* and *relevant geographic market*.

Be the above as it may; understanding the legal import of “relevant market” ahead of any discussion on the “relevant product market” and “relevant geographic market” is not just germane but also crucial.

“*Relevant Market*”<sup>10</sup> is defined in terms of substitutability/interchangeability of products *inter se* and is based on both product and geographical market. The market power is the ability of an enterprise to raise or alter prices and/or reduce production independently and can be acquired by an enterprise by sheer efficiency in production, resource allocation and operational growth or through agreements with other enterprises, acquisitions, mergers, etc.<sup>11</sup> The increase in price must lead to an increase in profitability and must be exercised against the

benchmark of the “*outcome*” under conditions of effective competition.<sup>12</sup>

Relevant Product Market is defined in terms of substitutability of products.<sup>13</sup> Relevant Product Market is the smallest set of close substitutes. The main issue for discussion in *United Brands*<sup>14</sup> was whether enough consumers would switch to other alternatives in response to a rise in the price of bananas to make that price increase unprofitable.

The effort lies in identifying which products are sufficiently similar to be regarded by users as reasonable substitutes for one another. There is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.<sup>15</sup> The mistake of focusing on one segment of consumers rather than concentrating on marginal consumers was termed as a “*toothless fallacy*” in the above mentioned case.

Relevant Geographic Market means “the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas”.<sup>16</sup> A relevant product in a relevant geographic market is what matters.

An enterprise is considered to abuse its dominant position when it:<sup>17</sup>

1. directly or indirectly imposes unfair or discriminatory conditions or unfair or discriminatory prices (predatory pricing) in the purchase or sale of goods and provision of services;
2. limits or restricts the production of goods or provision of services;
3. limits or restricts technical or scientific development relating to the goods or services to the prejudice of consumers;
4. indulges in any practice that results in denial of access to markets;
5. makes the conclusion of a contract conditional on the acceptance by other parties of certain obligations, which by their very nature or according to commercial practice have no connection with the subject matter of the contract; or
6. uses its dominance in one market to enter the other.

Having delved in a brief study of “relevant market,” “relevant product market” and “relevant geographic market,” it may be feasible and promising to explore the various issues revolving around “abuse of dominant position” for the nuances of the same would have been better realized and appreciated in light of the above discussion.

### Use, Misuse and Abuse of “Dominant Position” – Permissibility Under the Act

If an enterprise resorts to any of the activities mentioned above under the provisions of the Act, no further proof is required for establishing loss/damage and would automatically be tantamount to an enterprise/group abusing its dominant position. The Act falls short in defining thresholds of market share beyond which the enterprise would be considered to be dominant in the prescribed market. However, it is a settled understanding that market power is a question of degree.<sup>18</sup> The market share that a particular undertaking has in the relevant market is one of the most important factors to be taken into account to determine whether it is in a dominant position.<sup>19</sup>

The CCI, other than the factors mentioned above, also deals with a fair amount of economic analysis depending on the discretionary powers vested with them. No single factor can be used to dispose of a charge of abuse of dominance. A finding of dominance requires a careful assessment of market conditions, in what must necessarily be a case-by-case analysis.<sup>20</sup> The unavailability of substitutes in the market may also lead to establishment of dominance in the market, wherein new technologies are introduced in the market



leading to dominant positions as no competitors prevail in the market. “Undertakings enjoying exclusive rights to provide a given product or service will by definition enjoy a dominant position as no other firm can enter in the market to challenge them.”<sup>21</sup> Further, a comparison of market shares between a dominant firm and their competitors is useful in determining dominance as well as monopoly.

Predatory behaviour is one of the most common practices resorted to by enterprises constituting a class of anti-competitive action where prices are set so low as to eliminate competing undertakings and, thereby, threaten the competitive process itself.<sup>22</sup> Predation is exploitative behaviour and can be indulged in only by enterprises having a dominant position in the concerned relevant market.<sup>23</sup> The Act declares predatory pricing<sup>24</sup> as a means of abuse of dominance, thus dominance is a pre-condition necessary to sustain a predatory pricing claim under Indian law.<sup>25</sup>

Prior to the commencement of the Act, the MRTP Commission in *Modern Food Industries Ltd*<sup>26</sup> held that the essence of predatory pricing is pricing below the normal cost with a view to eliminate rivals. “Further, the Commission made it clear that the “mere offer of a price lower than the

cost of production cannot automatically lead to an indictment of predatory pricing” and that evidence of ‘malafide intent to drive competitors out of business or to eliminate competition’ have to be proved.”<sup>27</sup>

Be the above as it may, under the Competition Act in its present form, predatory pricing if “adopted to meet the competition” does not amount to anti-competitive activity.<sup>28</sup>

Creating barriers to entry is also another form of abuse adopted by major players to exert their dominance. “A dominant firm can also use its market power to engage in anti-competitive conduct and exclude or deter competitors from the market.”<sup>29</sup> When a group or enterprises enjoying dominance in a particular market restricts new players from entering a relevant market thereby obstructing essential facilities not easily reproducible within a short span from the reach of the consumers, the CCI steps in and passes remedial orders forcing dominant enterprises to share essential facilities with their competitors in the downstream markets.<sup>30</sup>

In the European Union, the landmark *Microsoft* judgment has spread the competition debate beyond judicial and competition policy. “What gave Microsoft the monopoly power in the market was the application of barriers to entry, which tilted the competitive balance in favour of the software giant.”<sup>31</sup> The European Union (“EU”) found Microsoft, the world’s largest software company, guilty of abusing its dominant position in the market with regard to personal computer operating systems, and in violation of the EU Treaty’s Competition Rules.<sup>32</sup> Microsoft’s tying of its media player product had the effect of foreclosing the market to competitors, and thereby ultimately reducing consumer choice, since competing products are set at a disadvantage not related to their price or quality. The Courts of China (Intermediate People’s Court) in their latest decision of *Tangshan Renren Information Service Company vs Baidu* recognized that the definition of *relevant market* is the springboard for abusing market position analysis.<sup>33</sup>

### Supremacy of the CCI: Ambitious and Far-Reaching?

The erstwhile MRTP Act considered dominance itself to be bad or illegal and was vested only with limited powers. Whereas, the provisions of the new Act allows the CCI to break up a dominant firm to ensure that it does not abuse its dominant position, without requiring proof of whether it has already done so, as has been done in the past in the United States in the case of the giant American telecom company AT&T in the 1980’s wherein it



Photo: Sven Hoppe

was divided into five baby bell companies. The amendments in the new Act permits the CCI to direct the division of enterprises to prevent the abuse of dominance through transfer of rights or liabilities, creation or surrender of shares, winding up of an organization or altering its Memorandum and Articles.<sup>34</sup> While this provision is likely to be used rarely in practice, it gives rise to legitimate concerns as to the ability of the CCI to penalize dominance *per se*, rather than only the abuse of that dominance and should be resorted to as a structural remedy.<sup>35</sup> This provision has far reaching impact if utilised in the right manner for regulating enterprises resorting to abuse of dominance and providing certainty to the market.

The CCI has the power to declare that an enterprise has abused its dominant position and thereby impose various penalties and directions after conducting an enquiry under s 19 of the Act. The CCI is vested with the powers to pass orders, including penalties up to 10 per cent of the turnover of the enterprise for the last three financial years, cease and desist orders, direct modifications of an agreement, or remedies such as ordering the restructuring and possible partial asset sale of the pertinent division of the dominant firm,<sup>36</sup> or discontinue such abuse of dominance and any other orders or directions that it may deem fit.<sup>37</sup> The new law also provides the CCI with powers to grant interim relief to temporarily restrain parties

from continuing with an alleged contravention of the Act. However, the CCI on being satisfied that no *prima facie* case exists can bring an end to the matter.<sup>38</sup>

### Conclusion: Will the New Amendments Stand the Test of Time?

Although it is incumbent upon the CCI to scrutinise/investigate each complaint on their respective merits, what ought to be borne in mind at all times by the CCI is the broader framework, policy and objectives of the Act and the recent amendments therein. Whether the CCI is able to pass orders of the nature under ss 27 and 28 of the Act will be known only after a considerable passage of time when all the authorities concerned have had reasonable time to develop and evolve their jurisprudence on the issues of concern.

However, until such time, adopting a balanced approach wherein rights of both consumers and market players are protected, without preventing innovation and efficiency of the competitors, obstructing market structure and/or violating the prevailing competition laws is the need of the hour. Competition law frowns upon the unreasonable exercise of market power or the abuse of a dominant position but the need of the hour is to adopt an appropriate mode of scrutiny for regulating the same without hampering new entities from investing or venturing into the Indian markets.

#### Notes:

<sup>1</sup> “The Impact of Competition Law on Advertising Regulations for Lawyers” (17 December 2008), available at <http://www.rainmaker.co.in/therainmaker/feature/competitionadvertising.htm>, last visited on 19 March 2010.

<sup>2</sup> S Chakravarthy, “MRTP Act Metamorphoses into Competition Act”, available at [www.cuts-international.org/doc01.doc](http://www.cuts-international.org/doc01.doc), last visited on 20 March 2010.

<sup>3</sup> Pham Alice, *Competition Law and Intellectual Property Rights: Controlling Abuse or Abusive Control?* (CUTS International, Jaipur, India, 2008), last visited on 17 March 2010.

<sup>4</sup> G R Bhatia, “Assessment of Dominance: Issues And Challenges Under The Indian Competition Act” (2002), available at [articles.manupatra.com/PopOpenArticle.aspx?ID=8de19f8a...](http://articles.manupatra.com/PopOpenArticle.aspx?ID=8de19f8a...), last visited on 18 March 2010.

<sup>5</sup> Guide published as part of Competition Advocacy and Awareness, available on [www.competition-commission-india.nic.in/.../Booklet\\_AbuseOfDominance11032008.pdf](http://www.competition-commission-india.nic.in/.../Booklet_AbuseOfDominance11032008.pdf) last visited on 17 March 2010.

<sup>6</sup> “Mergers & Acquisitions Under the Competition Act” (2002), available at [http://yedhulaprakash1.lawyersclubindia.com/articles/print\\_this\\_page.asp?article\\_id=1444](http://yedhulaprakash1.lawyersclubindia.com/articles/print_this_page.asp?article_id=1444), last visited on 21 March 2010.

<sup>7</sup> Explanation (a) to s 4 Competition Act, 2002. Similarly defined under various judgments by the European Court of Justice in *United Brands vs Commission* [1978] E.C.R 207 at para 65 and *Hoffman La Roche vs Commission*, 85/76

- [1979] E.C.R. 461 at para 38. “A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”
- <sup>8</sup> Section 19 (4) of the Act.
- <sup>9</sup> Section 19 (1) of the Act.
- <sup>10</sup> Section 2 (r) of the Act defines “relevant market” – It means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.
- <sup>11</sup> Augustine Peter, “Treatment of Abuse of Dominance” – State Level Seminar on “Competition Policy and Law” at Bangalore on 30 January 2009, available at [www.cci.gov.in/index.php?option=com\\_search...5](http://www.cci.gov.in/index.php?option=com_search...5), last visited on 20 March 2010.
- <sup>12</sup> Augustine Peter, “Treatment of Abuse of Dominance” – State Level Seminar on “Competition Policy and Law” at Kolkata on 9 January 2009, available at [www.cci.gov.in/index.php?Itemid=5&option=com...augustine](http://www.cci.gov.in/index.php?Itemid=5&option=com...augustine), last visited on 19 March 2010.
- <sup>13</sup> Section 2 (t) of the Act “Relevant Product Market” means “a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.
- <sup>14</sup> *United Brands v Commission of the European Communities Court of Justice of the European Communities, Case 27/76* [1978] ECR 207.
- <sup>15</sup> Rakesh Prabhakar & Co, “MRTP Law in India”, available at [www.rprabhakar.com/mrtp.htm](http://www.rprabhakar.com/mrtp.htm), last visited on 16 March 2010.
- <sup>16</sup> Section 2 (s) of the Act.
- <sup>17</sup> Section 4 (2) of the Act.
- <sup>18</sup> Communication from the Commission-Guidelines on the application of Article 81(3), (2004) OJ C 101, pp 97-118 at para 26.
- <sup>19</sup> Mallika Ramachandran, “Comparative Law: Law on Abuse of Dominant Position”, available at [www.cci.gov.in/.../ComparativeStudyLaw\\_mallikaramachandran09022007\\_20080411100811.pdf](http://www.cci.gov.in/.../ComparativeStudyLaw_mallikaramachandran09022007_20080411100811.pdf), last visited on 16 March 2010.
- <sup>20</sup> Damien Geradin, Paul Hofer, Frederic Louis, Nicolas Petit, Mike Walker, “The Concept of Dominance in EC Competition Law, Research Paper on the Modernization of Article 82 EC, Global Competition Law Centre” (July 2005), available at [papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID770144\\_code362710.pdf](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID770144_code362710.pdf), last visited on 24 March 2010.
- <sup>21</sup> *Ibid.*
- <sup>22</sup> M R Venkatesh, “Predatory Pricing: Lessons for India Inc”, *Business Line* (20 October 2004), available at [www.thehindubusinessline.com/2004/.../20/.../2004102000091100.html](http://www.thehindubusinessline.com/2004/.../20/.../2004102000091100.html), last visited on 18 March 2010.
- <sup>23</sup> *Supra* at fn 12.
- <sup>24</sup> Explanation (b) to s 4 (2) the Act.
- <sup>25</sup> V Sriraj, “Predatory Pricing”, available at <http://www.indlaw.com>, last visited on 16 March 2010.
- <sup>26</sup> 1996 3 Comp LJ 154.
- <sup>27</sup> *Ibid.*
- <sup>28</sup> Section 4 (2) (a) Explanation of the Act.
- <sup>29</sup> The Chapter II Prohibition, OFT 402, 1999 at para 3.9 referred in Damien Geradin, Paul Hofer, Frederic Louis, Nicolas Petit, Mike Walker, “The Concept of Dominance in EC Competition Law” – Research Paper on the Modernization of Article 82 EC, Global Competition Law Centre (July 2005), available at [papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID770144\\_code362710.pdf](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID770144_code362710.pdf), last visited on 24 March 2010.
- <sup>30</sup> *Supra* at fn 8.
- <sup>31</sup> Nicholas Economides and Ioannis Lianos, “The Quest for Appropriate Remedies in the Microsoft Antitrust EU Cases: A Comparative Appraisal” (11 November 2009). NET Institute Working #09-05; NYU Law and Economics Research Paper No 09-36, last visited on 5 March 2010.
- <sup>32</sup> *Supra* at fn 8.
- <sup>33</sup> <http://www.chinalawvision.com/admin/trackback/176557>, last visited on 19 March 2010.
- <sup>34</sup> Section 28 (2) of the Competition Act, 2002.
- <sup>35</sup> Vinod Dhall, “Essays on Competition Law and Policy” (2007), available on [http://www.cci.gov.in/images/media/articles/essay\\_articles\\_compilation\\_text29042008new\\_20080714135044.pdf](http://www.cci.gov.in/images/media/articles/essay_articles_compilation_text29042008new_20080714135044.pdf), last visited on 20 March 2010.
- <sup>36</sup> Report of the Working Group on Competition Policy, available at [planningcommission.nic.in/aboutus/committee/.../wg11\\_cpolicy.pdf](http://planningcommission.nic.in/aboutus/committee/.../wg11_cpolicy.pdf), last visited on 20 March 2010.
- <sup>37</sup> Section 27 (a), (b), (d), (e) of the Competition Act, 2002.
- <sup>38</sup> Section 26 (2) of the Competition Act, 2002.

# The Effect of the Anti-Monopoly Law in China: A Practical Case



Caroline Berube



Shelly Chen

With the enactment of the Anti-Monopoly Law, China shows its interest on taking a greater control over M&A and other activities under the umbrella of “concentration of operators.” While it spells out a two-tier examination process, much of its application remains to be explored. Caroline Berube and Shelly Chen unveil the mystery by examining a mega acquisition deal between two of the largest brewers in the world.

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## Introduction

For the past 18 years, the People’s Republic of China (the “PRC” or “China”) is believed to have been the leading developing country in terms of drawing foreign investment. Numerous multinationals that entered China in the late 1980s and early 1990s have since acquired a major market presence through advanced technology, efficient scales of production and heavy capital investment. Some of the market share was gained at the expense of fair competition; however, for fear of discouraging the much-needed inflow of foreign capital, the PRC government was hesitant to address the negative aspects or ramification of foreign investment, including the possible rise of market monopolies.

However, in the past a few years, the Chinese

government appears to have developed a growing concern for the viability of domestic industries, and has taken the initiative to bring order to unruly markets by introducing tighter anti-monopoly laws. The following article provides an overview of anti-monopoly laws in China and their implications, and a relevant case study on a recent merger control case regarding the acquisition of Anheuser-Busch Companies by InBev.

## Overview of Chinese Anti-monopoly Laws

On 30 August 2007, the *Anti-Monopoly Law* (“*中华人民共和国反垄断法*,” the “AML”) was finally enacted by the National People’s Congress after around thirteen (13) years of drafting and heated debate. This law came into effect on 1 August 2008, soon after which the PRC government also issued the AML implementation rules, including the *Guidelines on the Reporting of Concentrations of Business Operators* (“*关于外国投资者并购境内企业反垄断申报指南*”, February 2009) and the *Guidelines on the Definition of Relevant Markets* (“*关于相关市场界定的指南*”, May 2009).

### A. “Concentration of Operators” Covering More Than M&A

A merger, acquisition or buyout is considered to give effect to a “concentration of business” where a company, through the transaction, obtains the ability to control, or have a decisive influence on, other business operators through contractual or other means.<sup>1</sup> This provision appears to be broad and vague enough to allow the Chinese government to decide whether to approve or deny each given transaction without heavy focus on the specific details of the matter. The Chinese government may even consider the establishment of a joint venture as a concentration of business and therefore, subject such to the merger control review under the AML (as explained below).

### B. Two-phase Examination

When an imminent transaction is likely to give rise to a “concentration of business” as explained above, the purchasing party should file details on the transaction (a merger-control filing) to the Anti-Monopoly Bureau as operated by the Ministry of Commerce (“MOC”).<sup>2</sup> The MOC will decide, within thirty (30) days of notification to all parties involved (both buyer and seller), whether to conduct a further examination on the transaction. The business operators may not proceed with the

transaction until a decision is made or the thirty (30) day limit expires.

The second phase of examination is a full-scale review by the MOC who will then make the final decision whether or not to prohibit or restrict the transaction.<sup>3</sup> The examination should not take more than ninety (90) days. However, if necessary, the MOC can extend the review period, but in any event, the extension may not exceed sixty (60) days.<sup>4</sup>

As a result, the maximum examination period by the MOC in the second phase is one hundred and fifty (150) days. During this examination, the MOC will look into every aspect of the intended transaction. The companies in question do not have to place a freeze on their relevant activities. They are given a chance to adjust their relevant strategies and also to present any arguments to the Anti-Monopoly Bureau in favour of the transaction.

### C. Penalties and Remedies

The AML provides for administrative and civil penalties, which may be applied separately or together towards the business operators who violate the control rules.

The buying party has an obligation to submit a merger-control filing to the Anti-Monopoly Bureau prior to the closing of the transaction. Should a



Photo: John Kerher

merger-control filing not be filed, the company faces a reversal of the transaction and a fine of up to RMB 500,000 (approximately USD 73,000).<sup>5</sup>

There is a leniency provision in which voluntary reporting of monopoly activity may lead to a mitigation or exemption of penalty.<sup>6</sup> Such voluntary reporting relates to reporting made after the transaction has occurred.

### Case Study: Acquisition of Anheuser-Busch Companies by InBev

#### A. Background

On 13 July 2008, InBev announced its proposed acquisition of all equity shares in Anheuser-Busch Companies (“AB”). Both are among the world’s largest brewing companies. A merger-control filing was thereafter submitted to the Anti-Monopoly Bureau of the MOC on 10 September 2008. InBev and AB filed supplementary filings on October 17th and 23rd, at the request of the MOC and the review process was not commenced until 27 October 2008.

#### B. The Bureau’s Decision

After a full-scale review and investigation, the Anti-Monopoly Bureau decided that, since the acquisition of AB by InBev would not have the effect of eliminating and restricting competition in the national or provincial market, nor to the product market or the competitive structure of the Chinese beer market, it would not prohibit the transaction under the AML.<sup>7</sup>

However, given that the InBev-AB transaction is a large-scale acquisition, the newly-formed company will become more competitive and therefore more capable to significantly increase its market share after the InBev-AB transaction. In order to reduce the possible negative influence on future competition within the Chinese beer market, the Anti-Monopoly Bureau decided to permit the transaction, but with the following restrictive conditions under Art 30 of the AML:

1. AB will not increase its present share proportion of 27 per cent in Tsingtao Brewery (“青岛啤酒股份有限公司”). Subsequently, in

early 2009, AB sold most of its share in the company to Asahi Breweries and now only holds 7 per cent;

2. InBev must inform the MOC of any changes concerning InBev’s controlling shareholders or its controlling shareholders’ shareholders;
3. InBev shall not increase its present share proportion of 28.56 per cent in Guangzhou Zhujiang Brewery Group Co, Ltd (“广州珠江啤酒集团有限公司”); and
4. InBev shall not seek to hold any shares of China Resources Snow Breweries (“华润雪花啤酒有限公司”) or Beijing Yanjing Brewery (“北京燕京啤酒股份有限公司”).

### Conclusion

As mentioned above, the ALM affords considerable latitude to the government in the realm of merger control, especially when fair market competition is potentially jeopardised by concentration of business of foreign enterprises. Although the advent of the AML is welcomed and a positive step toward a more transparent legal regime, the merger control process is still uncertain, to some extent, in terms of its application. Some have argued that the broad scope of the powers given under the AML will lead to decisions by the Chinese authorities that are without proper basis or respect to the rationale behind such law. Furthermore, we believe that the broad definition of a “concentration of business” may confuse some parties as to whether they are obligated to file a merger-control filing.

#### Notes:

- <sup>1</sup> Article 20 of the AML.
- <sup>2</sup> Article 25 of the AML.
- <sup>3</sup> Article 26 of the AML.
- <sup>4</sup> Article 27 of the AML.
- <sup>5</sup> Article 48 of the AML.
- <sup>6</sup> Article 46 of the AML.
- <sup>7</sup> Article 28 of the AML.



# An Invitation to Join the Inter-Pacific Bar Association

The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organizing conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then, it has grown to over 1,400 members from 65 jurisdictions, and it is now the pre-eminent organization in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy, they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another, is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organizations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

## IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees. All of these committees are active and have not only the chairs named, but a significant number of vice-chairs to assist in the planning and implementation of the various committee activities. The highlight of the year for the IPBA is its annual multi-topic 4-day conference, usually held in the first week of May each year. Previous annual conferences have been held in Tokyo (twice), Sydney (twice), Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali and Beijing, attracting as many as 700 lawyers plus accompanying guests.

The IPBA has organized regional conferences and seminars on subjects such as Practical Aspects of Intellectual Property Protection in Asia (in five cities in Europe and North America respectively) and Asian Infrastructure Development and Finance (in Singapore). The IPBA has also cooperated with other legal organizations in presenting conferences—for example on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

The IPBA also publishes a membership directory and a quarterly *IPBA Journal*.

## Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- |  |                   |
|--|-------------------|
| • Standard Membership                                    | US\$195 / ¥23,000 |
| • Three-Year Term Membership                             | US\$535 / ¥63,000 |
| • Lawyers in developing countries with low income levels | US\$100 / ¥11,800 |
| • Young Lawyers (under 30 years old)                     | US\$50 / ¥6,000   |

Annual dues cover the period of one calendar year starting from January 1 and ending on December 31. Those who join the Association before August 31 will be registered as a member for the current year. Those who join the Association after September 1 will be registered as a member for the rest of the current year and for the following year.

Qualified lawyers who attend the IPBA Annual Meeting and Conference and pay the non-member conference fee will be automatically registered as a member for the current year ending on December 31.

Membership renewals will be accepted until July 31.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues will be charged by the Secretariat.

Further, in order to encourage young lawyers to join the IPBA, a Young Lawyers Membership category (age under 30 years old) with special membership dues has been established.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

## Corporate Associate

Any corporation may become a Corporate Associate of the IPBA by submitting an application form accompanied by payment of the annual subscription of (¥50,000/US\$500) for the current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ("Associate Member"), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

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| • Annual Dues for Corporate Associates | US\$500 / ¥50,000 |
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## Payment of Dues

Payment of dues can be made either in US dollars or Japanese yen. However, the following restrictions shall apply to payments in each currency. Your cooperation is appreciated in meeting the following conditions.

1. A US dollar check should be payable at a US bank located in the US. US dollar checks payable in Japan may be returned to sender depending on charges.
2. A Japanese yen check should be payable at a Japanese bank located in Japan.
3. Japanese yen dues shall apply to all credit card payment. Please note that the amount charged will not be an equivalent amount to the US dollar dues.
4. Please do not instruct your bank to deduct telegraphic transfer handling charges from the amount of dues. Please pay related bank charges in addition to the dues.

## IPBA Secretariat

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See overleaf for membership  
registration form



# IPBA SECRETARIAT

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## IPBA MEMBERSHIP REGISTRATION FORM

### MEMBERSHIP CATEGORY AND ANNUAL DUES:

- Standard Membership.....US\$195 or ¥23,000
- Three-Year Term Membership.....US\$535 or ¥63,000
- Lawyers with low income levels in developing countries.....US\$100 or ¥11,800
- Young Lawyers (under 30 years old).....US\$ 50 or ¥6,000

Name: Last Name \_\_\_\_\_ First Name / Middle Name \_\_\_\_\_

Date of Birth: year \_\_\_\_\_ month \_\_\_\_\_ date \_\_\_\_\_ Sex: M / F

Firm Name: \_\_\_\_\_

Jurisdiction: \_\_\_\_\_

Correspondence Address: \_\_\_\_\_

Telephone: \_\_\_\_\_ Facsimile: \_\_\_\_\_

Email: \_\_\_\_\_

### CHOICE OF COMMITTEES:

- |   |  |
|---|--|
| <input type="checkbox"/> Aviation Law                       | <input type="checkbox"/> Intellectual Property               |
| <input type="checkbox"/> Banking, Finance and Securities    | <input type="checkbox"/> International Construction Projects |
| <input type="checkbox"/> Competition Law                    | <input type="checkbox"/> International Trade                 |
| <input type="checkbox"/> Corporate Counsel                  | <input type="checkbox"/> Legal Development and Training      |
| <input type="checkbox"/> Cross-Border Investment            | <input type="checkbox"/> Legal Practice                      |
| <input type="checkbox"/> Dispute Resolution and Arbitration | <input type="checkbox"/> Maritime Law                        |
| <input type="checkbox"/> Employment and Immigration Law     | <input type="checkbox"/> Scholarship                         |
| <input type="checkbox"/> Energy and Natural Resources       | <input type="checkbox"/> Tax Law                             |
| <input type="checkbox"/> Environmental Law                  | <input type="checkbox"/> Technology and Communications       |
| <input type="checkbox"/> Insolvency                         | <input type="checkbox"/> Women Business Lawyers              |
| <input type="checkbox"/> Insurance                          |  |

### METHOD OF PAYMENT (please read each note carefully and choose one of the following methods):

- US\$ Check/Bank Draft/Money Order  
– limited to checks payable at US banks in the US only (others will be returned to sender)
- Japanese yen ¥ Check/Bank Draft  
– limited to checks payable at Japanese banks in Japan only (others will be returned to sender)
- Credit Card – **Please note that Japanese yen dues shall apply to payment by credit card.**  
 VISA       MASTER CARD       AMEX (Verification Code): \_\_\_\_\_  
 Card Number: \_\_\_\_\_ Expiration Date: \_\_\_\_\_
- Bank Wire Transfer – Bank charges of any kind should be paid by the sender.  
 to      The Bank of Yokohama, Shinbashi Branch (SWIFT Code: HAMAJPJT)  
          A/C No. 1018885 (ordinary account) Account Name: Inter-Pacific Bar Association (IPBA)  
          Bank Address: Nihon Seimei Shinbashi Bldg 6F, 1-18-16 Shinbashi, Minato-ku, Tokyo 105-0004, Japan

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

### PLEASE RETURN THIS FORM WITH MEMBERSHIP FEE OR PROOF OF PAYMENT TO:

IPBA Secretariat, Inter-Pacific Bar Association  
Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan  
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 Email: ipba@tga.co.jp