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The American Chamber of Commerce in Singapore

comments on

The Singapore Competition Act of 2004

(Draft Competition Bill)

May 29, 2004

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Statement of Interest

The American Chamber of Commerce in Singapore, hereafter referred to as "AmCham" or "AmCham Singapore," represents the interests of the 1,500 U.S. companies operating in Singapore, and the more than 18,000 Americans living and working in Singapore. With more than 700 corporate and 1,400 individual members from American, Singaporean, and other firms, AmCham has been a strong proponent of the U.S.-Singapore Free Trade Agreement (USSFTA).

The USSFTA, including provisions such as the proposed Competition Law which Singapore is currently developing, will play a vital role in furthering both nations' trade objectives, increasing business opportunities for businesses of all sizes, and contributing to the overall future economic growth of Singapore and the United States.

Enacting a competition law in Singapore is important for a number of reasons. Because Singapore is a small but open economy, it is an attractive destination for international companies looking to setup regional operations here. It also plays an important role as an intermediary for the transshipment and manufacturing of goods. Singapore's current economic policies contribute greatly to helping local and foreign businesses compete in a marketplace that rewards competitiveness and efficiency through greater choice for consumers, lower prices, and more efficient allocation of resources.

However, by developing a competition law, Singapore's already positive reputation globally will be enhanced even further. Enactment of this legislation will help to define more clearly where restrictive and anti-competitive practices are taking place, and to inform corporations about behaviors which could be viewed as unlawful. It will also help to ensure that all companies competing (in those sectors identified as non-excluded) have a level playing field from which to start, thereby increasing the likelihood that more firms from the United States and other countries will choose to setup operations and/or conduct business here. Finally, depending on the approach taken, the Competition Commission has the potential to be a keystone in Singapore’s economic restructuring.

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Summary of Major Points

AmCham and our members strongly support Singapore's enactment of The Competition Act of 2004. Overall, we feel that the draft legislation is comprehensive and far-reaching in its approach. However, there are some areas that we would like to see amended in the current bill:

1. Definition of "Goods"
COMPETITION BILL, PAGE 2, SECTION 2

For clarity, the definition of goods should state that it "includes, **inter alia**, buildings, other structures, and ships, aircraft and hovercraft".

2. Definition of Undertakings
COMPETITION BILL, PAGE 3, SECTION 2

The definition of "Undertakings" is defined too narrowly. The definition especially in the area of 'associations' should be expanded to distinguish between active and inactive members participating in prohibited activities. It should also be made clear, on the face of the statute, that in accordance within common practice in other jurisdictions, a group of companies under common control and trading only amongst themselves would not be subject to either the Section 34 or Section 47 prohibition.

3. Establishment and Incorporation of the Competition Commission of Singapore
COMPETITION BILL, PAGE 4, SECTION 3

AmCham believes that putting the Competition Commission under the purview of Singapore's Ministry of Trade and Industry could be seen as a potential conflict of interest. The Commission should be placed under the Office of the Prime Minister, similar to the Corrupt Practices Investigation Bureau.

4. Agreements, etc. Preventing, Restricting or Distorting Competition
COMPETITION BILL, PAGE 18, SECTION 34(1)

AmCham considers that the insertion of a materiality condition in relation to such agreements would not only help improve legal certainty for businesses inside and outside of Singapore, but would also relieve the Competition Commission of a significant burden of unnecessary work.

5. Agreements, etc. Preventing, Restricting or Distorting Competition
COMPETITION BILL, PAGE 18, SECTION 34(2)

AmCham considers that certain examples of anti-competitive behavior mentioned in this section go beyond the level necessary for effective enforcement of competition law matters, in particular, sub-sections (d) and (e). Each of these are, in other jurisdictions,

very rarely the subject of enforcement under equivalent provisions to the proposed Section 34 prohibition.

6. Agreements, etc. Preventing, Restricting or Distorting Competition
COMPETITION BILL, PAGES 18-19, SECTION 34

In Section 34, the discrimination and tying infringements in Subsections (2)(d) and (e) should be deleted and dealt with only as potential abuses of a dominant position under Section 47. In addition, Section 34 should expressly recognize exceptions to Subsections (2)(a)-(c) in the context of joint ventures and other broader, pro-competitive collaborations. It should also expressly exclude agreements between parent and subsidiary companies, or other entities under common ownership or control.

7. Agreements, etc. Preventing, Restricting or Distorting Competition
COMPETITION BILL, PAGE 19, SECTION 34(3)

AmCham considers that the power to make an agreement void, while a strong deterrent, is disproportionate to the benefits gained. AmCham would suggest two qualifications to this principle, in line with other jurisdictions applying the concept of voidness to infringing provisions. The qualifications would be the automatic invalidity of the provision that infringes the Act, rather than the entire agreement, and the introduction of automatic enforceability if the Agreement satisfies the requirements of Section 41.

8. Agreements, etc. Preventing, Restricting or Distorting Competition
COMPETITION BILL, PAGE 19, SECTION 34(5) AND SECTION 47

AmCham considers that it is inappropriate to have the Section 34 prohibition (or indeed the Section 47 prohibition) act retrospectively. As such, the deletion of the word "before" in this subsection is proposed, and it is proposed that it be made clear that Section 47 would apply only in relation to acts on-going at the appropriate time and into the future.

9. Agreements, etc. Preventing, Restricting or Distorting Competition
COMPETITION BILL, PAGE 19, SECTION 36

AmCham considers that, rather than granting exemptions in each case that would qualify, the Competition Commission should oppose agreements that might not qualify for exemption (similarly to the situation under Section 39).

10. Abuse of Dominant Position
COMPETITION BILL, PAGE 27, SECTION 47

In the current draft of the Competition Act, no definition of a dominant position is given. AmCham considers it fundamental that a strict definition of dominance be given, to aid in legal certainty for business, and the consistent application of the law.

11. Abuse of Dominant Position
COMPETITION BILL, PAGE 27, SECTION 47(2)

In Section 47, Subsection (2)(a) should be limited to "predatory pricing" or otherwise narrowed to specifically identifiable behavior, so as not to over deter pro-consumer price cutting and other healthy competition for market share. In addition, the phrase "or elsewhere" should be deleted from Subsection (3), in order to avoid application to companies that have no market power in Singapore.

12. Abuse of Dominant Position

COMPETITION BILL, PAGE 27, SECTION 47(3)

AmCham believes that a pre-requisite for the application of the Section 47 prohibition should be the existence of a dominant position in Singapore, irrespective of the position of the undertaking concerned outside of Singapore.

13. Mergers

COMPETITION BILL, PAGE 31, SECTION 54

AmCham welcomes the initiative of making mergers subject to a voluntary notification regime, where parties are concerned that a particular transaction may infringe the Section 54 prohibition. However, AmCham considers that it would be helpful if thresholds were laid down, below which it would be assumed that no infringement of the Section 54 prohibition would take place.

14. Mergers - Ancillary Restraints

COMPETITION BILL, PAGE 34, SECTIONS 58 AND 60

A common concern of parties to a transaction is that certain provisions of the transaction documents might be seen as infringing provisions equivalent to the Section 34 prohibition, and in certain jurisdictions, a merger clearance provides legal certainty as to the status of such provisions. AmCham would welcome a clarification within Sections 58 and 60, which makes it clear that any notification and clearance decision would be deemed to cover so called "ancillary restraints" within the transaction documents.

15. Privileged Communications

COMPETITION BILL, PAGE 42, SECTION 66

AmCham considers that Section 66 should make it clear that legal privilege applies to communications between in-house counsel and their client, the company that employs them, for these purposes, and any communication between an external legal adviser and its client made in contemplation of any proceeding involving competition law, whether or not such communications would be regarded as privileged within another jurisdiction.

16. Enforcement Powers of the Competition Commission

COMPETITION BILL, PAGE 44, SECTION 68

AmCham considers that the statute should make it clear that any decision taken under Section 68 must be addressed to a legal entity based within the jurisdiction of Singapore.

17. Additional Powers to the Competition Commission
COMPETITION BILL, PAGE 44, SECTION 69

Allow for provision to have undertakings give binding commitments over concerns of possible breaches of the competition law.

18. The Competition Appeals Board
COMPETITION BILL, PAGE 47, SECTION 72

In the U.S. system, when antitrust decisions are not accepted, the party which does not agree with the judgement will normally appeal to the courts, without needing to go through an Appeals Board first. AmCham feels that a Competition Appeals Board should not be created as part of the new Competition Law.

19. Disclosure of Interest by Competition Commission Members
COMPETITION BILL, PAGE 67, PARAGRAPH 4

Paragraph 4 should be amended to include "brother," "half-brother," "sister," and "half-sister," as relations of the Committee member which would be deemed to have an interest in such transactions or projects, as defined under Section 11 (pages 66-67).

20. Goods and Services Regulated by Other Competition Law
COMPETITION BILL, THIRD SCHEDULE, PAGE 72, PARAGRAPH 5
(AND AS FURTHER SPECIFIED IN ANNEX B, PAGES 1-2)

AmCham believes that the Competition Law should be overarching in scope, and therefore supplemental to the sectoral laws mentioned in Annex B (e.g., electricity and gas; telecommunications; letter and postcard services; media). This would be similar in approach to practices in the United States under The Federal Trade Commission Act.

21. Proposed Exclusion of the Telecommunications Sector from the Competition Law
COMPETITION BILL, ANNEX B, PAGE 2

As a follow-on to Point 18 above, AmCham feels that the telecommunications sector should not be excluded from the proposed Competition Law.

22. Merger Transactions and the Section 34 Prohibition
COMPETITION BILL, THIRD SCHEDULE, PAGE 73, PARAGRAPH 8

AmCham believes that, in common with many other jurisdictions, mergers that have been the subject of a clearance decision by the Competition Commission should be exempted from the application of the Section 34 prohibition.

23. Rights of Private Action

COMPETITION BILL, PAGE 51, SECTION 75

On the question of rights of private action, these should be limited under Section 75 to those directly harmed by an infringement, so as to limit speculative litigation and duplicative payments. The level of exemplary damages that may be awarded under Section 75(8)(b) should also be limited to avoid excessive claims designed to coerce settlements.

24. Intellectual Property Rights (IPR)

On the subject of IPR, the rule of reason approach set forth in the Consultation Paper, Annex C, should reinforce IPR by acting as a limit on per se application of Sections 34 and 47. It should not undermine them by creating a free standing basis for case-by-case decisions about whether intellectual property rights are the best way to promote innovation. In particular, competition law should not limit the right of an owner of IPR to refuse to license its IPR or to restrain infringements.

Comments

Further details and explanation of the aforementioned points are as follows:

1. Definition of "Goods"
COMPETITION BILL, PAGE 2, SECTION 2

For clarity, the definition of goods should state that it "includes, **inter alia**, buildings, other structures, and ships, aircraft and hovercraft." Traditionally, such definitions have also included intangible items, such as gas and electricity (see Point 17 below for more details).

2. Definition of Undertakings
COMPETITION BILL, PAGE 3, SECTION 3

The definition of "Undertakings" is defined too narrowly. The definition especially in the area of "associations" should be expanded to distinguish between active and inactive members participating in prohibited activities.

The draft Competition Law allows for penalties to be recovered directly from "Undertakings" and in the present form "Associations" are included in the definition. This will be inequitable to members of associations who are not in any way involved in any prohibited activity and may be penalized together with active members who have participated in prohibited activities. The definition of associations of undertakings should be expanded to distinguish representatives who are active members of the decision making body of the association and members who are inactive.

With an expanded definition, it should become more equitable for the members of the association who have not breached the basic tenets of a pro-competition business environment, who show that they were not aware of the existence, have not implemented or had distanced themselves from the prohibited activities in allowing them the ability to disassociate themselves from such prohibited activities and not be penalized together with the active members.

In addition, it should also be made clear, on the face of the statute, that the single economic entity principle would apply in relation to the Section 34 and Section 47 prohibitions, in accordance within common practice in other jurisdictions. This is because a group of companies under common control and trading only among themselves could not have an appreciable effect on competition for these purposes. This principle is clear on the face of the statute for the purposes of merger control in Singapore, and is directly analogous for these prohibitions.

3. Establishment and Incorporation of the Competition Commission of Singapore
COMPETITION BILL, PAGE 4, SECTION 3

While AmCham feels that the Singapore government and Ministry of Trade and Industry (MTI) would strive to operate the Competition Commission and other bodies established under the auspices of the Competition Law in a fair and transparent manner, concerns could arise from parties involved in commercial disputes about the objectivity and independence of this commission.

MTI has a number of statutory boards, some of whose senior executives sit on the Boards of Directors of corporate entities, be they private firms or government-linked companies (GLCs). Additionally, some of these stat boards have ownership interests in GLCs that would be subject to the Competition Act. Examples include IE Singapore and Jurong Town Corporation (JTC), both of which have ownership interests in GLCs which actively compete with private sector companies, including some members of AmCham. Equally troubling is that senior officials of the Ministry serve on the boards of corporate entities whose activities might also be subject to the Act. We understand, for example, that MTI's Permanent Secretary is on the Board of Directors of SingTel.

In the April 29, 2004 hearings on Singapore's Competition Law, MTI officials indicated that the legislation and competition policy will impact not solely on specific industries, but they will cut across all sectors because of the nature of competition and Singapore's economic development.

The JTC example is a clear one in which government entities and companies from several industries and sectors could have interests in -- or be affected by -- commercial activities which JTC undertakes. If JTC were to be involved in a commercial dispute with a third party, obvious questions would be raised as to the objectivity of the hearings and how much influence MTI, MINDEF, and others involved with JTC could have on the outcome of the Commission's findings.

Again, AmCham presumes that the Commission's hearings would be held with the utmost objectivity and transparency. Yet the perception of potential conflict of interests, even if unwarranted, can be as damaging as an actual conflict of interest. External media and others, including both Singaporeans and foreigners, who review the case, could speculate as to the fairness of the process. Having spent such effort on implementing a Competition Act, it would be unfortunate if the Act's effectiveness were undermined by such speculation.

To address these concerns, we believe that an important Commission such as this should be placed under the auspices of the Office of the Prime Minister (PMO). A Commission appointed by the Prime Minister, and held accountable to his office, would be clearly seen as impartial, and would be seen as being in a better position to address the broad issues and concerns cutting across numerous industries and ministries, rather than trying to address these as a subset of an existing functional ministry. We would draw a parallel

with the Corrupt Practices Investigation Bureau, whose position reporting to the PM underscores the seriousness with which the Government takes the anti-corruption issue.

If under the PMO, the Competition Commission would be demonstrably above disagreements among multiple Singapore government ministries, stat boards, and/or GLCs (or where disagreements between a Singapore-related entity and a private company were questioned because of the Singapore entity's linkages to other governmental bodies and corporations). It would also be viewed externally as more independent and objective, than would a body which is ultimately established under and reporting to an individual ministry. Just as with the CPIB, placing the Competition Commission within the PMO would send a powerful message of the seriousness with which the Government takes ensuring a level playing field for business in Singapore.

4. Agreements, etc. Preventing, Restricting or Distorting Competition
COMPETITION BILL, PAGE 18, SECTION 34(1)

AmCham considers that the insertion of a materiality condition in relation to such agreements would not only help improve legal certainty for businesses inside and outside of Singapore, but would also relieve the Competition Commission of a significant burden of unnecessary work. If such a condition is not included, then the Competition Commission risks receiving an extremely large number of notifications in respect of harmless agreements that have been notified out of an excess of caution and a wish to ensure that legal certainty is obtained. The concept would work in a similar way to that of the appreciability concept under UK and EC law, and could be included within the section itself, or be included in Guidelines on appreciability to be published by the Competition Commission. If it were to be included, it would require simply the addition of the word "appreciable" prior to prevention in section 34.

5. Agreements, etc. Preventing, Restricting or Distorting Competition
COMPETITION BILL, PAGE 18, SECTION 34(2)

AmCham considers that certain of the examples of anti-competitive behavior mentioned in this section go beyond the level necessary for effective enforcement of competition law matters, namely sub-sections (d) and (e).

Each of these are, in other jurisdictions, more commonly cited as examples of behavior that would be prohibited under the proposed Section 47 prohibition, and have very rarely been the subject of enforcement under equivalent provisions to the proposed Section 34 prohibition.

As such, AmCham considers that citing such examples goes beyond that which is necessary in this section. As the section is not exhaustive, the deletion would not prevent enforcement of the prohibition in the event that any such agreements were found to exist.

6. Agreements, etc. Preventing, Restricting or Distorting Competition

COMPETITION BILL, PAGES 18-19, SECTION 34

In Section 34, the discrimination and tying infringements in Subsections (2)(d) and (e) should be deleted and dealt with only as potential abuses of a dominant position under Section 47. In addition, Section 34 should expressly recognize exceptions to Subsections (2)(a)-(c) in the context of joint ventures and other broader, pro-competitive collaborations. It should also expressly exclude agreements between parent and subsidiary companies, or other entities under common ownership or control.

7. Agreements , etc Preventing, Restricting or Distorting Competition

COMPETITION BILL, PAGE 19, SECTION 34(3)

AmCham considers that the power to make an agreement void, while a strong deterrent, is disproportionate to the benefits gained. AmCham would suggest two qualifications to this principle, in line with other jurisdictions applying the concept of voidness for contractual provisions infringing competition law.

Section 34(3) would therefore be amended to read: "Any provision in an agreement or decision which is prohibited by subsection (1) is void."

Secondly, in relation to enforceability of provisions that satisfy the requirements of Section 41, these should not be void. In the United Kingdom (UK), which had a similar provision to Section 34(3), this will now be amended (to bring it into line with the European Union (EU), which has already made the change), such that agreements which satisfy the requirements of Section 9(1) Competition Act 1998 require no decision to be enforceable, mirrored in the EU by the application of Article 81(3) EC Treaty.

As such, AmCham would suggest the addition of the following sentence at the end of Section 41: "Any provision which satisfies the criteria set out above shall be enforceable."

In this way, parties may make an assessment that the provision is enforceable, avoiding the need for a burdensome notification, but this is without prejudice to the ability of the Competition Commission to find in any individual case that these criteria have not, despite the party's assessment, been met.

8. Agreements, etc. Preventing, Restricting or Distorting Competition

COMPETITION BILL, PAGE 19, SECTION 34(5) AND SECTION 47

AmCham considers that it is inappropriate to have the Section 34 prohibition (or indeed the Section 47 prohibition) act retrospectively. As such, the deletion of the word "before" in this subsection is proposed and it is proposed that it be made clear that Section 47 would apply only in relation to acts ongoing at the appropriate time and in the future.

Clearly, the work burden of the Competition Commission would be greatly reduced, in that it need not investigate past practices in Singapore to ensure compliance with the provision.

Furthermore, making the Act focused on the present and future would be in accordance with international best practices, and would avoid the potentially disproportionate cost to business of conducting significant internal audits to determine whether, for caution's sake, agreements in place prior to the introduction of the Act need be notified to the Competition Commission. By retaining the word "on", it is made clear that any ongoing practices are indeed caught by the law, thus achieving the change (if one is required) in business practices required.

9. Agreements, etc. Preventing, Restricting or Distorting Competition
COMPETITION BILL, PAGE 19, SECTION 36

AmCham considers that rather than granting exemptions in each case that would qualify, the Competition Commission should oppose agreements that might not qualify for exemption (similarly to the situation under Section 39).

Thus, an agreement notified to the Competition Commission, if not opposed within a reasonable time period (for example 90 working days), would be deemed to have been granted an exemption from the Section 34 prohibition.

If such an approach, which AmCham believes is sensible, were adopted, an opposition might not necessarily mean that no exemption could be granted, merely that a particular agreement deserves or requires further investigation prior to the grant or otherwise of an exemption.

10. Abuse of Dominant Position
COMPETITION BILL, PAGE 27, SECTION 47

In the current draft of the Competition Act, no definition of a dominant position is given. AmCham considers it fundamental that a strict definition of dominance be given, to aid in legal certainty for business, and the consistent application of the law.

Such a definition could be based on that applicable in jurisdictions such as the UK and the EU, being " a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers". In the interests of legal certainty, AmCham would strongly urge the inclusion of this definition, whatever the wording of it decided by the Ministry may ultimately be, into the statute itself.

11. Abuse of Dominant Position

COMPETITION BILL, PAGE 27, SECTION 47(2)

In Section 47, Subsection (2)(a) should be limited to "predatory pricing" or otherwise narrowed to specifically identifiable behavior, so as not to over deter pro-consumer price cutting and other healthy competition for market share. In addition, the phrase "or elsewhere" should be deleted from Subsection (3), in order to avoid application to companies that have no market power in Singapore.

12. Abuse of Dominant Position

COMPETITION BILL, PAGE 27, SECTION 47(3)

AmCham believes that a pre-requisite for the application of the Section 47 prohibition should be the existence of a dominant position in Singapore, irrespective of the position of the undertaking concerned outside of Singapore.

It is hard to see how a dominant position, outside of Singapore, could lead to the behavior prohibited under Section 47, unless a dominant position on the relevant market within Singapore where also affected.

This qualification would not affect the ability of the Competition Commission to determine whether, in the event that the undertaking is active on a market whose relevant geographic scope is global, the position enjoyed at a global level is replicated, and with similar effect, in Singapore.

13. Mergers

COMPETITION BILL, PAGE 31, SECTION 54

AmCham welcomes the initiative of making mergers subject to a voluntary notification regime, where parties are concerned that a particular transaction may infringe the Section 54 prohibition.

However, AmCham considers that it would be helpful if thresholds were laid down below which it would be assumed that no infringement of the Section 54 prohibition would take place, such as a threshold of minimum turnover in Singapore for each of the parties to the transaction.

Such thresholds might operate by analogy to those in the UK, where the Office of Fair Trading does not have jurisdiction over a transaction when the turnover of the target is less than GBP 70 million.

14. Mergers - Ancillary Restraints

COMPETITION BILL, PAGE 34, SECTIONS 58 AND 60

A common concern of parties to a transaction is that certain provisions of the transaction documents might be seen as infringing provisions equivalent to the Section 34

prohibition, and in certain jurisdictions, a merger clearance provides legal certainty as to the status of such provisions.

AmCham would welcome a clarification within Sections 58 and 60 that made it clear that any notification and clearance decision would be deemed to cover so called ancillary restraints within the transaction documents.

This would reduce burden on the Competition Commission, who would thus not have to rule separately on the same set of documentation. The exemption thus provided could be made conditional on no significant changes to market conditions occurring, to preserve the ability of the Competition Commission to later challenge such provisions if required, in line with the provisions of Section 60.

15. Privileged Communications
COMPETITION BILL, PAGE 42, SECTION 66

AmCham considers that Section 66 should make it clear that legal privilege applies to communications between in-house counsel and their client, the company that employs them, for these purposes, and any communication between an external legal adviser and its client made in contemplation of any proceeding involving competition law, whether or not such communications would be regarded as privileged within another jurisdiction.

16. Enforcement Powers of the Competition Commission
COMPETITION BILL, PAGE 44, SECTION 68

AmCham considers that the statute should make it clear that any decision taken under Section 68 must be addressed to a legal entity based within the jurisdiction of Singapore.

17. Additional Powers to the Competition Commission
COMPETITION BILL, PAGE 44, SECTION 69

Allow for provision to have undertakings give binding commitments over concerns of possible breaches of the competition law.

In the context of the provisions related to seeking guidance for potential breaches of the Section 34 and Section 47 prohibitions contained in Sections 43 and 49, AmCham believes it would be helpful for the Competition Commission to be able to accept the offer of binding commitments by parties as part of this process. This would allow parties to allay any potential concerns in relation to the agreement or conduct on which guidance is sought in a clear manner without the need for a formal notification at an early stage.

Hopefully, this will help foster a more consultative environment to promote healthy competition and help businesses from inadvertently falling foul of the Competition Law. This will also increase the flexibility and reach of the Competition Commission in administering the Competition Law as a pre-emptive measure, rather than having to

impose punitive penalties or having compel parties to unravel anti-competitive arrangements.

18. The Competition Appeals Board
COMPETITION BILL, PAGE 47, SECTION 72

In the U.S. system, when antitrust decisions are not accepted, the party which does not agree with the judgement will normally appeal to the courts, without needing to go through an Appeals Board first. While the intent of an Appeals Board is to help address cases in which parties have not been satisfied, and to try and reduce potential cases going before the courts, we still feel that it is an unnecessary step in the appeals process.

Going through an Appeals Board costs companies additional time and money for going through this added step. Smaller firms with limited financial resources who might be victims of anti-competitive practices would be less likely to file appeals, knowing that they would need to go through the extra time and expense of a lengthened process (i.e., one that includes an Appeals Board and courts, in the event they do not agree with the Appeals Board's decision). Or, firms that go to the Appeals Board might not find the additional time and expense of needing to protest their decision to the courts worthwhile, and would drop the lawsuit altogether.

However, if the Singapore government chooses not to eliminate the Competition Appeals Board from this process, AmCham feels that -- for similar reasons provided with respect to putting the Competition Commission under the purview of the PMO -- the Appeals Board should also be put under the PMO, to ensure a level playing field for business in Singapore.

19. Disclosure of Interest by Competition Commission Members
COMPETITION BILL, PAGE 67, PARAGRAPH 4

Paragraph 4 should be amended to include "brother," "half-brother," "sister," and "half-sister," as relations of the Committee member which would be deemed to have an interest in such transaction or project, as defined under Section 11 (pages 66-67).
The paragraph should read as follows:

(4) For the purposes of this paragraph, a member whose spouse, parent, brother, half-brother, sister, half-sister, son, adopted son, daughter, or adopted daughter has an interest in the transaction or project referred to in sub-paragraph (1) shall be deemed to be interested in such a transaction or project.

To clarify the definitions above, "half-brother" and "half-sister" would be defined as siblings from the spouse of the member's natural mother or father, who had remarried in cases of divorce or death of the original spouse.

AmCham would like to see these four relations included to further ensure that Competition Commission members would not have a vested interest in cases involving

immediate family members, or those who became members of the immediate family as in the case of half-siblings.

20. Goods and Services Regulated by Other Competition Law
COMPETITION BILL, THIRD SCHEDULE, PAGE 72, PARAGRAPH 5
(AND AS FURTHER SPECIFIED IN ANNEX B, PAGES 1-2)

AmCham believes that the Competition Law should be overarching in scope, and therefore supplemental to the sectoral laws mentioned in Annex B (e.g., electricity and gas; telecommunications; letter and postcard services; media). This would be consistent with U.S. practices as governed under The Federal Trade Commission Act.

As mentioned above, and as MTI officials correctly pointed out at the April 29, 2004 hearings, the issues of competition policy and competition law are not limited to specific industries or sectors (i.e., having a very microeconomic focus). Rather, they cut across a wide variety of areas and situations.

AmCham believes that Singapore's Competition Law should be structured to provide an overall, comprehensive approach to sorting out commercial disputes, even in those sectors (with their own competition laws already in place) identified as being excluded.

The approach should not statutorily preclude petitioners filing challenges to practices governed under separate sectoral competition codes. Rather, the Commission should be empowered to review all petitions. That does not mean the Commission should be forced to accept all petitions; rather, the Commission should be able to reject petitions that are not complete, are unsubstantiated, or ones which, in the Commission's view, should more properly be handled by sectoral competition authorities. Such an approach would prevent "forum shopping", while still leaving the door open to possible petitions in sectors subject to separate legislation.

In the United States, the Federal Trade Commission Act, administered solely by the FTC (which could be viewed as the equivalent of Singapore's proposed Competition Commission), is a catch-all enactment which has been construed to include all the prohibitions of the other antitrust laws (e.g., The Clayton Act and The Sherman Act). In addition, the Federal Trade Commission Act can be utilized to fill apparent loopholes in more explicit regulatory statutes. The FTC's authority is additional to that of the sectoral competition authorities in the US, including the US Federal Communications Commission, the Federal Energy Regulatory Commission, etc.

It is our view that a similar structuring of Singapore's Competition Law, administered solely by the Competition Commission which is housed under the PMO, would make the most sense and also help to ensure that any conflicts or potential loopholes created as a result of differing legal requirements within the sectoral competition laws and that of The Competition Act of 2004, were addressed in a comprehensive manner which is similar to how the Federal Trade Commission Act seeks to address these potential grey areas.

21. Proposed Exclusion of the Telecommunications Sector from the Competition Law
COMPETITION BILL, ANNEX B, PAGE 2

As a follow-on to Point 18 above, AmCham feels that the telecommunications sector should not be excluded from the proposed Competition Law.

Currently, the telecommunications sector is governed by the Infocomm Development Agency (iDA)'s competition code. However, the Code has weaker powers relative to a full fledged Competition Law. It lacks a legal framework to address and to curb anti-competitive and abuse of dominant behavior.

In Australia and other relevant jurisdictions, regulation of the telecom sector is supplemental to industry-wide laws. AmCham members feel that there are real risks associated with industry-specific competition regulation that operates outside of general principles. Linking with the general economy heightens transparency of regulators conduct and means it is less likely to set rules/processes/patterns that simply reflect the views of the incumbent.

Also, in looking at Singapore's obligations under the USSFTA:

Article 9.4 of the US-SG FTA requires each party to "maintain appropriate measures for the purpose of preventing suppliers of public telecommunication services who, alone or together, are major suppliers in its territory from engaging in or continuing anti-competitive practices. Singapore has competition law obligations under the FTA. Mere reliance on the Code to meet that obligation is insufficient.

Article 9.11 requires each party to ensure that any enterprise aggrieved by a determination or decision of the telecommunications regulatory body to have the opportunity to obtain judicial review of such determination or decision by an independent judicial authority. The Competition Code does not articulate the right of judicial review.

22. Merger Transactions and the Section 34 Prohibition
COMPETITION BILL, THIRD SCHEDULE, PAGE 73, PARAGRAPH 8

AmCham believes that, in common with many other jurisdictions, mergers that have been the subject of a clearance decision by the Competition Commission should be exempted from the application of the Section 34 prohibition. This has the benefit of increased legal certainty for parties to transactions and a reduced burden for the Competition Commission, who would therefore not have to open separate files relating to a single set of transaction documentation.

23. Rights of Private Action
COMPETITION BILL, PAGE 51, SECTION 75

On the question of rights of private action, these should be limited under Section 75 to those directly harmed by an infringement, so as to limit speculative litigation and

duplicative payments. The level of exemplary damages that may be awarded under Section 75(8)(b) should also be limited to avoid excessive claims designed to coerce settlements.

24. Intellectual Property Rights (IPR)

On the subject of IPR, the rule of reason approach set forth in the Consultation Paper, Annex C, should reinforce IPR by acting as a limit on per se application of Sections 34 and 47. It should not undermine them by creating a free standing basis for case-by-case decisions about whether intellectual property rights are the best way to promote innovation. In particular, competition law should not limit the right of an owner of IPR to refuse to license its IPR or to restrain infringements.

Conclusions

AmCham supports the Singapore government's plans to enact a Competition Law. We feel that the comments listed above will further enhance the strong steps which this proposed legislation takes to ensure a level playing field for all participants -- large and small -- who wish to do business in Singapore.

Such legislation would not only benefit American and other international, but it would also serve to protect the interests of the many Singaporean SMEs who are doing business here. Small companies are the lifeblood of new and future innovations in many countries, including Singapore. Their ability to contribute their products and ideas into the marketplace, where consumers will ultimately judge them through their spending power, depends heavily on a market which is structured to ensure that competing firms can do so fairly and without restrictive and anti-competitive practices.

The Competition Law and its impact on players in the market will ultimately result in Singapore consumers having access to a larger pool of better-produced, lower-priced, variety of goods and services. It will also attract increased foreign investment, ensuring that Singapore continues to be viewed as a pivotal economy in the Asia Pacific region in the years to come.