

**In the Matter of the Proposed  
Acquisition by International  
Container Terminal Services, Inc. of  
Shares in the Manila North Harbour  
Port, Inc.**

**MAO Case No. M-2018-034**

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## **COMMISSION DECISION NO. 09-M-034/2019**

### **STATEMENT OF THE CASE**

1. For the Philippine Competition Commission's (the "Commission") approval is the transaction involving the proposed acquisition by International Container Terminal Inc. ("ICTSI") of 15.17% of the shares in Manila North Harbour Port, Inc., ("MNHPI") from Harbour Centre Port Terminal, Inc. ("HCPTI") (the "Proposed Transaction"). The Proposed Transaction will increase ICTSI's current shareholdings in MNHPI from 34.83% to 50%.
2. The acquiring party, ICTSI, is a domestic corporation engaged in the business of port operations and related services for container and non-container cargoes worldwide. ICTSI and its subsidiaries currently operates nine (9) ports and one (1) inland container terminal in the Philippines, including the Manila International Container Terminal ("MICT").
  - 2.1. MICT is one (1) of the four (4) cargo terminals located in Metro Manila that offers services to the general public. ICTSI was granted the right to operate the MICT until 2035 under a concession agreement with the Philippine Ports Authority ("PPA"). At present, MICT only services foreign vessels carrying containerized cargo.
  - 2.2. Mr. Enrique Razon, Jr. ("Mr. Razon"), the incumbent President and Chairperson of ICTSI's Board of Directors, directly and indirectly owns 61.99% of the shares in ICTSI. The ultimate control of ICTSI, hence, may be attributed to Mr. Razon.
    - 2.2.1. Mr. Razon also indirectly controls Port Capital South East Asia Holdings, Inc. ("Port Capital"), which owns the land on which the Harbour Centre Port Terminal ("Harbour Centre") is located. Harbour Centre is one (1) of the four (4) cargo port terminals in Metro Manila and is operated by HCPTI.
    - 2.2.2. Aside from port-related assets, Mr. Razon also has controlling interests in other businesses such as hotels, resorts, casinos, and property.
3. The acquired entity, MNHPI, is a domestic company that was granted the right to operate the Manila North Harbour Port Terminal ("North Harbour") until 2035 under a concession agreement with the PPA.) At present, MNHPI operates North Harbour, which caters to domestic containerized and domestic break bulk cargo only.

- 3.1. MNHPI's ultimate parent entity is Top Frontier Investment Holdings, Inc. ("Top Frontier").
- 3.2. MNHPI's largest shareholders are San Miguel Holdings Corp. ("SMHC") and ICTSI, which owns 43.33% and 34.83% of MNHPI's outstanding shares, respectively.

## RELEVANT MARKETS AND THE COUNTERFACTUAL

4. To determine whether the Proposed Transaction is likely to prevent, restrict, or lessen competition, the competitive effects of the Proposed Transaction within the identified relevant markets should be assessed.
  - 4.1. A relevant market is one that could be subject to an exercise of market power that would likely result in significant harm to competition. Each relevant market has two (2) dimensions: product market<sup>1</sup> and geographic market.<sup>2</sup>
5. The product markets for the provision of port services are primarily distinguished by the following characteristics:
  - 5.1. Type of cargo received at port, (i.e. containerized cargo, bulk cargo or break-bulk cargo); and
  - 5.2. Port classification and intended use as determined by the PPA.
6. Presently, ICTSI operates the MICT as a foreign containerized cargo port terminal. On the other hand, MNHPI operates the North Harbour as a domestic multipurpose (i.e., containerized, bulk, and break-bulk) cargo and passenger port terminal operator.

### ***By type of cargo: containerized, bulk and break-bulk***

7. During the review, it was determined that containerized, bulk, and break-bulk cargo handling are distinct product markets for the following reasons:
  - 7.1. *Characteristics of Cargo Require Different Handling and Vessels.* Containerized, bulk, and break-bulk cargo require different types of port handling and may require different kinds of vessel to transport the cargo, depending on the cargo's physical characteristics. The vessels used to transport these cargoes may differ depending on the specific shipping, stowage and port transfer requirements of the cargo being handled;
  - 7.2. *Difference in Customers.* Containerized, bulk, and break-bulk cargo cater to different types of customers. For instance, the needs of regular importers who procure goods in commercial quantities vary from those of individuals who make one-off importation as returning residents and these affect the type and modality of cargo transport that their intermediaries in the market utilize; and

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<sup>1</sup> Relevant Product Market comprises all those goods and/or services that are regarded as interchangeable or substitutable by the consumer or the customer, by reason of the goods and/or services' characteristics, their prices, and their intended use.

<sup>2</sup> Relevant Geographic Market comprises the area in which the entity concerned is involved in the supply and demand of good and services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are different in those areas.

- 7.3. *Difference in Price.* Container, bulk, and break-bulk cargo handling costs and fees are priced differently because of the differences in the cargo handling necessitated by the physical characteristics of the cargo.

***By port classification: foreign vs. domestic cargo handling***

8. It was likewise determined that international and domestic port services are distinct product markets primarily due to existing regulations that prevent substitutability between international and domestic ports.

8.1. *Difference in Customers.* Due to existing cabotage restrictions, including the lack of full implementation of Republic Act 10668, otherwise known as the 2014 Foreign Ships Co-Loading Act (the “Co-Loading Act”), domestic vessels are limited to transporting domestic cargo, which are serviced by designated domestic port services providers,<sup>3</sup> while foreign vessels are limited to transporting foreign cargoes, which have to avail of facilities in designated international ports.<sup>4</sup> Thus, there is no substitution by customers between domestic and foreign cargo handling.

8.2. *Contractual Restrictions on Port Use.* The PPA exercises the power to classify the intended use of port terminals through its concession agreements with port terminal operators.

8.2.1. Under the *Contract for the Development, Management, Operation and Maintenance of the North Harbour* (“MNHPI Concession Agreement”),<sup>5</sup> MNHPI is restricted to domestic terminal services and may not serve foreign vessels.<sup>6</sup>

8.2.2. This restriction is reinforced in the Memorandum Order<sup>7</sup> issued by the PPA, where the PPA reiterates MNHPI’s contractual limitations under the MNHPI Concession Agreement and prohibits MNHPI from providing terminal services to foreign vessels at the North Harbour.

8.2.3. Under the MNHPI Concession Agreement, the PPA is likewise contractually barred from allowing any expansion of existing competing ports or terminals; further, PPA shall only allow the construction/operation of new ports/terminals handling domestic traffic at the Port of Manila, subject to certain conditions being met.<sup>8</sup>

8.2.4. On the other hand, ICTSI’s operation under its original *Contract for the Management Operation and Development of the Manila International Container Terminal* (“ICTSI Concession Agreement”), was limited to import/export and foreign transshipment at the MICT. This limitation was amended in 2008,<sup>9</sup> such that ICTSI was given the right to handle domestic vessels and domestic cargo and potentially, the opportunity to develop a

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<sup>3</sup> See paragraphs 21-27 for further discussion of the current regulatory regime.

<sup>4</sup> Commonwealth Act 146 of 1936, as amended by Republic Act 2677, Republic Act 1937 of 1957, and Republic Act 9295 of 2004.

<sup>5</sup> Entered on 19 November 2009.

<sup>6</sup> MNHPI Concession Agreement, Section 4.02.

<sup>7</sup> PPA Memorandum Order No. 08-2016.

<sup>8</sup> *Id.*, Sec. 4.11.

<sup>9</sup> *Supplemental Contract to the Contract for the Management, Operation and Development of MICT dated 19 May 1988* signed on 20 April 2007; *Consolidated Supplemental Contract to the contract for the Management, Operation and Development of MICT dated 19 May 1988* dated 11 June 2008, Appendix 1.c.ii, B-6, ICTSI response to the RFI.

cargo port terminal that caters to the domestic market. However, although the ICTSI Concession Agreement thereby authorized ICTSI to provide domestic cargo operations, the expansion of MICT operations to domestic shipping was curbed by a PPA advisory in 2014 directing ICTSI to discontinue allowing domestic vessel calls at the MICT due to the port congestion that occurred in 2014. The PPA has confirmed that this prohibition remains in place.

8.2.5. Should there be any changes to either the concession agreement of MNHPI or ICTSI, PPA approval must first be secured before such changes may be implemented. However, such approval from the PPA is unlikely with regard to MNHPI, considering the provisions in the MNHPI Concession Agreement where the PPA agreed to limit any entry or expansion of domestic terminal, as well as the PPA's existing memorandum order limiting the operations of North Harbour to domestic traffic.

8.2.6. As a result of the PPA's regulations limiting substitution between North Harbour and MICT, no domestic vessel has called at the MICT since 2014, and no foreign vessel has called at the North Harbour since the execution of the MNHPI Concession Agreement. MICT and MNHPI do not have any customers in common. As far as the parties are concerned, MICT's and South Harbour's customers are international shipping lines, while North Harbour's customers are domestic shipping lines.

8.3. *Different Prices.* Fees paid by shipping lines for calling at international ports are far higher than fees charged by the MNHPI at the North Harbour for domestic vessels. International vessels tend to be larger than domestic vessels as they carry more cargoes and traverse greater distances.

9. The Port of Manila is a unique cargo destination, and as such, is its own relevant geographic market based on the following:

9.1. *Cargo Destination Dictates Geographic Market.* The Port of Manila is the most accessible port to and from Metro Manila and its surrounding areas. Based on the parties' estimates, majority of cargo unloaded at the Port of Manila have as their destinations, Manila, Cavite, Rizal and Bulacan. Market participants expressed that shifting to other ports outside Metro Manila is highly unlikely due to significant trucking costs and time delays due to traffic congestion going to and from Metro Manila.

9.2. *Transportation Costs from Manila to Subic and Batangas.* While there are other ports located within Luzon, the location of ports in Manila, Subic, and Batangas are strategically placed near export-processing zones or manufacturing hubs. During the review, it was found that the trucking costs to and from the areas outside Metro Manila are approximately more than twice the cost of trucking within Metro Manila. Thus, port users are not willing to incur said additional costs.

9.3. *Weight Limit on Roads.* With regard to non-containerized cargo, SLEX and NLEX have maximum weight restrictions which make trucking less viable from Batangas and Subic.

9.4. *Practice of Docking at both Manila and Subic, and Manila and Batangas.* International ships calling at the Port of Manila also call at international ports in Subic and Batangas as part of their international route. This practice, most especially common with international shipping lines, indicates that these non-

adjacent ports do not and are unlikely to compete with one another. This means that shipping lines view each port as unique cargo destinations.

9.4.1. In addition, the customers of MICT and North Harbour are liner shipping vessels which have fixed and regular routes as approved by the Maritime Industry Authority ("MARINA"). A vessel cannot merely choose a port to call at per trip, thereby reinforcing the theory that different ports do not compete with each other.

9.5. *MICT Laguna and Cavite Gateway Terminal.* MICT has an existing inland facility in Laguna and a gateway terminal in Cavite. These enable shippers or importers, who have warehouses in Southern Luzon, to import cargo into MICT in the Port of Manila, and avail of services offered by ICTSI to transport the same cargo by truck to the Laguna facility or by barge to the Cavite facility. However, this service by ICTSI comes with additional costs to the shipper or importer, aside from the trucking costs and toll fees for transporting a container from their warehouses to the Cavite facility. In addition, the Cavite facility is not a port per se, which is capable of accepting commercial vessels, but is used only for the purpose of transporting cargo from MICT's yard through the use of RoRo barges.

10. Based on the foregoing observations by the Mergers and Acquisitions Office's (the "MAO") during its review, the Commission finds that:

10.1. The current regulatory regime precludes a horizontal overlap in the provision of port services for foreign containerized cargo in the Port of Manila, due to the present policy decision of the PPA<sup>10</sup> to classify the North Harbour as a domestic-only port operator; and

10.2. There are no vertical relationships between the Parties because port services, within each port terminals, are provided by their respective port operators (i.e., ICTSI for MICT, and MNHPI for North Harbour).

11. In addition to MAO's observations, the Commission notes that notwithstanding the passage of the Co-Loading Act, which allows foreign ships to dock in MNHPI. PPA has issued Memorandum Order No. 08-2016 which reiterated to all port users of MNHPI's contractual limitation to engage in domestic terminal services only. Moreover, the Commission finds that the historically increasing revenues from domestic containerized cargoes derived by ICTSI demonstrate that the latter was previously a viable market participant in the provision of port operations services for domestic containerized cargoes in the Port of Manila.<sup>11</sup> ICTSI ceased such services only after PPA's advice to discontinue its services for domestic containerized cargoes. These circumstances prompted the Commission to likewise consider the potential overlap in the provision of port services for domestic containerized cargo in the Port of Manila.

11.1. However, the Commission believes that a competitive assessment for this market is not indispensable at this stage considering that on account of the regulatory bar imposed by the PPA, ICTSI is not able to use MICT as a modality of entry into the domestic containerized cargo market.<sup>12</sup> It likewise appears that given the capacity utilization of MICT of approximately 75%, there is currently little margin for ICTSI to do so. Nonetheless, the Commission recognizes that a competitive assessment may be necessary should there be changes in the

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<sup>10</sup> P.D. 857, Sec. 6.

<sup>11</sup> Such historical revenues were derived during the period where MICT was allowed to handle domestic traffic which was only halted because of the existing PPA regulations

<sup>12</sup> Interview with ICTSI on 13 November 2019.

factual circumstances as represented by the Parties or in the existing regulatory conditions.

12. However, even if the Commission finds that there are no actual overlaps in the provision of port services for foreign containerized cargo given the existing regulatory regime, it nonetheless behooves the Commission to undertake a competitive assessment of the primary candidate relevant market under the Proposed Transaction, which is the **provision of port operations services for foreign containerized cargoes in the Port of Manila.**
13. In assessing the competitive effects of a proposed merger or acquisition,<sup>13</sup> the Commission compared the prospective competition conditions arising from the merger against the competitive conditions that would have prevailed if the transaction does not proceed (the “counterfactual”).
  - 13.1. The counterfactual used for the assessment is the pre-transaction scenario where MICT continues to provide port terminal services exclusively to foreign vessels and MNHPI continues to provide port terminal services exclusively to domestic vessels in North Harbour.
  - 13.2. The Commission included in the counterfactual the attempt by MNHPI to enter the market for the provision of port services for foreign containerized cargo pursuant to the Co-Loading Act.
    - 13.2.1. The Co-Loading Act mandated the Bureau of Customs (“BOC”) to issue the Implementing Rules and Regulations<sup>14</sup> (“IRR”) of the Co-Loading Act. Thus, the BOC formulated the IRR and issued Customs Memorandum Orders (“CMO”) allowing the MNHPI to accept foreign cargoes at the North Harbour. However, these CMOs were subsequently revoked by the BOC.<sup>15</sup>
14. Thus, the Commission considered the effect of the merger in the context of the likelihood of a future change in market conditions where the industry regulators (i.e., PPA and BOC) decide on the possible implementation of the Co-Loading Act.

## COMPETITIVE ASSESSMENT

15. Despite the finding that no actual overlaps exists in the provision of port services for foreign containerized cargo, MAO pursued the assessment on whether the Proposed Transaction will likely harm competition, based on the theory of loss of potential competition, should MNHPI be allowed to enter the market, in view of possible change in the PPA’s policy direction on the port classification of the North Harbour, and taking into account MNHPI’s intent, given its previous attempt to enter the market for the provision of port services for foreign containerized cargo.
16. Under a potential competition theory of harm, a merger between two firms may harm competition if, absent the merger, one of the merging firms would enter the relevant market and compete with incumbent firms. Loss of potential competition is thus assessed based on the likelihood of entry, subject to existing entry conditions, with the

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<sup>13</sup> The term merger in this paper shall mean both merger and acquisition as defined under the Philippine Competition Act and its Implementing Rules and Regulations as amended.

<sup>14</sup> Joint Department Administrative Order (JDAO) No. 001-2016, Implementing Rules and Regulations of Republic Act No. 10668 dated 24 May 2016.

<sup>15</sup> See paragraph 21-27 for further discussion of the current regulatory regime.

principal focus on the effect of the premerger position of the potential entrant on the exercise of market power of the incumbents without ever actually entering the market.

17. MNHPI's readiness and capability to compete in the market was examined to determine whether MNHPI could exert competitive constraints on the incumbents in the market for the provision of port services to foreign vessels in Metro Manila. The following criteria were considered:

- 17.1. Capability of North Harbour to provide port services to foreign vessels;
- 17.2. MNHPI's concrete plans to enter and compete in the market for port services for foreign containerized cargo;
- 17.3. The strength of the competitive constraint on the actions of MICT or Asian Terminals, Inc. ("ATI") by MNHPI; and
- 17.4. Capability of the North Harbour to accept foreign cargoes.

#### ***Capability of the North Harbor to accept foreign cargoes***

18. In assessing the capability of MNHPI to enter into the market for foreign containerized cargo, the ability of the North Harbour to accommodate foreign containerized cargoes was looked into. After the review of available data gathered from the Parties and the PPA, interviews from market participants, and the result of site visits, it was found that MNHPI is capable of providing port terminal services for foreign containerized cargo due to the following:

- 18.1. Port handling equipment and infrastructure for containerized cargo are standardized;
- 18.2. North Harbour's berth depth<sup>16</sup> is sufficient to accommodate foreign vessels, as the smaller feeder vessels require a shallower berth depth.<sup>17</sup> Possible potential customers will likely be foreign feeder vessels;
- 18.3. North Harbour has excess yard capacity to accommodate additional foreign vessels calling; and
- 18.4. North Harbour has a status of an authorized customs facility, which can process customs-related documentation of foreign cargo. Having such status likewise allows the establishment of a customs facility with equipment necessary for customs clearances.

#### ***Commitment of MNHPI to enter the market for the provision of port services for foreign containerized cargo***

19. MNHPI's commitment to enter the market was also assessed given MNHPI's physical ability to service foreign cargoes. Committed entrants are those that enter a market with the intention of remaining and competing on a long-term basis. Submissions by the Parties show MNHPI's clear intention to participate in the market for the provision of port terminal services for foreign containerized cargo.

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<sup>16</sup> -7.5 to -10 meters.

<sup>17</sup> PPA data of port calls in MICT, for the years 2016-2017.

20. While subsequent actions of MNHPI seem to suggest that the plan to provide these services was abandoned, it appears that MNHPI's decision to abandon its initial plans was due primarily to the PPA's exercise of its regulatory powers limiting North Harbour to domestic cargo.<sup>18</sup>

### ***Conditions of Entry***

21. The conditions of entry determine the strength of the relative competitive constraint imposed by the potential entrant on the incumbent. To assess whether MNHPI exerted any measure of constraint upon either MICT or ATI in the market for port services for foreign cargo, the likelihood, timeliness and sufficiency of entry must be considered.
22. It was found that due to the prevailing regulatory barriers imposed by the PPA and the BOC that prevents entry by MNHPI in the international port services market, the likelihood of entry is unlikely. The PPA designated specific terminals to service either domestic or foreign cargo. The provisions in the MNHPI Concession Agreement effectively barred domestic cargo calling on the said port.
23. MNHPI anchored its attempt to enter the market for port services for foreign containerized cargo on the basis of the Co-Loading Act and the CMOs issued by the BOC, allowing foreign cargoes to be accepted at the North Harbour. However, North Harbour was constrained from accepting foreign cargoes because of the absence of the PPA's approval and the latter's challenges of BOC issuances.
24. When the Co-Loading Law was passed, the PPA opposed MNHPI's petition filed in court to allow foreign vessels to call at the North Harbour. The PPA asserted that the Co-Loading Law should only have prospective application and as such, may not affect the clear provisions of the MNHPI Concession Agreement which limited MNHPI operations at the North Harbour to domestic traffic. Since the MNHPI Concession Agreement was signed prior to the Co-Loading Law's passage, the provisions of the concession agreement should take precedence over the law and any changes on the provisions of the MNHPI Concession Agreement may only be made through an amendment of the contract.
25. This position was later reiterated by the PPA in response to the BOC issuances, permitting foreign vessels to dock at North Harbour. The PPA underscored that pursuant to the MNHPI Concession Agreement, MNHPI may "undertake DOMESTIC terminal services only of the North Harbour."
  - 25.1. The BOC had posited that, since ICTSI and ATI's concession agreements were subsequently amended to allow both operators to handle domestic vessels to facilitate faster movement of containers and foster open competition in domestic port operations, the same treatment should also be accorded to the North Harbour. Subsequently, the permission of ICTSI and ATI were withdrawn through a PPA advice in the same year.
  - 25.2. Upon the instructions of the Secretary of the Department of Finance to review the CMOs, the BOC Commissioner recommended the issuance of a Customs Memorandum Order suspending the effectivity of the CMOs on the basis of the lack of prior consultation with the PPA on the implementation of the Co-Loading Act.
  - 25.3. Thereafter, the BOC likewise issued Customs Memorandum Order No. 20-2016 suspending the effectivity of CMOs.

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<sup>18</sup> State of Play meeting with MNHPI on 01 March 2019.



26. MNHPI filed a civil case on 05 July 2016 against the PPA, assailing among others, the limitation of the North Harbour as a domestic port terminal only, due to the absence of the restrictive word “only” in the MNHPI Concession Agreement. Furthermore, MNPHI alleged that laws and existing rules or regulations, specifically the Co-Loading Act, promulgated after execution of the MNHPI Concession Agreement should be deemed to form part of the agreement between MNHPI and the PPA. However, on 15 March 2018, MNHPI withdrew its case against the PPA.
27. The Commission likewise notes the following legal impediments to the conversion of MNHPI’s Concession Agreement to accept foreign cargoes:
  - 27.1. The PPA, in support of its position that the North Harbour is a domestic port terminal, cited Customs Administrative Order No. 4-79 which established the North Harbour as a domestic port. The PPA reiterated that the Terms of Reference and the bid parameters form part of the MNHPI Concession Agreement, together with historical North Harbour port statistics which restricts the North Harbour as a domestic terminal;
  - 27.2. The alleged amendment of MNHPI’s contract, through the issuance of CMOs is a violation of the provisions of R.A. 9184, the Government Procurement Reform Act, R.A. No. 6957, and PPA Administrative Order No. 1-2006 which contains, among others, the guidelines and procedures in the selection and award of cargo handling contracts in all government ports as well as cargo handling services that would be turned over by the PPA to the private sector; and
  - 27.3. Section 6 of PD No. 857 expressly vests the jurisdiction to authorize cargo handling services in Philippine ports to the PPA.
28. Given the PPA’s heretofore consistent position that the North Harbour is a dedicated domestic port, coupled with the eventual withdrawal by MNHPI of its action against the PPA to implement the Co-loading Act, the Commission finds that entry by MNHPI into the market of the provision of port terminal services for foreign containerized cargo is not likely.
29. However, the Commission underscores the fact that were it not for the presence of these existing regulatory barriers, the Commission would have found that the Proposed Transaction would likely result in a substantial lessening of competition in the markets for the provision of port operations services for foreign and domestic containerized cargoes in the Port of Manila.

***MNHPI’s entry as competitive constraint***

30. In addition to assessing MNHPI’s attempt to enter the market, the impact of the North Harbour’s entry as a competitive constraint on incumbent firms, MICT and the South Harbour was likewise assessed. It was found that during the period of MNHPI’s attempt to enter the market, upward rate adjustments were observed from the incumbent firms, ICTSI and ATI.<sup>19</sup> Thus, the threat of MNHPI’s entry in the market was not a sufficient competitive constraint on the incumbent firms.

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<sup>19</sup> MAO’s Focus Group Discussion on 16 January 2019.

### ***Proposed Transaction will not lead to a loss of potential competition***

31. Based on the foregoing, the Commission finds the likelihood of North Harbour's entry is subject to high regulatory barriers set by the PPA, which has taken a firm position on the limitation of the North Harbour as a domestic port terminal in the Port of Manila.
32. Thus, given the existing regulatory barriers pre- and post-merger, the Commission finds MNHPI is not a likely entrant in the relevant market and the Proposed Transaction will not lead to a loss of potential competition.

### ***ICTSI's possible control over Harbour Centre***

33. The possibility of whether Harbour Centre may already be under the control or influence of ICTSI or Mr. Razon was examined, and a competitive assessment was made on a post-Transaction scenario where Harbour Center is under the control of ICTSI.
34. During the review, Mr. Razon confirmed that he is the controlling shareholder of both ICTSI and Port Capital. Port Capital owns the land on which the Harbour Centre is located. At present, the property is under lease to Harbour Centre through a Deed of Sale with Leaseback Agreement ("Deed ") dated 30 May 2016. Thus, the ability of Mr. Razon to exercise control over Harbour Centre through Port Terminal's ownership of the Harbour Centre land, and under the Deed, was likewise assessed.
35. The Deed provides that the subject land was to be leased back to HCPTI under the condition that the land shall be used exclusively for and in relation to the operation, management, and maintenance of the port terminal facilities. Upon termination of the original contract period in 2026, the subject land and all improvements located therein shall belong to Port Capital. This clause, however, is subject to HCPTI's right to renew the contract at its option upon the termination of the original lease period.
36. The Deed provides a termination right in favor of Port Capital should Mr. Reghis Romero II loses control over HCPTI, in which case, Port Capital may pre-terminate the contract. No other special rights are granted to Port Capital under the Deed.
37. In view of the terms under the Deed, it would appear that the mere fact that Mr. Razon, through Port Capital, owns Harbour Centre's assets, is not, in and of itself, sufficient to establish the existence of control or influence over Harbour Centre.
38. A determination of whether or not ICTSI, through its former employees, controlled or exerted influence on the operations and decisions of HCPTI, was likewise made. It was found that a domestic corporation, Malay Bulk Handling Philippines, Inc. ("Malay Bulk"), formed by former ICTSI employees had entered into a Technical Services Contract ("Contract") with Harbour Centre on 18 August 2018.
39. Under the Contract, Malay Bulk will be the exclusive technical services provider of Harbour Centre in relation to the operation, maintenance, and management of HCPTI's terminal facility. Further, the consultants, all of which are former ICTSI employees, deployed by Malay Bulk to Harbour Centre under the Contract, either hold key positions in the Harbour Centre organization or act as high-level advisers to the top management of Harbour Centre.
40. MAO interviewed ICTSI employees to determine if ICTSI exercised any measure of control over Malay Bulk and if ICTSI exercised control or influence over their actions as personnel providing expert advice to Harbour Centre. From the interviewees' statements, it was found that neither Mr. Razon nor ICTSI exercise control over Malay Bulk because:

- 40.1. Malay Bulk's General Information Sheet reveals that there are no interlocking directors and officers with ICTSI, nor with any other entity owned or controlled by Mr. Razon; and
  - 40.2. The employees which are currently connected with Malay Bulk or hired by Harbour Centre are either resigned employees or retired under the mandatory retirement policy of ICTSI.
41. Even assuming a scenario where ICTSI will eventually control HCPTI, there is little likelihood of concentration in the markets for the provision of port services for domestic containerized cargo and domestic break-bulk cargo where MNHPI is active, and for domestic break bulk cargo where HCPTI controls the market. North Harbour is the only domestic containerized cargo and the only significant domestic break-bulk port terminal in Metro Manila.<sup>20</sup> On the other hand, Harbour Centre's business is focused on port services for foreign and domestic bulk cargo.<sup>21</sup>
  42. Based on the foregoing, the Commission finds that based on the information disclosed by the Parties, there does not appear to be sufficient evidence to support a finding that Mr. Razon or ICTSI exercises control over Harbor Centre. Furthermore, even assuming that such control exists, based on MAO's observations, the Commission finds that there is no substantial likelihood of concentration in the markets for the provision of port services for domestic containerized cargo and domestic break-bulk cargo.

### ***Entry and Expansion***

43. An assessment was made whether the new entrants or existing competitors expanding to the relevant market can pose significant competitive constraint on the behavior of the merged entity. In assessing entry or expansion, MAO looked into whether such is likely, sufficient in scope, and timely.
44. The Commission finds that there is little evidence to show the possibility of a new entrant given the high barriers to entry in the relevant market, considering MAO's findings as follows:
  - 44.1. *Period of Concession Agreement.* New market participants are highly unlikely because of the long period of the concession agreements which lasts for 25 years subject to renewal for another period of 25 years.<sup>22</sup>
  - 44.2. *Regulatory Barriers.* The PPA regulates the entry of port terminal operators, whether the port is a common-user or a private port. The PPA likewise has the jurisdiction to classify ports to handle international or domestic cargoes. New entrants would have to comply with PPA rules and regulations as a condition for entry.
  - 44.3. *Location.* The establishment of a new port terminal facility in the Manila area is unlikely due to the lack of space and area. Given the significant capital investments required for port operations, ports are located near consumption areas with a historical demand for inbound and outbound cargoes.

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<sup>20</sup> North Harbor accounts for 97% of total domestic break-bulk cargo volume while Harbour Centre accounts for the remaining 3% of the market in the Port of Manila.

<sup>21</sup> Harbour Centre accounts for 99% of total domestic bulk cargo volume while North Harbor accounts for the remaining ~1% of the market in the Port of Manila.

<sup>22</sup> Based on the ICTSI Concession Agreement and MNHPI Concession Agreement.

44.4. *Huge capital expenditure.* The only option for a new port is through the reclamation of land, which in itself costs a substantial amount of investment. In addition, building of the facilities on the reclaimed land would cost a significant amount of capital cost. For a port with a scale similar to the North Harbour, the estimated cost is approximately PhP14 billion.<sup>23</sup>

### **Efficiencies**

45. Mergers that may substantially prevent, restrict or lessen competition may be exempt from the prohibition when the parties establish that the transaction may likely bring about efficiencies that are greater than the anti-competitive effect which will likely result from the merger.
46. ICTSI asserted that there are efficiencies that may result from the Proposed Transaction, specifically, ICTSI's claim of technical expertise with Navis N4<sup>24</sup> which lead to a decrease in truck turnaround times by 72% and decreased yard berth utilization per terminal.
47. The Commission agrees with MAO's finding that the evidence submitted by ICTSI is not merger-specific. These efficiencies claimed by ICTSI were already in place even in the absence of the Proposed Transaction.

### **CONCLUSION**

48. The Commission, upon evaluation of the findings and recommendation of MAO, which included, among others, the information obtained from the parties and other sources to date, finds that the Proposed Transaction will likely result in substantial lessening of competition in the identified relevant market for the provision of port operations services for foreign containerized cargoes in the Port of Manila, if not for the existing regulatory barriers to entry. Were it not for the presence of these existing regulatory barriers to entry, the Commission would have had a different conclusion on the Proposed Transaction.
49. Accordingly, the Commission hereby resolves that it will take no further action with respect to the Proposed Transaction without prejudice however to the Commission's exercise of its full powers under the Philippine Competition Act and its rules and regulations, should there be any changes in the factual circumstances relevant to the Proposed Transaction as represented by ICTSI and MNHPI, or in the existing regulatory regime, policy, or practice covering both foreign and domestic containerized cargo.

14 March 2019, Quezon City, Philippines.

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<sup>23</sup> Feasibility Study of MNHPI.

<sup>24</sup> A globally recognized and widely used terminal operating system introduced to modernize port transactions.



**ARSENIO M. BALISACAN**  
Chairman



**JOHANNES BENJAMIN R. BERNABE**  
Commissioner

**(INHIBITED)**  
**AMABELLE C. ASUNCION**  
Commissioner



**MACARIO R. DE CLARO, JR.**  
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