Preventing Prospective Trade Issues in ASEAN by Instigating International Cooperation on Competition Policies and Law*

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Abstract

The formulation of the ASEAN Economic Community (AEC) will transform its member states into countries with a free flow of goods, services, capital, and skilled labor. On one hand, the establishment of the AEC marks a new era of economic prosperity. On the other hand, the advent of the AEC accompanies with a variety of prospective trade issues, which could adversely affect economic integrity among all members, such as international price fixing cartel, illegitimate mergers which likely to create monopolistic condition in a certain market, and potentially abuse of market dominance, price fixing cartels.

Against this backdrop, transnational corporations potentially pose a serious threat to a free and fair competition following the removal of internal trade barriers through employing or abusing their position to squeeze competitors out of the market. Conversely, the same transnational corporations are likely to secretly collude with domestic entities to fix the price of products or limit production. Furthermore, due to political, cultural and legal perspectives regarding cross-border business transactions vary among member countries. Competition Policies and Law (CPL) can serve as a touchstone to help ASEAN's members comply with the agreement on a neutral and non-discriminatory basis. The efficient implementation of CPL ensures that the playing field is equal for all competitors in the market. Additionally, as States Owned Enterprises (SOEs) in each member country will eventually privatize within in a few years, competition law

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also need to play an important role to ensure fair play between these former monopolies and foreign competitors.

As cross-border transactions by international business corporations frequently affect multiple jurisdictions, enhancing CPL will serve as the optimal institutional vehicle to deal with anti-competitive behavior in cross-border business transactions. This paper contains three topics as following: 1) why do we need competition law for ASEAN Economic Community? ; 2) Case studies on cross-border trade issues: lessons from Europe Union; 3) enhancing competition policies and law as prophylactic measure for ASEAN and Thailand

Keywords: ASEAN Economic Community/Competition Policies and Law/ Cross-Border Trade Issues

Introduction

The establishment of the ASEAN Economic Community (AEC) in 2015 will not only generate a freer flow of trade, capital, goods, services, and skilled labor, but also induce a higher level of competition for this region to compete more effectively in the global economy.[11] According to the Declaration on the ASEAN Economic Community Blueprint (AEC Blueprint) signed by the ASEAN leaders in Singapore in November 2007, each member country will abide by its commitment to transform the AEC into a single market of equitable economic development and fully integrate the AEC with the global economy.[22]

The formulation of the AEC will help its member states develop to countries with a free flow of international trade and investment. On one hand, the establishment of the AEC could

[1] *The Association of Southeast Asian Nations, or ASEAN, was established on 8 August 1967 in Bangkok, Thailand with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam then joined on 7 January 1984, Vietnam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999.*

[2] *ccording to the AEC Blueprint, section B of Competitive Economic Region required all member states to fulfill the four actions as follows: 1) Endeavour to introduce the competition policy in all ASEAN Member Countries by 2015; 2) Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies; 3) Encourage capacity building programs/activities for ASEAN Member Countries in developing national competition policy; and 4) Develop a regional guideline on competition policy by 2010, based on country experiences and international best practices with the view to creating a fair competition environment.*

mark a new era of economic prosperity. On the other hand, the AEC could become affiliated with a variety of prospective trade issues and adversely affect the equitable economic development principles, which could result in the international price fixing cartel, the illegitimate mergers that will most likely create a monopolistic condition in certain markets, and the potential abuse of market dominating, price fixing cartels. [33]

Against this backdrop, transnational corporations potentially pose a serious threat to a free and fair competition following the removal of internal trade barriers through employing or abusing their position to squeeze competitors out of the market. Conversely, the same transnational corporations are likely to secretly collude with domestic entities to fix the price of products or limit production. Furthermore, due to political, cultural and legal perspectives regarding cross-border businesses, transactions vary among member countries. Competition Policies and Law (CPL) can serve as a touchstone to help ASEAN's members comply with the agreement on a neutral and non-discriminatory basis.[44] The efficient implementation of CPL ensures that the playing field is equal for all competitors in the market.[55]

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[3] *The ASEAN Regional Guidelines are derived from the experiences of the member states and internationally approved practices. The guidelines contain a number of important provisions including an independent structure of the regulatory body, specific elements of national competition law, an introduction to leniency procedures, and methods for private enforcement. Available at http://www.asean.org /resources /item/asean-regional-guidelines-on-competition-policy-3 (last visit February 17, 2013)*

[4] *Competition Policy and Law can be broadly defined as a governmental policy that promotes or maintains the level of competition in markets, and includes governmental measures that directly affect the behavior of enterprises and the structure of industry and markets. Competition policy basically covers two elements: The first involves putting in place a set of policies that promote competition in local and national markets, such as introducing an enhanced trade policy, eliminating restrictive trade practices, favoring market entry and exit, reducing unnecessary governmental interventions and putting greater reliance on market forces. The second, known as competition law, comprises legislation, judicial decisions and regulations specifically aimed at preventing anti-competitive business practices, abuse of market power and anti-competitive mergers. It generally focuses on the control of restrictive trade (business) practices (such as anti-competitive agreements and abuse of a dominant position) and anti-competitive merge.*

[5] *According to the ASEAN Regional Guidelines, the term "competition policy" refers to public policies and general governmental directions aimed at introducing, increasing and/or maintaining competition. It does include, but it is not limited to, "competition law", which refers, more in particular, to legal acts (in the form of laws, regulation, guidelines, etc.), including the establishment and maintenance of a competition regulatory body, aimed at preventing anti-competitive business practices, abuse of market power and anti-competitive mergers. Hereinafter, the Regional Guidelines will use the general term "competition policy". The most commonly stated objective of competition policy is the promotion and the protection of the competitive process. Competition policy introduces a "level-playing field" for all market players that will help markets to be competitive. The*

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I. Why do we need competition law for ASEAN Economic Community?

ASEAN economic integration has gone through a greater economic collaboration after the Free Trade Agreement became virtually effective in 2010.[6] This embarked on a new direction of deeper integration to stimulate international business transaction and facilitate the free flow of international trade and investment in the Southeast Asian Region. A process of trade liberalization will enhance a more favorable trade and investment climate by eliminating various trade barriers.[77] Nevertheless, this might open the floodgate for international business corporations to take advantage by abusing their dominant market position or colluding with domestic entities to

introduction of a competition law will provide the market with a set of "rules of the game" that protects the competition process itself, rather than competitors in the market.

[6] *The ASEAN Free Trade Area (AFTA) has now been virtually established. ASEAN Member Countries have made significant progress in the lowering of intra-regional tariffs through the Common Effective Preferential Tariff (CEPT) Scheme for AFTA. More than 99 percent of the products in the CEPT Inclusion List (IL) of ASEAN-6, comprising Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand, have been brought down to the 0-5 percent tariff range. ASEAN's newer members, namely Cambodia, Laos, Myanmar and Vietnam, are not far behind in the implementation of their CEPT commitments with almost 80 percent of their products having been moved into their respective CEPT ILS. Of these items, about 66 percent already have tariffs within the 0-5 percent tariff band. Vietnam has until 2006 to bring down tariff of products in the Inclusion List to no more than 5 percent duties, Laos and Myanmar until 2008 and Cambodia until 2010.*

[7] *Thank to the free trade agreement between China- ASEAN became effective in the beginning of 2010 and cross border business transactions have skyrocketed in merely a short period of time. This phenomenon certainly gives a good signal for greater economic integration in South East Asia Region in the near future. "In the first half of this year, the total value of China-ASEAN two-way trade reached $136.5 billion, growing by nearly 55 percent compared with the same period last year. Exports to ASEAN countries reached 64.6 billion U.S. dollars, up by more 45 percent, and imports from ASEAN countries reaching nearly 72 billion U.S. dollars, up by 64 percent" China-ASEAN Free Trade Agreement leads to new business opportunities, the People's Daily Online, July 26, 2010 available at http://english.peopledaily.com.cn/90001/90778/90861/7080749.html*

perform illegal business practices. In order to achieve the ultimate objectives of ASEAN economic integration, there are three significant factors that ought to be taken into account.

First, after removing the internal trade barriers at the domestic level imposed by governments, there is a high feasibility that the transnational corporations may pose a serious threat by employing or abusing their market positions to squeeze their competitors out of the market. Conversely, those transnational corporations might secretly collude with domestic entities to fix the price of products or limit productions which could culminate in earning an exceedingly unreasonable profit from consumers.[88]Notwithstanding regionalization by stipulations in the free trade agreement, it is still unclear how to resolve issues from anti-competitive conducts. Without clear international regulations and amicable collaborations, the anti-competitive business practices may adversely affect the international trade and investment among member countries.

Second, there is a high degree of diversity in the political, cultural and legal perspective of cross-border business transactions in each member country. Some form of business practices may be acceptable and officially permitted in one country; nevertheless, it may be illegitimate and unauthorized in another country. In this regard, the competition law and policy can serve as a touchstone to help the members of ASEAN countries comply with the free trade agreement under a neutral and non-discriminatory basis. Moreover, the efficient implementation of CPL ensures that the playing field is leveled for all business competitors in the market.[99] Many empirical studies point out that the principle of competition law and policy guarantees a free and fair competition in the market between the dominant business entities and small and medium enterprises (SMEs). More importantly, as a result of trade liberalization, some States Owned Enterprises (SOEs) in each member country will eventually become private within the next

[8] *See OECD, Strengthening the Coherence between Trade and Competition Policies: Joint Report by the Trade Committee and the Committee on Competition Law and Policy, OECD Documents, OECD/GD(96), See also, D. Thompson, UNCTAD: Model Law on Restrictive Business Practices 1980) 14 Journal of World Trade 444, see also Mark R. Joelson, An International Antitrust Primer: A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy, third Edition, International Competition Law Series Vol.22, Kluwer Law International Publication, 2006*

[9] *Dr.Surin Pitsuwan, the Secretary-General of ASEAN, mentioned that "Greater governmental efforts may need to be expended to strengthen the capacity of domestic firms to compete but this should be short-term and does not remove the incentive to innovate and cut costs," ASEAN-China Free Trade Area: Not a Zero-Sum Game, ASEAN Secretariat, 7 January 2010, available at http://www.aseansec.org/ 24161.html*

decade.[1010] Again, the CPL plays an important role in ensuring a fair play between these previous monopolistic entities and other competitors in a particular market.

Third, the violations of CPL in the cross-border transaction by international business corporations frequently have adversely affected multiple jurisdictions. The limitation of an unilateral approach is a major hurdle for implementing the competition law and policy. For this reason, the institution of a proper international cooperative framework of competition law in ASEAN will serve as the optimal institution vehicle to deal with anti-competitive conducts regarding cross-border business transaction.[1111] Likewise, the successful of establishment of an international legal cooperation framework will serve as a stepping-stone toward further higher development in the economic integration for the South East Asian regime.

II. Prospective Trade Issues in ASEAN: lessons from the Europe Union

A. International hard-core cartel: Hoffmann-La Roche, vitamin cartel case

One of the most notorious business practices that has gradually been increasing like a shadow of liberalization of international trade is the international hard-core cartel.[1212] The international cartel was severely condemned and subject to harsh punishment. In the United

[10] *David E.M. Sappington and J. Gregory Sidak, Competition Law for State-Owned Enterprises, Antitrust Law Journal Vol. 71, No. 2, pp. 479-523, 2003 , Moreover, many non OECD countries are also looking towards the OECD experience to guide their own reforms because they started to privatize their big state sector and avoid some problems during the transition. The OECD Guidelines on Corporate Governance of State-Owned Enterprises give concrete advice to countries on how to more effectively manage their responsibilities as company owners, thus helping to make state-owned enterprises more competitive, efficient and transparent. Corporate Governance of State Owned Enterprises: A Survey of OECD Countries (2005) Improving corporate governance in state-owned enterprises (SOEs)* ***(2010)***

[11] *Without the enforcement of international cooperation competition law, the extraterritorial jurisdiction does not effectively correct the problems of cross-border anti-competitive conducts. Historically, the experiences of exercising extraterritorial jurisdiction by the US have aroused resentment in many countries. Furthermore, the extraterritoriality triggered jurisdictional conflict and posed a serious threat to the target countries. i.e. United States v. Aluminum Co. of America, 148 F2d 416 (2nd Cir 1945), International Association of Machinists v. OPEC 477 F Supp 533, 649 F.2d 1354, cert. denied, 454 US 1163 (1982), Timberlane Lumber Co. v. Bank of America. 549 F.2d 597, 609 (9th Cir 976), on remand, 547 F Supp 1453, cert denied, 472 US 1032 (1995)*

[12] *According to the definition of the Organization for Economic Co-operation and Development, a hard core cartel is "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce."*

States, both individuals and business entities involved with international cartel carry a penalty of imprisonment and heavy fine.[1313] Not only the United States imposed unilateral action on the international cartel, but international organizations also have taken further steps to cope with these illegal business practices. The Organization for Economic Co-operation and Development (OECD) had called its members to condemn the international cartel by adopting the Recommendation of the Council Concerning Effective Action against Hard-Core Cartels in 1998. This recommendation signaled the global community to be aware of mounting problems of international cartel and to collaborate with other member states to promote the most effective enforcement of competition law against the international cartel.[1414]

Perhaps, the best ways to exemplify the detrimental ramifications to the free trade agreements by the international hard-core cartel is to examine a case from the past, which adversely affected the economic cooperation and citizens in the Europe region: the vitamin hard core cartel case. This case demonstrates the harmful effect of an international cartel that affected virtually every consumer as if those international business companies were stealing money without caution from the consumer's pocket.

In 1999 a Swiss pharmaceutical giant, F. Hoffmann-La Roche Ltd (Roche) was the worldwide market leader in vitamin production with a market share of 40 percent. Collaborating with a German firm, BASF, and four other firms in Europe, they had secretly agreed to orchestrate the production and fix the prices of vitamins-- vitamins A, B2, B5, C, E, and Beta Carotene. The vitamin products of the scheme ranged virtually from nutritional supplements, premixed vitamins in breakfast cereals, processed foods to animal feed. The conspiracy scheme lasted from January 1990 to February 1999 by annually meeting to set the price of vitamin products and to control the overall production by its cartel members upon quota. [1515]

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[13] *18 U.S.C. ß 1001The violation of this section will be imposed a maximum penalty of five years imprisonment and a $250,000 fine"*

[14] *The OECD Documents on the Recommendation of the Council Concerning Effective Action against Hard Core Cartels (adopted by the Council at its 921st Session on 25 March 1998 [C/M(98)7/PROV]), Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation (2005), Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations (2005)*

[15] *Francesco Russo, Maarten Pieter Schinkel, Andrea Gunster, and Martin Carree, European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Cases, (2010) 37-41*

After several years of investigation, the conspiracy crackdown was the largest antitrust conspiracy uncovered. For raising and fixing the prices for certain vitamins sold in the United States, a Swiss pharmaceutical company agreed to plead guilty and paid a record $500 million criminal fine for leading a worldwide conspiracy. Likewise, a German firm, BASF, pleaded guilty and paid a $225 million fine for its role in this conspiracy.[1616] In fact, the $500 million fine as a punishment of criminal violation not only was the record in antitrust cases, but also was the largest fine penalty that the United States Justice Department has ever prosecuted in any criminal case.

According to the information from the United States Assistant Attorney General, this conspiracy affected more than five billion dollars of commerce in products found in the United States.[1717] Joel I. Klein, Assistant Attorney General who was in charge of the Department's Antitrust Division mentioned that "During the life of the conspiracy, virtually every American consumer paid artificially inflated prices for vitamins and vitamin enriched foods in order to feed the greed of these defendants and their co-conspirators who reaped hundreds of millions of dollars in additional revenues."[1818]

B. Vertical Restraints of Trade: Nintendo Video Game Case

The second anti-competitive business practice that undermines the principle of competition law and policy are vertical restraints. Generally, vertical restraints are related to supply and distributor agreements. The term “vertical” signifies that there are at least two or more

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[16] *After the European Commission became aware of the vitamin cartel, on May 12, 1999, Rhone-Poulenc cooperated with the Commission to barter for non-imposition or a reduction of fines in cartel cases (the leniency policy) in exchange for information about the vitamin cartel and other companies’ involvement. On July 6, 2000, the Commission decided to initiate proceedings against the cartel. It is worthy to note that since the implementation of the leniency program, many international cartel cases have been struck down in the European Union. As a result, the European Commission renewed the first version [1996] OJ C207/04 by the Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OC J 298/11*

[17] *Department of Justice of United States of America’s Document, Department of Justice News Release, May 21, 1999, Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel, available at http://www.justice.gov/atr/public /press_releases /1999/2450.htm*

[18] *Department of Justice of United States of America’s Document, Statement of Assistant Attorney delivered by General Joel I. Kline, May 20, 1999 available at http//www.justice.gov/atr/public/press_ releases/1999/2451.htm*

companies at different levels of production or distribution that enter into an agreement such as manufacturers, wholesalers and retailers. For example, manufacturers may agree to supply products to a limited number of buyers or prohibit sales to unauthorized agents, also known as exclusive distributors. Sometimes, manufactures take a step further to restrain the buyers' ability to set the resale price to end users, otherwise known as resale price maintenance. On one hand, vertical restraints are generally less harmful then horizontal restraints and may encourage more competitive conditions in the market.[1919] On the other hand, vertical restraints can be very harmful to consumers and cause them to purchase products which are much more expensive than the competitive price. Furthermore, vertical restraints are likely to create artificial barriers to separate the market from the new competitors.[2020]

In October, 2002, Nintendo, a Japanese games manufacturer, and seven of its official distributors in Europe allegedly violated article 81 of the European Treaty.[2121] According to the investigation by the European Commission, Nintendo and the seven distributors conspired to maintain artificially high prices of Nintendo video games and consoles in the European Union between January 1991 and 1998.[2222] Nintendo also discouraged its distributor from parallel trade in its territory and punished the violators by distributing smaller shipments or boycotting them from the group. As a consequence, the prices of the game consoles and video games greatly differed from one country to another in the European Union. For instance, the price of video games and consoles in the United Kingdom was 65 percent cheaper than those in Germany and the Netherlands.

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[19] *See Cifford A. Joones, Mitsuo Matsushita, Competition Policy In the Global Trading System: Perspectives from the EU, Japan and the USA, International Competition Law Series Vol.5, Kluwer Law International Publication, 2003, See also, Ky P. Ewing, Competition Rules for the 21st Century: Principles from America's Experience, International Competition Law Series Vol.9, Kluwer Law International Publication, 2003*

[20] *Mario Monti, a key note speech as the European Commissioner for Competition Policy at Fordham Annual Conference on International Antitrust Law & Policy, New York, 31 October 2002*

[21] *Article 81 of the EU treaty specifically prohibits agreements and concerted practices "which may affect trade between Member States and which may have as their object or effect the prevention, restriction or distortion of competition within the (EU's) common market".*

[22] *In the beginning, Nintendo distributed its products itself in Belgium, the UK and Ireland, but later appointed independent official importers to seven distributors of Nintendo products consisting of John Menzies plc (Nintendo's distributor for the United Kingdom), Concentra - Produtos para crianças S.A. (Portugal), Linea GIG. S.p.A. (Italy), Bergsala AB (Sweden), the Greek unit of Japan's Itochu Corp, Nortec A.E. (Greece), and the Belgian unit of Germany's CD-Contact Data GmbH.*

After the investigation, the European Commission handed down its decision to impose a total fine of €167.8 million on Nintendo and the seven of its official distributors in Europe.[2323] Mario Monti, the European Competition Commissioner, expressed the opinion in this case that "Every year, millions of European families spend large amounts of money on video games. They have the right to buy the games and consoles at the lowest price the market can possibly offer and we will not tolerate collusive behavior intended to keep prices artificially high,"[2424]

C. Vertical Restraints of Trade: Volkswagen AG Case

After receiving numerous complaints from consumers about the discriminatory practices of Audi and Volkswagen's car dealership in Italy to foreign consumers, the European Commission began inspecting Audi and Volkswagen offices in different countries to seek out more information.[2525] The investigation revealed lots of conclusive evidence indicating that Audi and Volkswagen had been involved in a market-partitioning policy defying the law of the European Treaty.

According to the investigation, there were about fifty authorized dealers who had been threatened to have their dealership contracts revoked if they sold cars to foreign customers. Twelve distributors did in fact have their contracts terminated. Audi and Volkswagen forced their Italian dealers to conceal the truth behind their refusal to sell cars to foreign customers. Instead of divulging the truth, Audi and Volkswagen suggested that the Italian dealers attempted to discourage foreign customers from purchasing a car by referring to the difficulty of accessible guarantees in different countries.[2626]

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[23] *The court slashed 40 percent off the original 149 million € fine against Nintento. Therefore the European court reduced Nintendo's fine to 119 million €. Court reduces Nintendo fine, straits times, April 30, 2009*

[24] *Nintendo fined for price fixing, BBC World News Business Report, Wednesday, 30 October, 2002, Malcolm Moore, Nintendo fined £92m by EC for price fixing, Daily Telegraph News Business Report*

[25] *Paul Meller, World Business Briefing | Europe: Germany: Volkswagen Fine Upheld, the New Yoek Times September 19, 2003 "The top court in the European Union upheld a fine of 90 million euros ($101 million) against Volkswagen. The company was fined by the European Commission in 1998 for unfair sales practices. The European Court of Justice dismissed Volkswagen's appeal of the fine and ordered each of the sides to pay costs.*

[26] *See Commission press release IP/96/1095 dated 28 November 1996 on the statement of objections sent to Volkswagen AG et Audi AG.*

After the investigation, the European Commission imposed a total fine of € million 102 on Audi and Volkswagen, the largest motor manufacturing group in Europe. In its decision, the European Commission agreed that the discriminatory conducts of Audi and Volkswagen posed a serious threat on the consumers and the common market. This was a warning to other dominant manufacturers that the European Commission would not tolerate illegal business practices that violate the competition law. Mr. Van Miert commented in the decision that the Commission would not hesitate to take the necessary measures against manufacturers who do not comply with the law. Although they were allowed to organize their distribution networks, the law required them to allow consumers to exercise their right to buy a car anywhere in the European Union.[2727]

III. Enhancing ASEAN International Cooperation Competition Policies and Law as Prophylactic Measure

A. The ASEAN International Cooperative Framework Committee on Competition Policies and Law

At this stage, it is not too soon to consider the unification of a supranational organization or the harmonization approach to cope with differences in substantive competition law in each country. Rather, given the resolution to prevent the foreseeable cross-border transaction pertinent to competition matter, ASEAN members' states would be better off instituting the International Cooperative Framework Committee on Competition Policies and Law as the optimal institutional vehicle for international competition law and policy as the first step.[2828] The ASEAN International

[27] *The European Commission Press Releases, Commission fines Volkswagen ECU 102 million following consumer complaints, January 1998, IP/98/94*

[28] *In fact, ASEAN is already involved in the development of international cooperation of competition law and policy with the World Trade Organization,WTO Press Release, Competition Policies: Work Program for Ministerial Conference in Singapore, (November, 1996), WTO Press Release, Singapore Ministerial Declaration, 35 International Legal Materials 218 (1997), See also P. Nicolaides, For a World Competition Authority: the Role of Competition Policy in Economic Integration and the role of Regional Blocs in International Competition Policy, 30 Journal of World Trade 131 (1996), Martyn Taylor, International Competition Law: A New Dimension for the WTO?, Cambridge University Press (2006), Yang-Ching Chao, Gee San, Changfa Lo, Jiming Ho, International and Comparative Competition Law and Policies, International Competition Law Series Vol.3, Kluwer Law International Publication (2002), C. A. Jones, Toward Global Competition Policy – the Expanding Dialogue on Multilateralism"23 (2) World Competition 95 (2000)*

Cooperative Framework Committee on Competition Policies and Law could be appointed a group of experts in competition law and economic from ASEAN's countries to cooperatively research common interests such as the international hard core cartel, vertical restraints of trade and abuse of dominance.

For the second step, the ASEAN International Cooperative Framework Committee may propose recommendations of international competition law and policy regarding particular topics as well as suggest mechanisms for strengthening international cooperation on competition law. This helps to encourage the convergence and consistcy of domestic competition laws in each country. In the next step, after this regional cooperative approach becomes well-developed, this full-fledged institution will play an important role as the supranational organization serving to mitigate the inter-jurisdiction conflicts between member states. Furthermore, the ASEAN International Cooperative Framework Committee may cooperate with other outside enforcement authorities to carry out investigations of anti-competitive conducts that occur outside the region but cause adverse effects within the ASEAN territory.

B. Thailand and the Urgent Need for Effective Competition Policy and Law

Following the economic crisis in 1997, international organizations began to pressure Thailand to reform its economic structure and competition law. Thailand pledged to increase the level of free competition in its market, making commitments to the Asia Pacific Economic Cooperation (APEC), the Japanese Export and Trade Organization (JETO), the Asian Development Bank (ADB), and the World Bank.[2929] To fulfill its obligations, the Thai Parliament repealed many archaic laws and promulgated several statutes to promote fair competition in the market. Meanwhile, Free Trade Agreements between Thailand and its trading partners contained

[29] *Under the APEC Economic Committee, the implementation of competition policy and deregulation provide markets with a framework that encourages market discipline, eliminates distortions and promotes economic efficiency. APEC's Competition Policy and Law Group (CPLG) therefore works to promote an understanding of regional competition laws and policies to examine the impact on trade and investment flows, and to identify areas for technical cooperation and the capacity to build among member economies. The CPLG, formerly known as the Competition Policy and Deregulation Group, was established in 1996, when the Osaka Action Agenda (OAA) work programmers on competition policy and deregulation were combined. In 1999 APEC Ministers endorsed the APEC Principles to push for Enhance Competition and Regulatory Reform and approved a "road map" which established the basis for subsequent work on strengthening markets in the region. http://www.apeccp.org.tw/*

provisions concerning competition law and policy such as sections 147 - 150 of the Japan – Thailand Economic Partnership Agreement (JTEPA), and section 12 of the proposed draft of the Thailand – United States Free Trade Agreement.[3030]

When the Thai Trade Competition Act became effective in 1999, it provided a new hope for Thai citizens and received extensive public attention. The Thai society anticipated that the new act would serve as a powerful yardstick to measure competitive levels in domestic markets and provide an effective tool for regulating illicit behavior by monopolies, cartels, and others business entities. However, optimism surrounding the new law quickly vanished after the Trade Commission's ruling in the first two cases.[31] The Trade Competition Commission investigated two significant cases during its first year: allegations of unfair trade practices in the cable industry (the UBC case) and allegations of a tying arrangement by liquor companies in their whiskey and beer sales (the Chang Beer case). After six months of investigation, the Trade Competition Commission ruled that although the business practices employed by both defendants violated the spirit of the Trade Competition Act of 1999, they did not technically violate the Act.[32]

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[30] *Under the proposal of Thailand – United States Free Trade Agreement Article 12.2 requires that each party (1) maintains measures to proscribe anticompetitive business conduct (2) establish and maintain an authority responsible for enforcement of these measures which does not discriminate on the basis of nationality of the subjects involved. (3) ensure that a person under a violation or subject to a sanction or a remedy is provided with the opportunity to be heard, present evidence and seek review of such sanction or remedy in a domestic court or an independent tribunal. Article 12.3 (1) stipulates that each party shall ensure that any private monopoly that it designates after the date of entry of this agreement and any government monopoly that it designates or has designated (1) does not act anti-competitively or abuse its monopoly position in non-monopolized markets (2) must act solely in accordance with commercial considerations in the purchase and sale of good or service (3) does not discriminate against covered investment, goods or service suppliers of other Party in its purchase or sale of good or service. Article 12.3(2) requires that any government enterprises (a government enterprise refers to enterprises in which the government own not less than 20% of equity share both directly and indirectly) (a) act solely in accordance with commercial considerations in its sales and purchase of goods and services with regard to price, quality, availability, marketability and transportation and other terms and conditions of sale. (b) do not enter into agreement or engage in exclusionary practices that restrict competition without efficiency ground. Article 12.7 stipulates that provisions regarding co-operation and consultation are not subject to dispute settlement.*

[31] *Khajon Learsakulpanich, Legal Measures Against Predatory Pricing Practices in Thailand, (1995) (unpublished LL.M. thesis, University Chulalongkorn) (in Thai) (on file with Law Library, University of Chulalongkorn); Charalai Bunpiem, Legal Issues Relating to the Business Combination under the Trade Competition Act B.E. 2542, (1999) (unpublished LL.M. thesis, University Chulalongkorn) (on file with Law Library, University of Chulalongkorn).*

[32] *Nipon Poapongsakorn, Monopolies under the Thai Capitalism, in ROO TAN TAKSIN 89 (Jirmsak Pinthong ed., 2004) (Thai.). The Trade Competition Commission ruled that the two allegations were merely inappropriate but could not technically*

This hesitation to enforce sanctions has continued to the present day. Although over a hundred complaints are brought to the Trade Competition Commission every year, there has only been one case in which the defendant was found guilty.[33] In that case, the State Council of Thailand confirmed the Attorney General of State's final order that the investigation by the Trade Commission was illegal due to the lack of due process.[34] The Trade Commission has been prompted by the Attorney General to reinvestigate the case before the statute of limitation expires in July 2013. This case clearly reveals the practical problems with the Trade Competition Act of 1999 as well as the ineffective implementation of the act by the Trade Competition Commission.[34] Business entities and Thai citizens openly criticize the Trade Commission on a regular basis.[35] As a result, the public has lost faith in the Trade Competition Act of 1999's ability to effectively handle the chronic problems of monopolies and collusive business practices in Thailand.[36] Meanwhile, many scholars describe the enforcement of the competition law by the

violate the Trade Competition Act of 1999. The Commission gave the reason that the cabinet had not yet announced the ministerial notification on the threshold of market dominance; therefore, the Commission could not enforce section 25 of the Trade Competition Act.

[33] Ministry of Commerce pointed out that AP Honda violated unfair trade practice, Nsaw Na News Peper (January 3, 2007)(Thai). The only case when the Trade Competition Commission ruled the defendant guilty was the exclusive dealing in the motorcycle industry by the AP Honda, also known as the Honda case, See also Sumet Nakvarodom, Authorization on Trade Restrain: A case Study of Exclusive Dealing in Automobile industry, (2006) (unpublished LL.M. thesis, University Chulalongkorn) (in Thai) (on file with Law Library, University of Chulalongkorn). Indeed, there were fifteen complaints that had been received by the office of the Trade Competition Commission. However, after the preliminary investigation, the officials determined to cease further probing of the allegations and dropped all fifteen complaints.

[34] The Office of the Council of State of Thailand pointed out investigation of AP Honda was illegal, Matichon Thai Daily Newspaper (May 6, 2009).

[34] (The Trade Competition Act of 1999: Paper Tiger Act, PRACHACHART TURAKIT (January 28, 2008); Ministry of Commerce in a hurry to reinvestigate the case, June 28, 2012, http://www.news plus.co.th/NewsDetailMobile.php?id=47468

[35] Amorntumrong Waranon, A Comparative Study on Administration and Enforce of Competition law, (2004) (unpublished LL.M. thesis, University Chulalongkorn) (in Thai) (on file with Law Library, University of Chulalongkorn).

[36] Chitanong Poomipark & Sivinee Thanpase, Thailand to Overhaul Trade Competition Law, MAYER BROWN (2010); Chantong Jareanhirunyud, Market Conditions in Thailand and the Trade Competition Act of 1999, (2000) (unpublished LL.M. thesis, University Thammasart) (in Thai) (on file with Law Library, University of Thammasart); Somkiat Dokmaisrichan, A Case Study on Trade Competition Law: The Behavior of the Dominant Business Position, (2001) (unpublished LL.M. thesis, University Dhurakijpundit) (in Thai) (on file with Law Library, University of Dhurakijpundit).

Trade Competition Commission as opaque, selective, and arbitrary.[37] It is imperative that Thailand overhaul the Trade Competition Act of 1999 in order to transform Thailand's economic structure toward a free and fair market economy and use the law as a prophylactic measure to prevent prospective trade issues after the ASEAN Economic Community becomes fully effective in 2015.

IV. Conclusion

The ultimate purpose of competition law and policy aims to create a level playing field for transnational business corporations and domestic entities. In addition, this will ensure that consumers in the member countries can enjoy a variety of products and services with reasonable prices as a result of a free market and fair competition. Furthermore, this regional approach by direct collaboration is important to harmonize domestic competition and policy in the future. Instituting the ASEAN International Cooperative Framework on Competition Policies and Law will foster a closer relationship among ASEAN countries. This closely knit relationship will also assist the greater development for economic integration.

In light of the discussion above, Thailand's government must propose an inaugural amendment to the Trade Competition Act of 1999 by providing legislative treatment for current problems with the implementation and prophylactic solutions to forthcoming obstacles. As Thailand's economy continues to form more connections with the international market, its government must respond to the fast-paced and cyclical changes of globalization. This reaction should allow competition law and policies to override archaic government intervention policies. The proposal must include: 1) a revision of the substantive provisions and enactment of companion statutes; 2) a reformation of the structure of the Trade Competition Commission to redefine its mission; and 3) an improvement of Trade Competition Act enforcement procedures through the adoption and refinement of legal mechanisms from other jurisdictions.

[37] *Deunden Nikomborirak, The Political Economy of Competition Law: The Case of Thailand, 26 NW. J. INT'L L. & BUS. 597, 6-9 (2006).*