

**Does ASEAN need a Supranational Approach to
Its Competition Law and Policy to Create a Highly
Competitive AEC? Case Studies on Abuse of
Dominance in Singapore and Thailand**

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A thesis submitted for the degree of Doctor of Philosophy in Law

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April 2017

ABSTRACT

ASEAN aimed to create a highly competitive, single market, production-based AEC in 2015 by applying strategic measures set out in the AEC Blueprint. However, after seven years of its adoption, the deadline has become merely the beginning of the AEC, not the finished line. Since November 2015, ASEAN has adopted the AEC Blueprint 2025 which aims to create a competitive, innovative, and dynamic AEC by 2025. One of the measures ASEAN uses is ensuring effective competition policy through greater harmonisation and convergence of national competition law.

The key concept of this thesis is competitiveness. It applies Professor Michael E Porter's concept of competitive advantage and gathers 15 years of data on the ASEAN Member States' competitiveness. And it questions whether competition law and policy attribute to a nation's competitiveness. If yes, to what extent. Then it questions whether it is necessary for ASEAN to take a supranational approach to become a competitive region because ASEAN has its own norm of cooperation, the ASEAN way, which is ingrained in ASEAN since its establishment. And it is now formally recognised in the ASEAN Charter.

The results show that competition law and policy is not a sole key determinant of competitiveness. Having a low degree of market concentration, effective competition law and policy, and efficient goods market does not necessarily correlate to high competitiveness. A country's competitiveness is affected by its stage of development too. Additionally, the political economy of a country has a certain degree of effect on efficiency in competition law enforcement. However, the determinant factor of efficient competition law enforcement lies on political will rather than type of the government administration as in the case of Taiwan and South Korea.

The disparities in the economic development of AMSs are obvious. Therefore, trying to harmonise AMSs' competition law and policy using an all-sector approach is not recommended and proved difficult, if not impossible. Moreover, a supranational approach is not compatible with the ASEAN way. Hence, a sectoral approach is more likely to help ASEAN achieve its goal. ASEAN has already begun its own sectoral approach to competitiveness in the aviation market. The Aviation Agreements which the AMSs have signed between them provide much more details and commitments on competition rules concerning this industry than in the Regional Guidelines 2010. The

application of sectoral approach alongside with the comprehensive approach to competition law and policy to enhance competitiveness of the relevant market is practiced in many countries. Examples of how regulatory body in electricity in the US, the UK, Australia, New Zealand, Japan, and South Korea collaborate with their competition agencies provide evidence that it is possible and efficient. Therefore, ASEAN does not need a supranational approach to improve its competitiveness regarding competition law and policy. This thesis suggests that ASEAN should pursue a sectoral approach in dealing with competition issues among member state the ASEAN way.

ACKNOWLEDGEMENT

First and foremost, I am grateful for the opportunity that Rev. Bro. Pratip Martin Komolmas and Assoc. Prof. Pornchai Soonthornpan have given me and to Assumption University for sponsoring my studies in the UK for 5 years. Assumption University also sponsors two trips to attend the invaluable conferences in Singapore which are useful and crucial for my research. Without the scholarship and financial support from Assumption University, this thesis would not have existed.

I am in debt to my supervisor Dr Paul R. Hughes who has guided me throughout my studies. His suggestions and comments are always spot on and have helped me see more clearly what I am supposed to do. He encourages me and believes in me even when I doubt myself and my thesis. I deeply appreciate his kindness and patience with me.

Other than my university and my supervisor, I have received much help from many people. I would like to express my gratitude especially to Treeruk Romruk, Chatmas Siromaskul, Maez Bhucharoen, Patcharunnutt Pimsirinat, NG Ming Jie, and Dr G Deniz Both for providing me with relevant and useful documents which I have used in my thesis, and to Paunpimon Charoenchanikarn who translated the provisions of Laos Competition Act into Thai.

Another person whose help is an essential contribution to this thesis is my dear friend, Dr Johanna Hoekstra who has spent a considerable amount of her time and effort proofreading it. It is a very hard and time-consuming task, and exhausting at times, but she has done such a brilliant job.

Writing a PhD thesis is a journey. And I am blessed that along the journey, I have so much support from my friends and family. My lovely Dr Ana Matran-Fernandez, Dr Anil Yilmas, Dr Ayşem Diker Vanberg, Dr Chiara Macchi, Dr Diana Guarnizo-Peralta, Dr Johanna Hoekstra, Kai Yin Low, Dr Sara Hourani, and Dr Tara Van Ho have given me their peer comments, advice, tips, treats, hugs, shoulders to cry on and ears to listen to my problem, love and support. They have made this journey a pleasant and bearable one. My appreciation extends to law general office staffs, especially Mandy Gray and Laurence Wells, Naree Thai restaurant staffs, and the King family for their kindness, help and support.

This thesis is dedicated to my father, Weera Kongcharoen, my mother, Rewadee Sitthisurat, and my stepmother, Chamnian Kongcharoen for their unconditional love and support, and to my husband, Darren Springall for his love, support, understanding, and sacrifice. The thoughts of them have kept me going and finishing this thesis.

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CHAPTER 1

INTRODUCTION

1.1 OBJECTIVE AND SCOPE OF THE RESEARCH

The Association of Southeast Asian Nations (ASEAN) is an intergovernmental organisation¹ of ten member states namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam.² ASEAN Member States (AMSs) have signed many trade agreements including the ASEAN Free Trade Area (AFTA) and the ASEAN Trade in Goods Agreement (ATIGA). There is no common external tariff imposed on products imported from outside the region. The AMSs signed an Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (CEPT), but the CEPT applies to goods originating from AMSs only.³ Therefore, ASEAN's level of integration is at a free trade area stage.

ASEAN operates under the norm called the ASEAN way. In short, the ASEAN way means that ASEAN operates through consultation, consensus, non-legal binding agreements, and non-interference.

The objective of this thesis is to examine whether ASEAN needs a supranational approach to its competition law and policy to create a highly competitive ASEAN Economic Community as is suggested by many scholars; especially, in the

¹ Article 3 of the ASEAN Charter which came into force on 15 December 2008

² Although the spelling Vietnam is also used, official documents produced by the Government of Viet Nam as well as the documents of the United Nations use the spelling Viet Nam. Therefore, in this thesis, the country is referred to as Viet Nam.

³ Article 1(1) of Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area.

context of ASEAN's current competition policy frameworks, AMSs' national competition laws, and the ASEAN way. There is particular focus on whether the non-legal binding approaches as stated in the ASEAN Economic Community Blueprint (AEC Blueprint 2015), the ASEAN Economic Community Blueprint 2025 (AEC Blueprint 2025) (together referred to as the AEC Blueprints), and the Regional Guidelines on Competition Policy (Regional Guidelines 2010) will have an impact in helping ASEAN realise its goal of becoming a highly competitive economic region in 2025. It should be reiterated that this thesis is neither concerned with total welfare, nor consumer welfare, nor with efficiency aspects of the competition law and policy. It focuses solely on the connection between competition law and competitiveness.

In order to achieve this objective, the research will begin by clarifying and conceptualising competitiveness and its measurements. It will examine attempts to harmonise and converge competition law and policy by international organisations, specifically the approach countries use to deal with anticompetitive practices in the trade agreements they sign, especially trade agreements among AMSs and trade agreements between ASEAN and dialogue partners. Then ASEAN's approach stated in the AEC Blueprints and the Regional Guidelines 2010 regarding competition policy and law will be studied in order to identify to what extent competition law and policy play an important role in helping ASEAN become a highly competitive single market. In this regard, the concept of the ASEAN way will be scrutinised because it affects the functioning and effectiveness of the AMSs in carrying out their commitments under the aforementioned frameworks.

Some aspects of the European Union's (EU) supranational approach to enforce regional competition law and policy will be studied. The purpose of studying the EU

experience is not to compare the EU with ASEAN or to suggest that ASEAN should adopt a supranational approach in its competition law and policy, but to prove that the supranational approach is not compatible with the ASEAN way and the ASEAN Charter.

Then, the disparities of enforcement of provisions on abuse of dominance in Singapore and Thailand will be examined to understand the potential obstacles which ASEAN may face when trying to converge comprehensive national competition laws. The examples of Singapore and Thailand are used as case studies, not for the purpose of a comparative law study. The purpose is to demonstrate the degree of disparity between the two countries which are expected to have an established competition law regime. Thailand and Singapore are chosen because there are four AMSs which have enacted and enforced their competition laws for more than 10 years namely Indonesia, Singapore, Thailand, and Viet Nam. However, language barriers prevent this thesis from analysing Indonesian and Vietnamese national competition laws. A period of 10 years should be long enough for a country's national competition authority to develop its competencies in competition law enforcement and advocacy.

The selected case studies from Singapore and Thailand will focus on abuse of dominance cases because ASEAN aims to attract more inward foreign direct investment (FDI) to the region by becoming a single production based market. Foreign investors will potentially face challenges from domestic incumbents or foreign dominant undertakings may abuse their dominance in the AMSs' markets. Hence, the study of abuse of dominance is appropriate.

The experience of the United States of America (the US) does not fall within the scope of this thesis because the US, although comprised of 50 states, is considered one

country. The disparity between states and the challenges from market integration are not as great as for the AMSs. Moreover, the US enacted its federal antitrust law before the individual states enacted their own antitrust laws. This gave the US a platform for the unification of competition law right from the beginning. Each state follows the Sherman Act 1890 and other federal antitrust laws⁴ such as the Clayton Act, while in ASEAN there is no unified competition law to begin with. Considering that ASEAN countries are at significant different levels of development, the differences in the development level of the US' states are not comparable.

After examining the concept of competitiveness, different approaches to competition policy applied by international organisations, trade agreements, and trading blocs, ASEAN's competition policy frameworks, the ASEAN way, the EU approach, and the disparities in AMSs' enforcement of competition laws, the thesis aims to draw a conclusion on whether ASEAN needs a supranational approach to its competition law and policy to create a highly competitive AEC.

1.2 BACKGROUND: INTRODUCTION OF ASEAN AND THE AEC

This thesis argues that ASEAN does not need a supranational approach to competition law and policy to realise a highly competitive AEC, because competition law and policy is only one of the very many determinants of competitiveness. This does not mean that competition law and policy are irrelevant. They are relevant, but only in a

⁴ Federal Trade Commission, 'Guide to Antitrust Laws: The Antitrust Laws' <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>> accessed 12 May 2016

limited way, and there are many other factors that can increase or decrease competitiveness. Supranationalism is not compatible with the ASEAN way and the ASEAN Charter, especially because of a general sense of nationalism among the AMSs. It is highly unlikely that each AMS will surrender its sovereignty, specifically in judiciary matters, to any supranational body. Therefore, it is necessary to know the background of the founding members of ASEAN⁵ during the WWII period and the enlargement in order to understand why nationalism is common in ASEAN and why ASEAN operates under the ASEAN way.

Before the end of the World War II (WWII), many countries in Southeast Asia were colonised under Western powers such as the British, the Dutch, and the French. The Japanese invasion into the region during WWII had impact on many levels and in many ways.

In Indonesia, Japanese troops invaded Indonesia and took over the control of Indonesia from the Dutch. When Japan surrendered in 1945, the East Indies nationalists took the opportunities to proclaim independence, the battle with the Dutch continued and the nationalists finally gain independence on 2nd November, 1949.⁶

The Philippines had been colonised by the Spanish for hundreds of years and had fought countless battles against them only to be betrayed by the US and then became colonised by the US for decades. However, the American ruling differed from

⁵ Indonesia, Philippines, Malaysia, Singapore, and Thailand

⁶ Entoen.nu, 'Indonesia 1945-1949: A Colony Fights for Freedom' <<http://www.entoen.nu/indonesie/en>> accessed 14 May 2015; Richard Cavendish, 'Independence for Indonesia' <<http://www.historytoday.com/richard-cavendish/independence-indonesia>> accessed 14 May 2015

the Spanish one – it promised the Filipinos freedom in 1945 and it did grant independence to the Philippines on 4th July 1946.⁷

Singapore had been colonised by the British and used as trade post under control of the British East India Company. But it became a separate crown colony with civil administration in 1946 after the Japanese were defeated in WWII. Malaysia and Singapore are situated on the same peninsula, and Brunei is on the border to Sarawak of Malaysia, so their histories intertwine. In short, after being ruled by the Portuguese, then the Dutch, and finally by the British for centuries, they became independent. Nine Malay States, excluding Singapore, were formed as the Federation of Malaya and became an independent state on 31st August, 1957. The reason that Singapore was excluded was because the ethnic Chinese majority in Singapore was seen as a potential problem in creating unity with the rest of the Federation where the population were mainly Malay. During the Japanese occupation in the WWII, the British troops were ousted but they resumed power after Japan lost the war.⁸

Lee Kuan Yew was elected as the first Singaporean Prime Minister in 1959. He had always wanted Singapore to unite with Malaysia because of the economic advantages. His dream came true in 1963 when the Federation of Malaysia was formed. North Borneo (now Sabah), Sarawak and Singapore joined the Federation of Malaya and

⁷ Philippine History, 'Philippine Independence from the Americans' <<http://www.philippine-history.org/independence-from-americans.htm>> accessed 14 May 2015; Tim Lambert, 'A Brief History of the Philippines' <<http://www.localhistories.org/philippines.html>> accessed 14 May 2015; US Department of State Office of the Historian, 'The Philippine-American War, 1899-1902' <<https://history.state.gov/milestones/1899-1913/war>> accessed 14 May 2015

⁸ The Commonwealth, 'Malaysia History' <<http://thecommonwealth.org/our-member-countries/malaysia/history>> accessed date 18 May 2015; Tim Lambert, 'A brief History of Malaysia' <<http://www.localhistories.org/malaysia.html>> accessed 18 May 2015; BBC, 'Malaysia Profile – Timeline' <<http://www.bbc.co.uk/news/world-asia-pacific-15391762>> accessed 18 May 2015; 'History and Historical Facts of Malaysia' <<http://www.wonderfulmalaysia.com/malaysia-history-and-historical-facts.htm>> accessed 18 May 2015

formed the Federation of Malaysia. Then, Lee declared the independence of Singapore from the British government on 31st August, 1963. But his dream was short-lived. Singapore was forced to separate from the Federation in 1965 due to the ethnic and racial differences as well as discrimination. Rioting against Chinese and Malay people had led to political unrest and finally driven Singapore out of the Federation. It was a bitter ending for Lee who sought prosperity and economic progress for his country.⁹

Thailand has escaped colonisation while other nations in the region did not, at the cost of losing its territories in Cambodia, Laos and Malaya to France and Britain. During WWII, the country was led by a military government who granted access to the country to the Japanese troops to invade Burma and Malaya. The government, under pressure from Japan, wanted to declare war against the US and the Britain, but the Thai Ambassador to Washington refused to deliver such declaration to the US government. Therefore, the US has never declared war on Thailand, and supported underground activities of the anti-Japanese movement in Thailand.¹⁰

After the end of the WWII, the enemy of Thailand was not its neighbours or Western Powers, but the threat of communism. Changing from absolute monarchy to constitutional monarchy had been in the agenda of Kings Rama V, VI and VII, but to become a communist country was not an option. Therefore, one can surmise that for the

⁹ Your Singapore, 'Our History' <http://www.yoursingapore.com/about-singapore/singapore-history.html?cmp=brandlaunch_UK_googleSEM_%28UK%29-SG_History+Generic_Singapore+Independence_singapore%20independence%20history&mkwid=sKjWivdmv_pcid_52981987825_pdv_c> accessed 18 May 2015; BBC, 'Singapore Profile – Timeline' <<http://www.bbc.co.uk/news/world-asia-15971013>> accessed 18 May 2015; History of Singapore <<http://www.nationsonline.org/oneWorld/History/Singapore-history.htm>> accessed 18 May 2015; *Encyclopaedia Britannica*, 'Singapore' <<http://www.britannica.com/EBchecked/topic/545725/Singapore/214573/History>> accessed 18 May 2015; Tim Lambert, 'Brief History of Singapore' <<http://www.localhistories.org/singapore.html>> accessed 18 May 2015;

¹⁰ Barbara Leitch LePoer (ed), *Thailand: A Country Study*, (GPO for the Library of Congress September 1987) <<http://lcweb2.loc.gov/frd/cs/thtoc.html>> accessed 18 May 2015

sake of peace and the stability of the country, it was necessary for Thailand to seek and promote security, peace and stability in the region to avoid the influence and threats of communism.

The idea of regional cooperation in Southeast Asia came from three major reasons.¹¹ First, the fear of a power vacuum after the withdrawal of the colonisers could have attracted outsiders to step in for political gains. Second, the idea that cooperation is easier to achieve among closer nations than disparate nations. Last, the necessity to be heard in world politics is easier when you have a unified voice. Hence, Thailand initiated the cooperation. However, the idea was not welcomed as expected. Thailand could only initiate the cooperation among three countries – Philippines, Federation of Malaya and Thailand. The organisation was called Association of Southeast Asia (ASA) and was founded in 1961. Disappointedly, ASA collapsed after the territorial conflicts between Philippines and Indonesia on one hand and Malaysia on the other.

In 1966, the attempt to cooperate was reignited again with a larger number of Member States. This time the cooperation was with East Asian nations like Japan and South Korea as well as Malaysia, the Philippines, Australia, Taiwan, New Zealand, South Viet Nam and Thailand. It was known as Asian and Pacific Council (ASPAC). But this attempt failed again because of international politics. According to Dr Thanat Khoman, one of the founding fathers of ASEAN, '[t]he admission of the People's Republic of China and the eviction of the Republic of China or Taiwan made it impossible for some

¹¹ Thanat Khoman, 'ASEAN Conception and Evolution' (ASEAN 1 September 1992) <http://www.asean.org/?static_post=asean-conception-and-evolution-by-thanat-khoman> accessed 18 April 2016

of the Council's members to sit at the same conference table.' ASPAC consequently collapsed in 1975, marking another failure in regional co-operation.¹²

The definite attempt came after Philippines, Indonesia and Malaysia finally reached conciliation over their territorial dispute with the help of Thailand. Although the new organisation would originally consist of only the existing ASA members and Indonesia, Singapore was keen to join and its request to do so was accepted.¹³ Mr Lee's dream of joining Singapore with other nations in the region for greater economic progress was realised. It is clear that Singapore has always been very keen to integrate with other countries for economic reasons, which is understandable. Given the size and the limited natural resources of the country, without such integration, Singapore could have ended up playing a marginal role in the world trade.

Finally, ASEAN was established by the Bangkok Declaration on 8 August 1967 in Bangkok. The Declaration is a two-page document that contains the intention of the founding Member States to cooperate for the stability and peace of the region. The Declaration is the constituent of ASEAN, but it has no legal binding effect. It did not establish any supranational body or compliance authorities or even a dispute settlement mechanism. It is merely the expression of the founding Member States' determination not to allow their disputes to develop into conflicts.¹⁴ Given that most AMSs were colonised for a long period, it is highly unlikely that any of them will surrender their sovereignty to any supranational body.

¹² *ibid*

¹³ ASEAN, 'History: the Founding of ASEAN' <<http://www.asean.org/asean/about-asean/history>> accessed 18 May 2015

¹⁴ Rodolfo C. Severino, *Southeast Asia in Search of ASEAN Community: Insight from the Former ASEAN Secretary-General* (Institute of Southeast Asian Studies 2006), 3

At the time of the establishment in 1967, the idea of ASEAN as a single market was not yet in the scope. Besides, the machinery necessary to carry out the aims and purposes of ASEAN, which were Annual Meeting, Committee and National Secretariat, were not equipped with the legal authority to make any binding decisions.¹⁵

ASEAN has gradually expanded over the years since its first enlargement with Brunei in 1984. Brunei's membership of ASEAN was a straightforward process and a matter of good timing. It gained independence from Britain on 1st January, 1984 and joined ASEAN just a week after on 7th January, 1984. Then Viet Nam joined ASEAN in 1995, Laos and Myanmar in 1997 and Cambodia in 1999. Now ASEAN consists of ten Member States. Through the enlargement ASEAN now has more than 600 million total population, more than the EU (second to China and India). It is believed that a market this size should attract more FDI into the region.

For Viet Nam, joining ASEAN gives some degree of international acceptance and the prospect of more investment into the country as well as counter-balancing China's influence. In the same year of its accession to ASEAN, Viet Nam and the US resumed formal diplomatic relations.¹⁶ For Laos, it is considered a logical step to take in order to develop its economy after the Cold War period.

The case of Myanmar was controversial. There was much disagreement from both inside and outside ASEAN due to human rights problems in Myanmar. However, pushing Myanmar aside was seen as pushing it in China's sphere of influence. Hence, ASEAN leaders opted to include Myanmar instead of pushing it away even though it

¹⁵ Mark Beeson, *Institutions of the Asia Pacific: ASEAN, APEC and Beyond* (Routledge 2009) 20

¹⁶ *Encyclopaedia Britannica*, 'Vietnam War: 1954 - 1975' <<http://www.britannica.com/event/Vietnam-War>> accessed 3 June 2016

could hinder ASEAN Free Trade Agreements.¹⁷ Moreover, the ASEAN leaders seem to agree that to isolate Myanmar is not the answer for the long term well-being of the Association.¹⁸ The CLMV¹⁹ also fear being marginalised in the ASEAN. They also fear that the development gap between them and the existing ASEAN 6 would become wider.²⁰ Some commentators viewed the enlargement as a major drawback for ASEAN.²¹

As explained earlier, it can be argued that the main reason for enlargement for all ten member states was rather political and for security considerations.²² ASEAN has gained more 'weight' in representing Southeast Asia by including all ten member states.²³ However, one must admit that inclusion of CLMV has brought more challenges to ASEAN's attempt to converge their competition law and policy due to the disparities in levels of development of these countries compared with the rest of ASEAN.

Southeast Asia is extremely diverse in terms of ethnics, religions, cultural, political regime, legal system, economics, languages, value, and historical experience. Take Singapore and Cambodia, for example, there are clearly many differences between the two countries. For instance, Cambodia's GDP per capita based on purchasing power parity (PPP) was US\$ 3,262.6, while Singapore's GDP per capita PPP was US\$82,763 in

¹⁷ Frank Frost, 'ASEAN at 30: Enlargement, Consolidation and the Problems of Cambodia' (Parliament of Australia, 25 August 1998) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/CIB9798/98cib02> accessed 7 March 2013.

¹⁸ *ibid*

¹⁹ Cambodia, Laos, Myanmar, and Viet Nam

²⁰ Vo Tri Thanh, 'Perspective from ASEAN's Transitional Economies' in Denis Hew (ed), *Roadmap to an ASEAN Economic Community* (Institute of Southeast Asian Studies 2005)

²¹ Mely Caballero-Anthony, 'ASEAN Economic Community: Political and Security Implications' in Denis Hew (ed), *Roadmap to an ASEAN Economic Community* (Institute of Southeast Asian Studies 2005)

²² Ramses Amer, 'Conflict Management and Constructive Engagement in ASEAN's Expansion' (1999) 20 *Third World Quarterly* 1031

²³ Frost, 'ASEAN at 30: Enlargement, Consolidation and the Problems of Cambodia' (n 16)

2014.²⁴ And Cambodia's Gross National Income (GNI) per capita based on PPP was US\$ 3,080, while Singapore's GNI per capita PPP was US\$ 80,270 in 2014.²⁵ ASEAN is a region of disparities.

Through China's accession to the WTO, the emerging market of India, the establishment of economic regions such as NAFTA, and the establishment of a single market such as the European Economic Community, the AMS came to realise that deeper integration was needed to gain more weight in international trade. Despite their disparities, they agreed to establish the ASEAN Community which comprises of three pillars, namely the ASEAN Political-Security Community, the ASEAN Economic Community (AEC), and the ASEAN Socio-Cultural Community. In this thesis, the emphasis is solely on the AEC.

The AEC was established on 31 December 2015 as a single market and production base and as a competitive economic region that upholds equitable economic development and which integrates into the global economy.²⁶ However, it should be clarified here that ASEAN's single market is not the same as the European single market. Because, ASEAN's single market means intra-ASEAN single market. It provides market access to intra-regional trade among the AMS. There is a freer flow of goods, skilled labour, and capitals within ASEAN for intra-regional trade only. This is different from the EU's single market. The EU's single market includes common external tariffs imposed on goods imported into the region regardless of the point of entry of the

²⁴ World Bank, 'GDP per capita, PPP (current international \$)' <<http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD>> accessed 20 April 2016

²⁵ World Bank, 'GNI per capita, PPP (current international \$)' <<http://data.worldbank.org/indicator/NY.GNPPCAP.PP.CD>> accessed 20 April 2016

²⁶ ASEAN, *AEC Blueprint* (ASEAN Secretariat 2007) paras 9, 41, 60 – 64

goods. ASEAN does not have such rules yet. This point is examined in more detail in chapter 3.2 STAGES OF ECONOMIC INTEGRATIONS.

1.3 THESIS MOTIVATION

The motivation behinds this thesis is the concern that ASEAN's ambitious plan of deeper economic integration to transform ASEAN into a highly competitive single market, production based economic region may not be achievable. One may presume that ASEAN will take the EU approach of single market, because the ASEAN Community 2015 does not only embrace the AEC which aims at creating a single market, free movement of goods, capitals, and skilled labour, but also the Political-Security and Socio-Cultural aspects, all of which mirror the establishment of the EU.

But ASEAN is not the EU. ASEAN operates under the ASEAN way, the norm which has been embedded in ASEAN since the very beginning. The principle of supremacy and direct effect of the EU law upon its member states have been upheld by the European Court of Justice (ECJ). The functioning of the EU is based on supranational organisations such as the EU Commission, especially, in the area of competition law. The Commission and the ECJ play a vital role in overseeing the uniformity of enforcement and interpretation of the EU competition law in member states. The EU member states have committed to such a supranational approach since its establishment. ASEAN has never applied that approach to any of its cooperative endeavours since 1967.

This thesis concerns only the deeper economic integration of ASEAN, and specifically in competition policy and law. The AEC Blueprints aim at creating the AEC as a competitive, innovative, and dynamic ASEAN. The strategies planned in both

Blueprints and the Regional Guidelines clearly state the importance of competition law and policy as one of the key elements which can help ASEAN become a highly competitive region. But how much impact does an effective competition law and policy really have on the competitiveness of a country, or a region?

1.4 RESEARCH QUESTIONS

With the view to achieve the research objective, the following questions will be studied throughout the thesis:

1. What does competitiveness mean and entail? What must be taken into consideration when measuring a nation's competitiveness? Does the effectiveness of competition law and policy correlate with a country's competitiveness? How competitive are the AMSs and what factors underline their competitiveness?
2. What has been done internationally in terms of harmonisation and convergence of competition law and policy? Has any attempt to harmonise and converge competition laws succeeded?
3. What is the ASEAN way? How does it work with the competition policy-related commitments stated in the AEC Blueprints and the Regional Guidelines 2010? Will the ASEAN way hinder or assist AMSs achieving their aforementioned commitments? Is the EU's approach to competition law and policy through the supranationality of the Commission suitable to the ASEAN way and the ASEAN Charter?

4. What are the approaches concerning competition policy which ASEAN plans to accomplish in order to become a highly competitive single market and production based region as stated in the AEC Blueprints and the Regional Guidelines 2010? What have the AMSs done thus far in order to achieve their commitments under the aforementioned frameworks? After adoption of the AEC Blueprint 2015 and the Regional Guidelines 2010, has the AMSs' competitiveness improved?
5. What are the objectives of ASEAN's or the selected AMSs' national competition laws? What are the differences in competition laws of Thailand and Singapore regarding abuse of dominance provisions? What are the power and structure of their national competition authorities (NCAs)? How effective is their enforcement? Can their differences be reconciled or harmonised? Has their competitiveness been enhanced by their national competition law enforcement?

1.5 METHODOLOGY AND LIMITATION

This thesis applies a qualitative case study approach. It explores the process of becoming a highly competitive economic region within the context of the ASEAN way, its historical background, and ASEAN's competition policy frameworks by using data available from various sources such as the Global Competitiveness Index (GCI) of the AMSs as measured by World Economic Forum (WEF), primary sources such as legislations and cases; and secondary sources such as journal articles, news reports, websites, encyclopaedia, and commentaries.

The case which is being scrutinized and analysed in this thesis is the process of becoming a highly competitive region under the aforementioned context. The period of analysing the competitiveness in ASEAN is limited from 1999 to 2016. Because Thailand's Trade Competition Act entered into force in 1999, Singapore's Competition Act entered into force on a phased basis from 2005, and publication of the AEC Blueprint 2015 was in 2007, the publication of the Regional Guidelines was in 2010, and the publication of the AEC Blueprint 2025 was in November 2015. Therefore, the 17 years of data of competitiveness in ASEAN should be able to demonstrate the impact the national competition laws and the aforementioned competition policy frameworks have on the competitiveness of the AMSs.

This thesis uses abuse of dominance as example to demonstrate the application and enforcement of competition law in Singapore and Thailand because market access is at the core of economic regional integration. The market access which economic integration can offer will be hindered by barriers to entry and domestic incumbents' abuse of dominance.

Although anticompetitive agreements such as cartels, exclusive dealing, resale price maintenance, and market concentration such as mergers and acquisitions are also crucial for the functioning of an efficient market, this thesis concentrates on the competitiveness of ASEAN as a region, not on consumer protections and market efficiency. Besides, most AMSs domestic businesses have not yet reached the level where they start to merge at a regional scale. Thus, this thesis will not address these issues. More importantly, the example of abuse of dominance is not used to propose amendments to national competition laws of the AMSs. It is used as an example of the

difficulties and challenges the AMSs will face when attempting to harmonise and converge their competition laws.

One major limitation in conducting this research is the lack of access to certain sources which require membership or payment such as a report on the Handbook of Competition Enforcement Agencies 2015 Thailand published by the Global Competition Review and the World Competitiveness Yearbooks published by the IMD. The handbook costs €180 to purchase and it is neither accessible through the university library website nor available through interlibrary loan, while the IMD's yearbook costs CHF 1,200 to purchase to gain an online access for academia.

CHAPTER 2

CONCEPT OF COMPETITIVENESS

The aim of this chapter is to provide an understanding of the concept of competitiveness as used in this thesis. This chapter is divided into five sections. First, it discusses whether it is possible to define the competitiveness of a nation and the different definitions of competitiveness at different stages will be explored. Second, it seeks to answer what is taken into account when measuring a nation's competitiveness. The findings will indicate whether competition law has any impact on competitiveness or not. If yes, to what extent? Third, the competitiveness of ASEAN member states from 1999 – 2016 will be discussed by looking at the available data on competitiveness and the efficiency of their antimonopoly policy and market efficiency.²⁷ This is done with the aim to prove the connection between competition law and policy and competitiveness. The fourth section studies how political economy helps countries develop their competition law and become highly competitive countries. It specifically looks into the experience of two East Asian Economies: South Korea and Taiwan. The fifth section concludes on the earlier sections.

Becoming a highly competitive economic region is a goal of the AEC, but it does not clarify what is meant by being a 'highly competitive' economic region. And it did not declare in which market it competes and with whom. Is AEC competing with China in the manufacturing sector? Is AEC competing with the Common Market of the Southern

²⁷ However, the data from 2003-2004 is not available both online and in print. Attempts to get hold of a copy from the interlibrary loan were not successful. The library that has this book was unwilling to loan it to the interlibrary loan.

Cone (MERCOSUR) in attracting more inward FDI? In any case, the concept of competitiveness in international trade must be used with caution.

2.1 DEFINITION OF COMPETITIVENESS

There are various definitions of competitiveness at various levels. It is not the purpose of this thesis to study the history of the concept, find the most appropriate meaning, or to redefine the term. This section will explore different definitions of competitiveness within different settings.²⁸ This chapter starts with a contemplation of the concept of competition as used in this thesis.

2.1.1 What is Competition?

For economists, it is difficult to find an agreed definition of competition.²⁹ Hayek considered competition as ‘a process of the formation of opinion’. This in turn created a ‘unity and coherence’ economic system.³⁰ The simplest and boldest definition of competition is that it is regarded as the opposite of monopoly.³¹ Stigler suggested that a more appropriate word than just competition would be ‘market competition’ and

²⁸ For Historical development on concept of competitiveness See Andreas Mitschke, *The Influence of National Competition Policy on the International Competitiveness of Nations: A Contribution to the Debate on International Competition Rules* (Physica-Verlag 2008) 92-102; Razan Voinescu and Christian Moisoiu, ‘Competitiveness, theoretical and Policy Approaches. Towards a More Competitive EU’, (2015) 22 *Procedia Economics and Finance* 512, 513-517

²⁹ Anca Daniela Chirita, ‘The EC Commission’s Guidance Paper on the Application of Article 82 EC: An Efficient Means of Compliance for Germany?’ (2009) 5 *European Competition Journal* 677, 681

³⁰ Friedrich A. Hayek, *Individualism and Economic Order* (Routledge & Kegan Paul LTD 1949) 106

³¹ Paul J. McNulty, ‘Economic Theory and the Meaning of Competition’ (1968) 82 *Quarterly Journal of Economics* 639, 639-640

added that its meaning should be restricted to ‘absence of monopoly power’.³² But that is probably too simple.

Friedman clearly explained the two meanings of competition. The first meaning – in the ordinary discourse – competition means ‘personal rivalry’; the second meaning – in the economic world – is the opposite as it is impersonal. He explained that in a competitive market no individual participant could determine the other participants’ access to the goods or jobs, nor determine the price, because price was determined by the accumulative effect of their separate actions.³³

It is reported that Adam Smith viewed competition ‘as a process stimulating rivalry among agents (to improve their performances) by reacting and counter-reacting behaviours’.³⁴ Along with Adam Smith, Thorstein Veblen, David Ricardo, Karl Marx and Austrian economists viewed competition as ‘a dynamic process of rivalry and contention, not a market structure’.³⁵

In modern times, the world renowned Harvard economist, Michael E. Porter,³⁶ considers that there are two types of competition; a zero-sum game and a positive-sum game. According to him, a zero-sum game is where firms compete to be the best,³⁷ while

³² George J. Stigler, ‘Perfect Competition, Historically Contemplated’ (1957) 65 *Journal of Political Economy* 1, 14

³³ Milton Friedman, *Capitalism and Freedom* (40th Anniversary ed, University of Chicago Press 2002) 119-120

³⁴ Massimiliano Vatrio, ‘The Ordoliberal Notion of Market Power: An Institutional Reassessment’ (2010) 6 *European Competition Journal* 689, 692

³⁵ Tuna Baskoy, ‘Thorstein Veblen’s Theory of Business Competition’ (2003) 37 *Journal of Economic Issues* 1121, 1122

³⁶ According to the Institute for Strategy & Competitiveness, ‘Michael Porter is the founder of the modern strategy field and one of the world’s most influential thinkers on management and competitiveness.’ ‘He is the Bishop William Lawrence University Professor at Harvard Business School.’ Geoff Colvin, Senior Editor-at-large at *Fortune Magazine* referred to him as ‘having influenced more executives – and more nations – than any other business professor on earth.’ Harvard Business School, ‘About Michael Porter’ <<http://www.isc.hbs.edu/about-michael-porter/Pages/default.aspx>> accessed 23 May 2016

³⁷ When firms compete to be the best, they tend to cut cost to win the competition or they engage in predatory pricing to drive competitors out of the markets. There is a very interesting example

a positive-sum game is to compete to be unique. To Porter, competition should not be a zero-sum game because it is not a competition to be the best, but it is a competition to be unique. Therefore, there is no reason to chase after the same customers and to offer the same products only to arrive at competitive convergence.³⁸ In fact, Porter suggested that firms should compete in a positive-sum game. The more firms create their own customers, the more productivity, innovativeness, and variety of products there will be.³⁹ He also opines that in international markets, it is firms that compete, not countries.⁴⁰

2.1.2 Competitiveness of a Firm

Economists appear to mutually agree on the concept of competitiveness of a firm, in other words, the microeconomic level of competitiveness. It is understandable why economists can roughly agree on this matter because it is apparent that firms do compete. The competition among firms is equal to rivalry and the struggle for superiority. In certain conditions firms do co-operate, such as in a joint-venture for research and development of a new product. The more a firm becomes superior to its rivals, the more competitive it becomes.

given by Joan Magretta. It is the Hotel Bed Wars between leading hotel chains to provide superior quality beds to their customers. It began with Westin Hotels and Resorts' introduction of Heavenly Bed. Then Hilton, Marriot, Hyatt, Radisson, and the Crowne Plaza each introduced its own brand of custom-design beds. Within seven years after Westin introduced its beds, the war has come to an end. That was after they made large investments in research and development, installed and promoted their own brands. Magretta observed that 'one company's attempt to be "the best" ended up raising the bar for everyone. It's not surprising that, with this approach to competing, that long-term profitability in the hotel industry has been chronically low. See Joan Magretta, *Understanding Michael Porter: The Essential Guide to Competition and Strategy* (Harvard Business Review Press 2012) 25

³⁸ Competitive convergence refers to 'what happens when companies imitate and match each other's moves, when they compete to be the best. Over time all companies begin to look alike as one difference after another erodes. When rivals converge around a standard offering, customers must choose on price alone. Mainstream economics has always highlighted the way in which this kind of "perfect" competition benefits customers by lowering prices. But Porter sees it differently. Convergence can actually hurt customers because it limits their choices.' *ibid* 212 - 213

³⁹ *ibid* 19 - 31

⁴⁰ Michael E. Porter, *The Competitive Advantage of Nations: With a New Introduction* (Macmillan Business 1998) 33

A firm's competitiveness entails the firms' ability to produce goods and services more efficiently than its rivals;⁴¹ the ability to be superior to their competitors in every aspect of their business whether in design, skills, price or non-price qualities;⁴² the ability to profitably produce goods that correspond to the market requirements;⁴³ the ability to grow, to compete, and to be profitable.⁴⁴ The focus of a firm's competitiveness is on the firm itself, its choice of strategy, its performance, and its business decisions. There is not a strong connection with competition law in this regard.

Competition law cannot bring firms profit or make them grow. But competition law can indirectly affect the way firms compete. If anticompetitive practices are curbed properly, it can signal to firms that the authorities do not tolerate collusion, cartels, and concerted practices. Firms cannot, therefore, cooperate to distort market competition at the expense of the market structure and consumers. Either in a zero-sum or positive-sum game where competition law is effectively enforced, one can surmise that oligopolistic markets will operate through true competition among firms rather than firms colluding to share the market.

However, if competition law and policy is not effectively enforced, firms can be prone to collusion and cartelisation. Firms from advanced economies have more

⁴¹ Đula Borozan, 'Regional Competitiveness: Some Conceptual Issues and Policy Implications' (2008) 4 Interdisciplinary Management Research, Faculty of Economics in Osijek 50

⁴² Ajitabh Ambastha and K Momaya, 'Competitiveness of Firms: Review of Theory, Frameworks, and Models' (2004) 26 Singapore Management Review 45

⁴³ Hațegan D.B. Anca, 'Literature Review of the Evolution of Competitiveness Concept' (2012) 1 Journal of the Faculty of Economics, University of Oradea 41
<<https://ideas.repec.org/a/ora/journal/v1y2012i1p41-46.html#biblio>> accessed 10 February 2016

⁴⁴ Ronald L. Martin, 'A Study on the Factors of Regional Competitiveness' (A Draft Final Report for the European Commission Directorate-General Regional Policy, Cambridge Econometrics, University of Cambridge) 2 - 1
<http://ec.europa.eu/regional_policy/sources/docgener/studies/pdf/3cr/competitiveness.pdf> accessed 2 February 2016>

potential to engage in international cartels.⁴⁵ They tend to cartelise in developing countries' markets because these firms know that developing countries either do not have sufficient resources to effectively enforce cartel law or do not have effective cartel laws.⁴⁶ Empirical research reveals that on average the cartel overcharges are significantly larger than the fines imposed on hard core cartels in the US and the EU⁴⁷ and that the illicit gains that firms made considerably outweigh the fines that are imposed,⁴⁸ thus firms would continue to engage in cartel, despite awareness of the illegality of the cartel activities and the fines imposed on them.⁴⁹

If the authorities regularly investigate and prosecute dominant firms that exploit the consumers, exclude their potential rivals from entering the market, or drive their rivals out of the market, then the market structure and competition process will be preserved. Rivals can keep incumbents under pressure to improve their performance in order to keep their market positions. Merger and acquisition procedures can signal firms which type of cooperation is acceptable and if used properly can enhance firms' efficiency and competitiveness in the long term. Thus, the contribution of competition law to firms' competitiveness levels appears to be indirect.

⁴⁵ The data taken from a sample of 80 EU cartel decisions from 1974 to 2010 shows that these firms are based in Japan, Germany, the UK, France, the US, Netherlands, South Korea, Italy and other EU countries which are OECD countries. See D. Daniel Sokol and Andreas Stephan, 'Prioritizing Cartel Enforcement in Developing World Competition Agencies' in D. Daniel Sokol, Thomas K. Cheng, and Ioannis Lianos (eds) *Competition Law and Development* (Stanford University Press 2013)

⁴⁶ Sokol and Stephan, 'Prioritizing Cartel Enforcement in Developing World Competition Agencies' (n 44)

⁴⁷ A study of hard core cartel cases in the US and the EU. See John M. Connor and Robert H. Lande, 'The Size of Cartel Overcharges: Implication for EU and U.S. Fining Policies' (2006) 51 *Antitrust Bulletin* 983, 984

⁴⁸ A study of EU fine on 64 cartel cases from 1975 – 2009. See Emmanuel Combe and Constance Monnier, 'Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement' (2009) *Cahiers de Recherche PRISM-Sorbonne Working Paper*, 31 <<http://ssrn.com/abstract=1431644>> accessed 1 August 2016

⁴⁹ A study of four major cartel cases in Australia. See Christine Parker, Paul Ainsworth and Natalie Stepanenko, 'ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases' (2004) *Centre for Competition and Consumer Policy, The Australian National University Working Paper*, 60 – 61 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=583521> accessed 1 August 2016

2.1.3 Competitiveness of a Nation

The concept of competitiveness of a nation has received much more criticism and is highly debatable.⁵⁰ A leading economist who opposes the application of competitiveness to national economies is Krugman.⁵¹ This thesis agrees with Krugman that the tendency to overuse the concept of competitiveness to promote the governments' trade policy is dangerous.⁵² He argued that 'the concept of national competitiveness is elusive'.⁵³ Because a company's competitiveness can be measured with its bottom line – which is the ability to pay its employees, suppliers, and bondholders, while a country, such as Greece, may or may not be happy with its economic performance, but will not go out of business. A country will still exist even if it is not able to repay its debt, albeit Greece could leave the EURO zone and potentially the EU, the country would still exist.

His view has received much criticism from academia.⁵⁴ However, his view does not seem to have a significant effect on government policy or measurements of

⁵⁰ Michael E. Porter, *On Competition: Updated and Expanded Edition*, (Harvard Business School Publishing 2008) 174; Mitschke, *The Influence of National Competition Policy on the International Competitiveness of Nations: A Contribution to the Debate on International Competition Rules* (n 28) 102-103; Borožan, 'Regional Competitiveness: Some Conceptual Issues and Policy Implication' (n 41) 53; Anca, 'Literature Review of the Evolution of Competitiveness Concept' (n 43) 41 - 46

⁵¹ He categorically asserts that 'competitiveness is a meaningless word when applied to national economies.' He opposes the excessive use of the term in such a way that it becomes an obsession which is dangerous. In his opinion, the rhetoric of competitiveness is widespread because; (1) The concept of competitiveness sounds exciting and can attract a wider audience. Businessmen are more familiar with competitiveness than with comparative advantage. Because of this reason, Krugman claimed that some economists, although knowing that the benefits of higher productivity does not relate to international competition, would maintain that improving productivity will increase competitiveness and use competitiveness as a means to attract and persuade wider audiences that their proposed policy is sound. (2) Blaming the US economic difficulties on its failures in international competition somehow perplexingly appears to make them seem easier to solve. (3) The Competitive metaphor is extremely useful for world's leaders as a political device. See Paul Krugman, 'Competitiveness: A Dangerous Obsession' (1994) 73 *Foreign Affairs* 28

⁵² *ibid*

⁵³ *ibid* 31

⁵⁴ Some scholars disagreed with his stance that competitiveness does not matter. See John H. Dunning, 'Think Again Professor Krugman: Competitiveness Does Matter' (1995) 37 *The International*

competitiveness of a country, because governments continue to promote competitiveness along with the enactment of competition law. Many academics and organisations defined the concept of competitiveness of a nation. The most influential definition is developed by Porter.

A) Porter's Definition

According to Porter, if firms are competitive, a country is likely to be competitive too.⁵⁵ He disagreed with the classical notion of competitiveness of a nation as derived from inhibited resources, achieving trade surplus or a balanced trade *per se*.⁵⁶ He asserted that competitiveness did not mean just jobs, but what types of jobs. It is not good enough for a nation to have a lower standard of living due to cheap labour because even if it can balance its trade surplus of importing expensive and sophisticated products it cannot produce competitively with the export of its cheap products worldwide.

Executive 315. Dunning opined that Krugman disapproved of the usefulness of competitiveness completely, and suggested that competitiveness was 'a helpful basis for guiding actions and policies that determine the future productivity of a country's resources and capabilities.' Dunning claimed that Krugman appeared to ignore the role of the national government in influencing the competitiveness of a country. He claimed that national governments could learn from the experiences of other countries to upgrade the quality of their resources. Hence, measuring competitiveness of countries is useful when domestic firms are not using their resources and capabilities efficiently, or are not upgrading their assets at an optimum rate, when governments want to attract FDI or discourage their firms from locating their business activities outside their countries.; See Colin Hay, 'The 'Dangerous Obsession' with Cost competitiveness . . . and the Not So Dangerous Obsession with Competitiveness' (2012) 36 Cambridge Journal of Economics 463. Hay argued that Krugman's misdiagnose of the competitiveness problem has led to the wrong conclusion. Hay argued that it was not the obsession with competitiveness or with analogies between competition among nations and among companies, but the obsession of cost competitiveness that has led the EU policy-makers to assume that all product and service markets are analogous to the cheap consumer goods product markets.

⁵⁵ This view of national competitiveness derived from firms' competitiveness has received much support from academia. See Anca, 'Literature Review of the Evolution of Competitiveness Concept' (n 43)

⁵⁶ However, Porter's approach to explain competitiveness without regards to tradition trade theories receives some opponent views. See Leonard Waverman, 'A Critical Analysis of Porter's Framework on the Competitive Advantage of Nations' in Alan M. Rugman and others (eds) *Research in Global Strategic Management* (Vol 5, JAI Press Inc. 1995)

Porter opined that it is less important to define what a nation's competitiveness is as long as one can determine what creates productivity and what the rate of productivity growth is. Because, he claimed, 'the only meaningful concept of competitiveness at the national level is productivity'. He also claimed that ensuring a high and rising standard of living for its citizens is the principal goal of a nation, and 'a nation's standard of living depends on the capacity of its companies to achieve high levels of productivity – and to increase productivity over time'. He also asserted that in order to achieve high productivity, it is important to look at each industry separately and improve them individually. It is not possible for a nation to attain a high competitiveness in all sectors.⁵⁷

For developing countries, Porter emphasised that the quality of the business environment is crucial for competitiveness. A good business environment entails good infrastructure which supports advanced technology, developed logistics, good research and an education system which produces highly competent labour that can use sophisticated strategies, a good legal system with minimum amount of red tape, and an enforcement regime which is quick and fair.⁵⁸

At present, Porter's work on the competitive advantage of nations is undeniably influential. His theory on competition and competitiveness has been well received globally although his theory is criticised for lacking a sufficient theoretical basis and not being 'empirically rigorous'⁵⁹ and his diamond theory was criticised as irrelevant to small

⁵⁷ Porter *On Competition: Updated and Expanded Edition* (n 49) 174 - 178

⁵⁸ *ibid* 226

⁵⁹ Waverman, 'A Critical Analysis of Porter's Framework on the Competitive Advantage of Nations' (n 56)

open economies.⁶⁰ Not only his work on global competitiveness reports has had a positive reception, but he is also invited to present his view on Singapore's competitive advantage and it appears that Singapore has followed his theory.⁶¹

In order to determine what makes a nation more competitive than others in international markets, Porter has developed the Diamond theory to analyse a nation's competitiveness. According to Porter, the classical theory on comparative advantage which argues that the abundance of endowments of factors of production such as natural resources, cheap labour cost, land, and capital can bring comparative advantage to a nation is no longer relevant because they are 'nothing more than the basic inputs necessary for production',⁶² and 'insufficient to explain the pattern of trade'.⁶³ Thailand has an abundance of these factors of production compared with Singapore, yet its competitiveness is much further behind. There are certainly more attributions to the competitiveness of nations than these inherited endowments. This thesis is interested in the role of competition law in those areas.

Porter's Diamond Theory

The Diamond theory explains the relation and interdependence between four elements which contribute to a nation's competitiveness. They are: 1. Factor

⁶⁰ H. Chang Moon, Alan M. Rugman, and Alain Verbeke, 'The Generalized Double Diamond Approach to International Competitiveness' in Alain M. Rugman and others (eds) *Research in Global Strategic Management* (Vol 5, JAI Press Inc. 1995) 97 - 114

⁶¹ Michael E. Porter, 'The Competitive Advantage of Singapore: Transition to the Innovation Stage' (New Economy Conference, Singapore, 2 August 2001) <http://www.hbs.edu/faculty/Publication%20Files/caonsingapore08-02-01ck_3477b03a-fcf2-4f91-825a-5dc593197998.pdf> accessed 15 February 2016

⁶² Porter *The Competitive Advantage of Nations: With a New Introduction* (n 40) 11

⁶³ *ibid* 12

Conditions,⁶⁴ 2. Demand Conditions,⁶⁵ 3. Related and Supporting Industries,⁶⁶ and 4. Firm Strategy, Structure, and Rivalry.⁶⁷

Porter gave the most weight to rivalry because it ‘puts more pressure on firms to invest and innovate’.⁶⁸ It is possible for firms to gain competitiveness with only one or two of these determinants in national resource-dependent industries. However, it is not sustainable in the long run because foreign firms can easily avoid resource-dependent industries.⁶⁹

Porter asserted that competitive advantages can be attained even when there is lack of some (basic) factors. The lack of natural resources and labour does not always

⁶⁴ *ibid* 71 It is ‘the nations’ position in factors of production, such as skilled labour or infrastructure, necessary to compete in a given industry.’ It is divided into basic and advanced factors. Some basic factors are inherited or required moderately investment to create them. The Advanced Factors are more important for competitive advantage. They include human resources which is vital to development. Narrowly skilled human resources and infrastructure with specific properties are considered Specialised Factors while highway system and well-motivated employees with college degree are considered Generalised Factors. These factors are dynamic and subject to change. For example, high-skilled labour is mobile among nations. Thus, it is possible that they will move to economy which gives better remuneration and have better standard of living. The most significant and sustainable competitiveness of a nation occurs when it possesses factors conditions which are both Advanced and Specialized. See Porter *The Competitive Advantage of Nations: With a New Introduction* (n 39) 74 - 80. Recently in Thailand, there was a case of a dentist who received scholarship from the public university to do her PhD in Harvard University on a condition that she would have to return to the university to work. Once she graduated, she breached the contract and never returned, but continued working as a lecturer in Harvard University instead. See Dumrongkiat Mala, ‘Rich dentist’ leaves friends with B30m in debts’ *Bangkok Post* (Bangkok, 1 February 2016) <<http://www.bangkokpost.com/news/general/846296/rich-dentist-leaves-friends-with-b30m-in-debts>> accessed 19 February 2016; Dumrongkiat Mala, ‘Mahidol, Ohec planning suit to declare Dolrudee bankrupt’ *Bangkok Post* (Bangkok, 3 February 2016) <<http://www.bangkokpost.com/news/general/849252/mahidol-ohec-planning-suit-to-declare-dolrudee-bankrupt>> accessed 19 February 2016; This is not the first case of ‘brain drain’. There is always the risk that Thai tax payers’ money would be used to provide better education for highly intelligent students who choose not to return home. If Thailand cannot attract more high-skilled labour or keep their own to contribute, Thailand will always face the challenges in constant change in advanced factors. This problem cannot be solved by competition law and policy.

⁶⁵ Porter *The Competitive Advantage of Nations: With a New Introduction* (n 40) 71 It is “the nature of home demand for the industry’s product or service.”

⁶⁶ *ibid*, it is “the presence or absence in the nation of supplier industries and related industries that are internationally competitive.”

⁶⁷ *ibid*, it is “the conditions in the nation government how companies are created, organized, and managed, and the nature of domestic rivalry.”

⁶⁸ *ibid*; Michael E. Porter, ‘The Competitive Advantage of Nations’ (1990) 68 *Harvard Business Review* 73, 75

⁶⁹ Porter *The Competitive Advantage of Nations: With a New Introduction* (n 40) 72 - 73

lead to a negative result in competitiveness as it could pressure firms to innovate around these limitations.⁷⁰ However, this lack must be balanced with advantages in some other areas in order to yield the best result in innovation as too many disadvantages can result in paralysis.⁷¹

Home demand conditions can help increase the competitiveness of an industry. If the home demand is sophisticated, it can pressure firms to innovate to create or provide a better product or service to support the needs of domestic consumers. In Japan, consumers' sophisticated demands for high performance, energy saving, and quiet air-conditioners pressured firms to develop air-conditioners suitable to their needs. The result is that Japan is leading in the global market for intelligent compact air-conditioners.⁷²

In Thailand, consumers have high and sophisticated demands for pick-up trucks. The Thais prefer their pick-up trucks to be suitable for all-purposes: carriers of large families and agricultural products, and durable to poor road conditions.⁷³ It is reported that Thailand's one-ton pick-up trucks market is the world's second largest after the US.⁷⁴ In 2011, it was reported that Thailand is the world's largest exporter of pick-up trucks and the quality of automotive parts is rated as the best among AMSs by the Japan Automobile Manufacturers Association.⁷⁵

⁷⁰ *ibid* 82

⁷¹ *ibid* 83

⁷² *ibid* 86 - 89

⁷³ Teoh Zsin Woon et al, 'Thailand Automotive Cluster' Microeconomics of Competitiveness 2007 Final Paper (Institute for Strategy and Competitiveness, 4 May 2007) <http://www.isc.hbs.edu/resources/courses/moc-course-at-harvard/Documents/pdf/student-projects/Thailand_AutomotiveCluster_2007.pdf> accessed 18 February 2016

⁷⁴ *ibid*

⁷⁵ Noor Azlan Ghazali et al, 'Thailand Automotive Cluster, Microeconomic of Competitiveness' (Institute for Strategy and Competitiveness, 6 May 2011) <http://www.isc.hbs.edu/resources/courses/moc-course-at-harvard/Documents/pdf/student-projects/Thailand_Automotive_2011.pdf> accessed 18 February 2016

However, without strong domestic rivalry, firms may become complacent and be slow to respond to domestic demands. Without appropriate supporting industries, firms may not be able to respond appropriately to sophisticated demands.⁷⁶ A rigorous enforcement of competition law can help maintaining rivalry in the markets by ensuring market access to all potential competitors. Rivalry keeps firms motivated, but it cannot replace or create strong and sophisticated demands.

Relating and supporting industries impact competitiveness, not only in access to capitals, machinery or availability of input, but most importantly in the ‘process of innovation and upgrading, close working relationships between world-class suppliers and the industry’.⁷⁷ Japan is a good example of close working relationships between industry and suppliers. Its *keiretsu* (business group) is the closed ‘intricate web of relationships among banks, suppliers, and companies in related fields’. This structure ‘created a built-in network of suppliers and customers that was seen as highly beneficial to collaboration and competitive success’.⁷⁸ This allows frequent exchanges of information from the very beginning of the product development process between the suppliers and the industry, personnel rotation, long-term relationships with a small number of first-tier suppliers, and incentives to suppliers for improvements in efficiency. All of these aspects are part of Japan’s success in achieving high global competitiveness.⁷⁹

However, securing global relating and supporting industries may provide little advantage if industries are faced with lack of other diamond determinants such as lack of access to advanced factors, lack of sophisticated and strong home demand which signals

⁷⁶ Porter *The Competitive Advantage of Nations: With a New Introduction* (n 40) 99

⁷⁷ *ibid* 100 - 103

⁷⁸ Michael E. Porter, Hirotaka Takeuchi and Mariko Sakakibara, *Can Japan Compete?* (Macmillan 2000) 74

⁷⁹ *ibid* 71

an appropriate product change, and lack of active rivalry.⁸⁰ The contribution of effective enforcement of competition law and policy to this determinant in the diamond is indirect, because competition law cannot create world-class related and supporting industry. But effective enforcement of competition law can ensure the competition process is not distorted. As a consequence, it can maintain active rivalry in the industry.

The nature of domestic rivalry is part of the last determinant in the diamond theory: Firm strategy, Structure, and Rivalry. It is not merely the existence of rivalry, but also its pattern.⁸¹ There is no one size fits all for the structures and strategy of domestic firms that leads to a competitive advantage. Each country and each industry has its own approach that works best in a given period of time. According to Porter, domestic rivalry can create more sense of competition among firms and their managers. Firms are competing domestically for customers, human resources, and technology. Therefore, domestic firms can pressure each other to be more efficient and innovative.

Foreign rivals, on the other hand, are not seen as immediate rivals because their success is considered distant, and often related to unfair advantages. The more firms are pressured by domestic active rivals, the more competitive they become internationally.⁸² The study of Japanese competitive and uncompetitive industries revealed that industries where there is no government involvement and domestic rivals are strongly present are more competitive than industries where government's policy and legalised cartels are allowed.⁸³

⁸⁰ Porter *The Competitive Advantage of Nations: With a New Introduction* (n 40) 107

⁸¹ *ibid* 107

⁸² *ibid* 117 - 120

⁸³ Porter, Takeuchi and Sakakibara *Can Japan Compete?* (n 78) 39

Other than the four elements of the diamond theory, Porter emphasised that there were two other elements which could influence the nation's policy and that complete the theory: chance and government.

Chance represents events and development outside firms' control which can change the course of development or impact the firms' competitiveness, such as war, technological breakthrough, and major shifts in foreign market demands. Government is the key to this theory. The government's strategy can hinder or enhance any of the diamond elements effectively. The government's antitrust policy can affect domestic rivalry. Laws can alter home demand conditions. Government spending can increase domestic volume of consumption and create jobs which can encourage related and supporting industries. The government's education policy can produce a highly skilled workforce that corresponds to the needs of more advanced business activities and changes factor conditions.⁸⁴ Thus, the true role of government according to this theory lies in its influence on the four determinants.⁸⁵

One can surmise that if rivalry is important for encouraging firms to compete and if the government's antitrust policy can affect that, and if a nation's antitrust policy and competition law is subject to regulatory capture, then it is not very difficult for powerful firms to distort the competition process in a market for their own benefit through weak competition law enforcement. Hence, the role of the government in designing and enforcing competition law and policy is crucial to a nation's competitiveness. The independence and capacity of the national competition authorities are essential elements for effective competition enforcement aimed at increasing firms'

⁸⁴ Porter *The Competitive Advantage of Nations: With a New Introduction* (n 40) 73

⁸⁵ *ibid* 127

competitiveness. If firms are not competitive domestically, it is unlikely that they are competitive internationally.

Criticisms of Porter's Theories

However, his competitive advantage theory also receives many criticisms over the years. Considering it was developed in the 1980s. Since then new business models and practices have developed such as Uber, GrabTaxi, Facebook, Massive Open Online Course are changing how people do business or provide services. Communication technology clearly is essential to this phenomenon. Is this theory still relevant?

In establishing the competitive advantage of a nation, he has developed many new concepts and models. One of them is the Five Forces which help to determine the industry's structure through analysis of threats, bargaining power, and rivalry from all five forces.⁸⁶ Although this thesis does not apply his Five Forces in its analysis because the WEF does not take it into account when measuring the competitiveness of a country, it can be used as an evidence as to whether his theory is still relevant.

According to Recklies, critiques opine that Porter's Five Forces does not match today's dynamic market. It is best applied to the analysis of simple market structure and that it was developed when the world market was a static market structure, which is very much different to the VUCA-world⁸⁷ we are living in today. Recklies claims that the Five Forces is a good starting point for managers to analyse the market, but it does not provide a comprehensive aspect to the current market structure anymore. Recklies also

⁸⁶ Magretta, *Understanding Michael Porter: The Essential Guide to Competition and Strategy* (n 37) 36.

⁸⁷ Volatility. Uncertainty. Complexity and Ambiguity.

asserts that the Five Force assumes a classic perfect market.⁸⁸ Besides, Recklies also mentioned that in 1997, Larry Downes has suggested additional three forces into the Five Forces analysis to meet today's market structure: digitalization, globalisation, and deregulation.⁸⁹ Downes's additional three forces appear to be well received by academics.⁹⁰

This seems to suggest that Porter's Five Forces does not have the significance it once did. But it is not so. Many have criticised his theory, but do they understand it correctly? Magretta explains that the reason there are only five forces because these are the structural forces which are applicable to all industries. They '*systematically* impact *profitability* in a *predictable direction*.'⁹¹ Although government regulation and technology are among those proposed new forces, they affect profitability and competitiveness of a firm through their impact on the five forces. But they are not structural.⁹² Hence, it is not advisable to add more forces merely because they could affect competitiveness and profitability. Moreover, 'Porter's five forces framework offers a way to think

⁸⁸ Dagmar Recklies, 'Porters Five Forces – content, application, and critique' (*THEMANAGER.ORG*, 20 November 2015) <<http://www.themanager.org/2015/11/porters-five-forces/>> accessed 12 April 2017

⁸⁹ Dagmar Recklies, 'Beyond Porter – A Critique of the Critique of Porter' (*THEMANAGER.ORG*, 20 November 2015) <<http://www.themanager.org/2015/11/critique-of-porter/>> accessed 12 April 2017

⁹⁰ Fabian Dälken, 'Are Porter's Five Competitive Forces Still Applicable? A Critical Examination concerning the Relevance for Today's Business' (3rd IBA Bachelor Thesis Conference, Enschede, 3 July 2014) <<https://pdfs.semanticscholar.org/063f/be50003c29c81150bae86d4229ce38602a8f.pdf>> accessed 12 April 2017; Marco Pister, 'Porter's Models – are they still of relevance?' (2014) 4(5) *International Journal of Economic Practices and Theories*, Special issue on Marketing and Business Development <http://www.ijept.org/index.php/ijept/article/viewFile/Porters_Models_are_they_still_of_relevance/pdf_59> accessed 12 April 2017

⁹¹ Magretta, Understanding Michael Porter: The Essential Guide to Competition and Strategy (n 37) 52.

⁹² *ibid* 53 – 54.

systematically about imperfect markets.⁹³ As a result, any claim that this theory assumes a classical perfect market is simply a misunderstanding of Porter's Five Forces.

The Diamond theory has received as much criticism. A thorough and solid research on the summary of the critique of this theory was conducted by Risto Penttinen in 1994. The author categorized these criticisms into nine issues on 1) where the competitive advantage is created 2) whether the Diamond theory appropriately view the impact of FDI on multinational corporations 3) whether Diamond theory is applicable to small open economies 4) whether the Diamond theory suits resource-based industry 5) impact of national culture 6) whether Porter's methodology is valid 7) Role of macro variables 8) whether Diamond theory is dynamic or static and 9) whether Porter's theory is rigorous enough.⁹⁴

Penttinen has thoroughly researched and analysed criticisms on Porter's Diamond theory and compiled a brilliant summary table of all nine main points of critique. This thesis found that the table is an effective way to easily understand both Porter's point of views and the critics' points of view on the Diamond theory. Penttinen also provides Porter's replies to this critique where possible. It is the most comprehensive compilation of these issues in one document thus far. Hence, this thesis presents Penttinen's summary table below.⁹⁵

As one can surmise from the table below that Porter's Diamond theory was heavily criticised. But some of the commentators, in Porter's own word, did not understand the concept, therefore, made the wrong assertion.

⁹³ *ibid* 53.

⁹⁴ Risto Penttinen, 'Summary of the Critique on Porter's Diamond Model: Porter's Diamond Model Modified to Suit the Finnish Paper and Board Machine Industry' (1994) ELTA Discussion Paper no. 462 <<https://www.elta.fi/wp-content/uploads/dp462.pdf>> 21 – 53 accessed 12 April 2017

⁹⁵ *ibid* 53 - 56

Issue	Porter's view	The core of the critique	Porter's answer
1. Where is competitive advantage created?	<ul style="list-style-type: none"> - Competitive advantage is created in a geographically limited area within the nation, where the determinants of the diamond are present. - The multinational enterprise (MNE) needs a home base. Innovation takes place in the home base and coordination of subsidiaries requires central control. 	<ul style="list-style-type: none"> - In many industries competitive advantage is no longer created in the nation state but in a transnational environment where the determinants of the Diamond are sourced all over the world. The world can be seen either as one large Diamond or a system of interlinking Diamonds. - The MNE does not need a home base. Innovations take place all over the world and coordination of a network is possible without strong central control. 	<ul style="list-style-type: none"> - The <i>geographic scope</i> of competition is global, but the <i>geographic locus</i> of competitive advantage is the home base, as reflected by the Diamond. These two concepts must be understood as separate. - As an exception the Diamond can cross a national border where culture and institutions on both sides are similar and physical distances short.
2. FDI	<ul style="list-style-type: none"> - Outward FDI is more valuable than inward FDI in creating competitive advantage. - Local ownership and a local home base create greater benefits than foreign ownership and a foreign home base. 	<ul style="list-style-type: none"> - Inward FDI is as valuable as outward FDI and foreign owned firms are as important to a nation as domestically owned firms. - There is no capital which is loyal to the home base. 	<ul style="list-style-type: none"> - In the case of weak and not anymore so attractive Diamond, foreign subsidiaries can more easily be drawn out of a country than domestically owned firms.

3. Small open economies	<ul style="list-style-type: none"> - The home base Diamond applies to all nations. Competitive advantage is created in a geographically limited area also in a small nation. - Demand and rivalry have to be present in the home base Diamond. The sophistication of home demand is more important than the size of it. - Mergers and acquisitions are a threat to tough domestic rivalry and therefore bad. - Economies of scale is not a true sources of sustainable competitive advantage. 	<ul style="list-style-type: none"> - The Diamond model may suit the situation of a large country but it does not suit small nations who are highly dependent on the Diamonds of other countries. - Home demand is too small in small nations in order to gain economies of scale. - Small nations cannot support local rivalry and still achieve economies of scale. - In small nations mergers are needed e.g. to be able to finance R&D projects. 	<ul style="list-style-type: none"> - Even in large countries, e.g. the USA, the creation of competitive advantage is geographically concentrated to a small area. - Sophistication of home demand is more important than size of home demand. - Even in smaller countries the successful industries usually have significant local rivalry.
4. Resource-based industries	<ul style="list-style-type: none"> - The importance of basic factors such as natural resources as sources of competitive advantage has been undermined by their diminishing necessity, widening availability and ready access on global markets. - The returns to natural resources are low. - Competitive advantage based on natural resources is unsustainable. 	<ul style="list-style-type: none"> - Resource-based industries can also have substantial competitive advantage when the resource product is differentiated and contains intangible value added e.g. in the form of managerial and marketing skills. - Returns on natural resources are not uniformly low. - Also resource-based industries have sustainable competitive advantage thanks to 	<ul style="list-style-type: none"> - There <i>are</i> significant firm-specific advantages in resource industries. - Cost positions are poor and productivity is lagging in many natural resources industries. - Competitive advantage based on natural resources can sometimes be sustained for a time but natural resource advantages alone are unstable and vulnerable.

	<ul style="list-style-type: none"> - Industries highly dependent on natural resources were avoided in the selection of industries. 	<ul style="list-style-type: none"> value added. - The Diamond model does not suit resource-based industries because of the methodology used in the selection of industries. 	
5. National culture	<ul style="list-style-type: none"> - Competitive advantage grows out of national and even local circumstances in the Diamond, one circumstance being culture. - Firms should draw on and reinforce their unique national cultures 	<ul style="list-style-type: none"> - National culture is the base on which the national Diamond rests. - Culture is exogenous to firms and cannot be changed. 	<ul style="list-style-type: none"> - National culture works through the four determinants of the Diamond model. - Culture is not necessarily exogenous to firms and it can be changed.
6. Methodology	<ul style="list-style-type: none"> - The best indicator of competitive advantage are substantial and sustained exports and/or significant outward FDI based on skills and assets created in the home country. - In the methodology industries were defined narrowly and based as closely as possible on strategically distinct businesses. Relevant industries were at the lowest level of aggregation for which data 	<ul style="list-style-type: none"> - Productivity would have been a better measure of international competitiveness than export data. - The FDI activities of MNEs are not covered by the methodology. - The use of the SITC classification causes problems, e.g. services and many other industries are not covered by this data. - Porter's model is only valid for studying successful industries since these are the 	

	<p>was available. For this purpose, the SITC classification was used.</p> <ul style="list-style-type: none"> - To avoid the risk of generalising when this is not appropriate, a wide range of nations and industries with widely differing characteristics and institutions were studied. 	<p>ones his model is based on.</p> <ul style="list-style-type: none"> - The generalizability of a study based on a few cases is questionable. - Because no uniform measures exist to evaluate the Diamond, comparison between countries is impossible. - The predictive power of the model is weak. 	
7. Macro Variables	<ul style="list-style-type: none"> - Studying macroeconomic variables like exchange rates, interest rates, and government deficits is not enough to explain the competitive advantage of industries or nations. - Unit labour costs can be achieved through low wages and because this is not an attractive industrial model, unit labour cost is not a good measure of competitiveness. 	<ul style="list-style-type: none"> - Unit labour cost is a measure which is better in assessing competitiveness than only output per hour emphasised by Porter. - Unit labour cost consists of output per hour (which is emphasised by Porter and by him named productivity) and compensation per hour (which is downplayed by Porter). Also exchange rates affect unit labour cost. 	<ul style="list-style-type: none"> - The increasing value of currency and high interest rates may exacerbate competitiveness problems but they are not the cause of them.
8. Dynamism	<ul style="list-style-type: none"> - The points of the Diamond are self-enforcing and they create a system. The 	<ul style="list-style-type: none"> - Porter's study concentrates on existing clusters and does not explain how to create 	<ul style="list-style-type: none"> - Competitive advantage is most easily established in industries with established

	<p>Diamond promotes industry clusters. Domestic rivalry and geographical proximity are especially important in promoting the creation of clusters.</p> <ul style="list-style-type: none"> - The nature of competitive advantage of many of a nation's industries tends to evolve together. - The four stages of economic development relate to the attributes in the nation's industry most important to rising economic prosperity. The stages do not explain everything of the nation's industry but provide a way of thinking about how nations progress in competitive terms. 	<p>a new Diamond.</p> <ul style="list-style-type: none"> - It is not logical that countries move from stage to stage in the four stage model. There are likely to be industries and companies in all major economies at each of the stages. - Porter does not explain what causes the transition from stage to stage. 	<p>strength, or entering related fields, rather than creating <i>de novo</i> industries.</p>
9. Rigour		<ul style="list-style-type: none"> - Porter's definitions lack precision and they are inconsistent e.g. when the analysis moves from the industry to the national level. - The structure of the Diamond lacks precision and the Diamond cannot be operationalised, i.e. objectively measured. 	

		- Porter's argumentation is sloppy and he uses generalisations.	
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B) IMD's Definition

The International Institute for Management Development (IMD) explained that the competitiveness of a nation is measured and analysed by 'the ability of a nation to create and maintain an environment that sustains more value creation for its enterprises and more prosperity for its people'.⁹⁶ It does not only emphasise the firms' ability to compete, but also emphasises the role of the nations to create such an environment and to provide a better quality of living to their citizens. Although, it appears to omit whether it is the firm or the nation that competes, in fact, it is quite clear that the IMD considers that the firms are competing in the market while the nation provides and fosters the environment which enables them to compete. This notion is very similar to the definition given by Porter.

Unfortunately, public access to the detailed IMD's World Competitiveness Yearbook is not available. Had it been available, a more thorough analysis on what constitute competitiveness of a nation would have been done in comparison to those criteria used by the WEF and Porter.

C) The WEF's Definition

Porter's definition and approach to the competitiveness of a nation was well received. It is used and followed by many organisations. One of them is the world leading organisation on competitiveness, the WEF. The WEF defined competitiveness as 'the set of institutions, policies, and factors that determine the level of productivity of a country'.⁹⁷ WEF works closely with Porter and applies his concept on competitiveness

⁹⁶ IMD, 'Frequently Asked Questions' <<https://www.imd.org/uupload/imd.website/wcc/FAQs.pdf>> accessed 22 February 2016

⁹⁷ Klaus Schwab (ed), *The Global Competitiveness Report 2015 - 2016* (World Economic Forum 2015) 43 - 44

or competitive advantage, Diamond theory, and stages of development in its Global Competitiveness Reports which are examined in section 2.2.1.

2.1.4 Competitiveness of a Region

The Organisation for Economic Co-operation and Development (OECD) describes the characteristics of a competitive region as ‘one that can attract and maintain successful firms and maintain or increase standards of living for the region’s inhabitants. Skilled labour and investment gravitate away from “uncompetitive” regions towards more competitive ones’.⁹⁸

ASEAN, although it aims at creating the AEC as a highly competitive economic region, has not defined what it means by that. The EU, on the other hand, defined its version of regional competitiveness as ‘the ability to offer an attractive and sustainable environment for firms and residents to live and work in’.⁹⁹ As a result, the competitiveness of a region, according to the EU, ‘depends on its ability to anticipate and successfully adapt to internal and external economic and social challenges, by providing new economic opportunities, including higher quality jobs’.¹⁰⁰

In this regard, the EU reinvents itself by emphasising ‘knowledge, innovation and the optimisation of human capital’.¹⁰¹ It also views that ‘competitiveness involves upgrading the economic development of all regions together . . . competitiveness is not a zero-sum game. . .’¹⁰² The EU envisions to strive for ‘knowledge economy

⁹⁸ OECD, ‘Regional Competitiveness’ <<http://www.oecd.org/gov/regional-policy/regionalcompetitiveness.htm>> accessed 2 February 2016

⁹⁹ Eurostat Statistics Explained, ‘Regional Competitiveness Statistics’ <http://ec.europa.eu/eurostat/statistics-explained/index.php/Regional_competitiveness_statistics> accessed 8 February 2016

¹⁰⁰ Robert Huggins and Will Davies, *European Competitiveness Index 2006-07* (Robert Huggins Associates Ltd. 2006) 1

¹⁰¹ *ibid* 1

¹⁰² *ibid* 1

competitiveness'.¹⁰³ Undoubtedly, the EU's definition of competitiveness is very much influenced by the work of Porter.

Clearly, the OECD and the EU view regional competitiveness quite similarly. Both extend beyond the pure economic competitiveness of firms within the region to include the wellbeing of their citizens. Both focus on attracting firms and citizens, albeit the OECD's preference is on attracting successful firms and skilled labour, while the EU aims to create an attractive environment for any type of firm and for all citizens to work and live in. However, it should be noted that both definitions correspond to the concept provided by Porter that a nation's goal is to create a high standard of living for its citizens.

It can be concluded that there is a consensus among economic integration entities/organisations that the competitiveness of a region derives from the nation's competitiveness. Providing an environment that fosters the competitiveness of firms and promotes a high standard of living is the key to the OECD's and the EU's approach to competitiveness. Their views on competitiveness of the region correspond with Porter's view on the competitiveness of nations. Although Krugman warned of obsessive use of the term competitiveness, it appears that policy makers and academia do not listen to his warning at all. The next section shall demonstrate how the OECD and the EU as well as other organisations measure competitiveness. Although they may share a very similar view, their approach in measuring it differs somewhat.

¹⁰³ Voinescu and Moisoiu 'Competitiveness, theoretical and Policy Approaches. Towards a More Competitive EU' (n 28) 519

2.2 MEASUREMENTS OF COMPETITIVENESS

This section explores the indicators and variables used by the world's leading organisations to determine competitiveness. The central idea is not to explain each and every variable, but to see whether competition law and policy plays any role in measuring competitiveness.

There are a number of institutions which publish international competitive reports; such as the WEF which publishes the Global Competitiveness Report since 1979,¹⁰⁴ the IMD which has published the World Competitiveness Yearbook since 1989, first under the name of World Competitiveness Report and since 1996 under the name World Competitiveness Yearbook,¹⁰⁵ the Centre for International Competitiveness (founded in 2007) which publishes three competitiveness indexes: the World Knowledge Competitiveness Index, the European Competitiveness Index, and the UK Competitiveness Index,¹⁰⁶ and finally the OECD's indicators of international competitiveness.

This thesis excludes data on competitiveness from IMD because the data which are publicly accessible are limited. It only provides data for 5 AMSs (Indonesia, Malaysia, Philippines, Singapore, and Thailand). Moreover, the data only shows overall ranking, economic performance, government efficiency, business efficiency, and infrastructure

¹⁰⁴ WEF, 'FAQs' <<http://reports.weforum.org/global-competitiveness-report-2015-2016/faqs/>> accessed 22 February 2016

¹⁰⁵ IMD, 'History – World Economy Ranking' <<http://www.imd.org/wcc/history-of-world-economy-ranking/>> accessed 22 February 2016. However, due to limited access to information caused by membership restriction, this thesis cannot include data from IMD. Because IMD's publicly available data is not sufficient to provide a meaningful information suitable for the purpose of the thesis.

¹⁰⁶ Centre for International Competitiveness, 'About the Centre for International Competitiveness' <<http://www.cforic.org/pages/about-us.php>> accessed 22 February 2016

without breaking down in details, which is not enough for analysis for this research. In order to be able to view more details, one needs a subscription.

The competitiveness indexes published by Centre for International Competitiveness are also excluded because they are not useful to this thesis and not up-to-date.

2.2.1 Global Competitiveness Index by the WEF

The Global Competitiveness Index (GCI) developed by WEF appears to have received more acceptance than other competitiveness measurements.¹⁰⁷ It collects hard data from reliable sources such as the United Nations (UN), the World Bank, and United Nations Conference on Trade and Development (UNCTAD) and conducts its own executive opinion surveys (EOS).¹⁰⁸ The GCI is influenced by Porter's definition of competitiveness. Albeit WEF does not specifically publish reports on competitiveness of particular regions with regularity and the Global Competitiveness Report represents individual country's competitiveness, the significance of this report is not compromised by this.

A) The Indicators and Indexes

It should be noted that before 2004, the WEF used two indexes to demonstrate the competitiveness of a country: the Growth Competitiveness Index and the Business Competitiveness Index (or also known as the Microeconomic Competitiveness Index).

¹⁰⁷ It was modelled after by the European Regional Competitiveness Index (RCI) because it is 'the most internationally recognized and acclaimed index in the field of competitiveness.' See Paola Annoni and Kornelia Kozovska, *EU Regional Competitiveness Index RCI 2010* (Publications Office of the European Union 2010) iii; A.N.M. Waheeduzzaman, 'Competitiveness and Convergence in G7 and Emerging Markets' in A.N.M. Waheeduzzaman (ed) *Competitiveness of the Emerging Nations in a Globalized World* (Emerald Group Publishing Ltd 2011)

¹⁰⁸ Klaus Schwab (ed), *The Global Competitiveness Report 2015 – 2016* (n 97) 63 - 72

The Growth Competitiveness Index indicated the macroeconomic determinants of productivity, while the Business Competitiveness Index indicated the microeconomic determinants of productivity.¹⁰⁹

In 2004, the WEF introduced a new index called the GCI. The GCI was designed to capture both macro- and microeconomic aspects of productivity.¹¹⁰ Since then, the Growth Competitiveness Index, the Business Competitiveness Index, and the GCI have been published in the Global Competitiveness Reports. From 2008, the GCI is the only index published in the Global Competitiveness Report and replaces the dual indexes.¹¹¹

In the latest Global Competitiveness Report of 2015 -2016, the WEF divides the GCI into three subindexes: Basic Requirements, Efficiency Enhancers, and Innovation and Sophistication Factors.

Firstly, the Basic Requirements subindex is measured through four pillars: Institutions, Infrastructure, Macroeconomic Environment, and Health and Primary Education. Secondly, the Efficiency Enhancers subindex is measured through six pillars: Higher Education and Training, Goods Market Efficiency, Labour Market Efficiency, Financial Market Development, Technological Readiness, and Market Size. Thirdly, the Innovation and Sophistication Factors subindex is measured through two pillars: Business Sophistication and Innovation. The WEF gives different weight for each subindex to countries in different stages of development (see Annex 2: table 1 for

¹⁰⁹ Xavier Sala-I-Martin and Elsa V. Artadi, 'The global Competitiveness Index' in Augusto Lopez-Claros (ed), *The Global Competitiveness Report 2004 – 2005* (Palgrave Macmillan 2005)

¹¹⁰ *ibid* 52

¹¹¹ Michael E. Porter et al, 'Moving to a New Global Competitiveness Index' in Klaus Schwab and Michael E. Porter (eds) *The Global Competitiveness Report 2008 – 2009* (World Economic Forum 2008)

different weight given for Basic Requirements subindex, table 2 for Efficiency Enhancers subindex, and table 3 for Innovation and Sophistication Factors subindex)

Each pillar is measured by various indicators. In total there are 114 indicators across all 12 pillars.¹¹² Annex 2 of this chapter provides details of all indicators and subindexes used in 2015 – 2016 Global Competitiveness Report.

It is clear that the WEF takes into account Porter's Diamond theory when determining which subindexes are to be applied. Porter's Factor Conditions of the Diamond theory are reflected in pillar 2 – Infrastructure, pillar 4 – Health and Primary Education, pillar 5 – Higher Education and Training, and in pillar 7 – Labour Market Efficiency.

Porter's Demand Conditions of the Diamond theory are reflected in pillar 6 – Goods Market Efficiency (under quality of demand conditions). Porter's third facet of the Diamond, Related and Supporting Industries are reflected in pillar 8 – Financial Market Development, pillar 9 – Technological Readiness, pillar 11 – Business Sophistication, and pillar 12 – R&D Innovation.

Porter's last facet of the Diamond, Firm Strategy, Structure, and Rivalry are reflected in pillar 1 – Institutions (under private institutions), pillar 6 – Goods Market Efficiency (under competition), pillar 10 – Market Size, pillar 11 – Business Sophistication, and pillar 12 – R&D Innovation.

¹¹² Before 2004, the WEF did not categorise indicators into Pillars. The Pillars have been regularly modified and updated. In 2004, there were 12 Pillars with slightly different names from the current ones. However, in 2005, there were only 9 Pillars. But it was added back to 12 Pillars again in 2006.

As Porter firmly asserted that the government's impact on a nation's competitiveness is undeniable, the WEF also takes this into account in pillar 1 – Institutions, pillar 3 – Macroeconomic Environment, pillar 8 – Financial Market Development (under trustworthiness and confidence), pillar 12 – R&D Innovation (under government procurement of advanced technology products and intellectual property protection)

At a glance, the role of competition law and policy under the WEF's methodology is only one of the 114 indicators. It is placed in the competition indicator under the Goods Market Efficiency pillar, of the Efficiency Enhancers subindex. However, this does not suggest that a competitive goods market does not have much influence on the overall competitiveness of a country. Competition law and policy still matter, but to what extent? Is it as important as lawyers and leaders who often link it to the increase in competitiveness think it is? Section 2.3 will provide the answers to these questions in relation to the statistics from the AMSs from 1999 – 2016.

B) Stages of Development

The 12 pillars mentioned above matter to a certain extent for competitiveness in all economies, but they affect different economies in different ways.¹¹³ From 2004, the WEF has categorised countries into different stages of development in order to calculate the competitiveness as accurately as possible through calibrating the exact weight given to each indicator. This is evidently influenced by Porter's four stages of national competitive development namely Factor-Driven, Investment-Driven, Innovation-Drive,

¹¹³ Xavier Sala-I-Martin (et al), 'Reaching Beyond the New Normal: Findings from the Global Competitiveness Index 2015 – 2016' in Klaus Schwab (ed) *Global Competitiveness Report 2015 – 2016* (World Economic Forum 2015)

and Wealth-Driven economies.¹¹⁴ The WEF based its stages of development on Porter's definition, although they do not adopt it entirely.¹¹⁵ The effect of stages of development on competitiveness is that countries in different stages can improve their competitiveness differently.

The WEF categorises countries into different stages of development based on GDP per capita at market exchange rates¹¹⁶ and the share of exports of mineral goods in total exports (goods and services).¹¹⁷

There are 5 stages of development. The 5 stages were given names in 2007 as Stage 1: Factor-Driven, Transition from stage 1 to 2, Stage 2: Efficiency-Driven, Transition from stage 2 to 3, and Stage 3: Innovation-Driven.

Stage 1 Factor-Driven Economy:

Countries within the Factor-Driven development stage are competing based on their factor endowments i.e. unskilled labour and natural resources. In order to become competitive and maintain competitiveness at this stage, countries which fall into this stage of development have to focus primarily on basic factors such as well functioning public and private institutions (pillar 1), well developed infrastructures (pillar 2), a stable

¹¹⁴ Porter *The Competitive Advantage of Nations: With a New Introduction* (n 40) 543 - 560

¹¹⁵ Xavier Sala-I-Martin (et al), 'The Global Competitiveness Index: Measuring the Productive Potential of Nations' in Klaus Schwab and Michael E. Porter (eds) *The Global Competitiveness Report 2007 – 2008* (World Economic Forum 2007)

¹¹⁶ Stage 1 – GDP per capita less than US\$2,000; Transition from stage 1 to stage 2 – US\$ 2,000 – 2,999; Stage 2 – income of US\$ 3,000 – 8,999; Transition from stage 2 to 3 – income of US\$ 9,000 – 17,000; and Stage 3 – income of more than US\$ 17,000.

¹¹⁷ This criterion is used to adjust for countries that generally have more income than countries in stage 1, but more than 70% of their exports are made up of mineral products. These countries are categorised closer to Factor-Driven. For example, if based on the GDP per capita at market exchange rates, a country is in stage 3 – Innovation-Driven, but 95% of its exports are mineral products, then that country would be in transition between stage 1 and 2. For countries that export less than 70% of mineral products, the GDP criterion will be strictly applied to determine their stages of development. See Xavier Sala-I-Martin (et al), 'Reaching Beyond the New Normal: Findings from the Global Competitiveness Index 2015 – 2016' (n 102) 37, 41

macroeconomic environment (pillar 3), and a primary level educated workforce (pillar 4).¹¹⁸ Therefore, the Basic Requirements subindex accounts for 60% of their competitiveness, while the Efficiency Enhancers and Innovation and Sophistication Factors subindexes account for 35% and 5% respectively. This means that for countries in this stage, improving their competitiveness must focus on improving pillar 1-4 under the Basic Factors subindex because it is more relevant to them.

Their GDP is less than 2,000 US\$. In ASEAN, as at the end of 2015, Laos, Cambodia, and Myanmar are at this stage. It is quite clear that countries at this stage are production based. They produce and rely on cheap products and have low levels of technology in production. Although an effective competition law regime can be useful to proscribe cartels, anticompetitive agreements, and abuse of dominance in their market, the core of their competitiveness lies in the fundamental Basic Factors. Hence, these countries will not reap the full benefit of an effective competition policy as they should if they fail to improve their basic factors.

Transition from Factor-Driven Economy to Efficiency-Driven Economy:

These countries' GDP is between US\$ 2,000 – 2,999.¹¹⁹ From 2008 – 2014, Brunei was categorised in this stage of development even though its GDP considerably exceeded this threshold¹²⁰ due to its reliance on exports of crude oil. At the end of 2015, Philippines and Viet Nam are at this stage.

¹¹⁸ Xavier Sala-I-Martin et al, 'Reaching Beyond the New Normal: Findings from the Global Competitiveness Index 2015 – 2016' (n 113) 37

¹¹⁹ see n 117 for more details on how the WEF categorises countries which largely depend on exports of minerals

¹²⁰ Brunei's GDP per capita from 2008 – 2014 are: US\$32,167.3, US\$37,053, US\$26,325, US\$31,239, US\$36,584, and US\$41,703.

Countries in this transition stage still rely on the basic factors, but they are progressing towards Efficiency-Driven. Therefore, the WEF varies the weights given on each subindex – depending on their GDP. For example, in 2012, Philippines' GDP was US\$ 2,223; the WEF gave 55.5% of weight in Basic Requirements, 38.4% in Efficiency Enhancers, and 6.1% in Innovation and Sophistication Factors.¹²¹ In 2013, Philippines' GDP was US\$ 2,614; the WEF gave 47.7%, 44.2%, and 8.1% to Basic Requirements, Efficiency Enhancers, and Innovation and Sophistication Factors subindexes respectively.¹²² In 2015, the Philippines' GDP was US\$ 2,865; the WEF gave 42.7%, 48%, and 9.3% to Basic Requirements, Efficiency Enhancers, and Innovation and Sophistication Factors subindexes respectively.¹²³ As it clearly shows that the more GDP a country at this transition stage has, the lesser weight is given to basic factors, and the more weight is accorded to efficiency enhancers. Thus, it is possible that the effectiveness of competition policy can influence the competitiveness of these countries provided that their GDP increases towards the Efficiency-Driven stage.

Stage 2 Efficiency-Driven Economies:

This stage is, despite its different name, comparable to Porter's Investment-Driven stage of national competitive development. The substances of subindexes which are relevant and influential to them are roughly the same. According to Porter, the government's role in improving the competitiveness of firms in these countries is substantial. One of the key roles is to provide temporary protection to encourage the entry of domestic rivals, while resisting powerful corporate interests to ensure adequate domestic rivalry. Such protection must be strictly temporarily despite inevitable pressure

¹²¹ Klaus Schwab (ed), *The Global Competitiveness Report 2012 – 2013* (World Economic Forum 2012) 291

¹²² Klaus Schwab (ed), *The Global Competitiveness Report 2013 – 2014 Full Data Edition* (World Economic Forum 2013), 314

¹²³ Klaus Schwab (ed), *The Global Competitiveness Report 2015 – 2016* (n 97) 296

to make it permanent to incentivise innovation and improvement. The key to the government's success lies in a 'politically secure government, continuity in government officials, and the ability to counteract special interests seeking favours. . .'¹²⁴

The GDP of countries in this stage is US\$ 3,000 – 8,999. In this stage of development, countries become more competitive, their productivity increases, and wages will rise with advancing development. These countries begin to develop more-efficient production processes and to increase product quality. Consequently, they gain and maintain their competitiveness through higher education and training which produces high skilled labour to serve the economy (pillar 5), efficient goods markets (pillar 6), well-functioning labour markets (pillar 7), developed financial markets (pillar 8), the ability to reap the benefits of existing technologies (pillar 9), and a large domestic or foreign market (pillar 10).¹²⁵ Thus, the WEF gives respectively 40%, 50%, and 10% to Basic Requirements, Efficiency Enhancers, and Innovation and Sophistication Factors to countries at this stage of development. In ASEAN, as of the end of 2015, Thailand and Indonesia are at this stage.

It clearly shows that countries which are in Efficiency-Driven stage will engage and focus on efficiency, and that they use more advance technology to produce, so they are undoubtedly more exposed to competition both in domestic and international markets. Efficient enforcement of competition law and policy can help them maintain goods market efficiency and to remain competitive. However, goods market efficiency is only one of the 12 pillars that affect competitiveness. Its impact on the overall competitiveness of a country can easily be compromised by ineffectiveness in other pillars.

¹²⁴ Porter *The Competitive Advantage of Nations: With a New Introduction* (n 40) 551 - 552

¹²⁵ Klaus Schwab (ed), *The Global Competitiveness Report 2015 – 2016* (n 97) 37

Transition from Efficiency-Driven to Innovation-Driven Economies:

In ASEAN, only Malaysia is at this stage. It has entered this transitional stage in 2012 when its competition law came into force. The GDP of countries in this stage is US\$ 9,000 – 17,000 annually. Again, the WEF varies the weights given to each subindex. This depends on the GDP. However, it only fluctuates between the Basic Requirements and Innovation and Sophistication Factors subindexes. The WEF fixes the weight given to the Efficiency Enhancers subindex at 50%. The importance of Efficiency Enhancers on competitiveness for countries at this transitional stage is clearly seen as the WEF puts the most weight on it.

For example, in 2012, Malaysia's GDP was US\$ 9,700; the WEF gave 38.3%, 50%, and 11.7% respectively to Basic Requirements, Efficiency Enhancers, and Innovation and Sophistication Factors.¹²⁶ In 2013, its GDP was US\$ 10,304; the WEF gave 36.7%, 50%, and 13.3% respectively to Basic Requirements, Efficiency Enhancers, and Innovation and Sophistication Factors subindexes.¹²⁷ The higher the GDP, the more weight is given to Innovation and Sophistication Factors compared to the Basic Requirements subindex. Thus, the effectiveness of competition law and policy undoubtedly affects the competitiveness of countries that are at this stage of development.

Stage 3 Innovation-Driven Economies:

Wages in countries that have moved into the innovation-driven stage have risen so much that the only way they can be sustained is by enabling businesses to become more innovative and to compete using the most advanced and sophisticated production

¹²⁶ Klaus Schwab (ed), *The Global Competitiveness Report 2012 – 2013* (n 121) 246

¹²⁷ Klaus Schwab (ed), *The Global Competitiveness Report 2013 – 2014 Full Data Edition* (n 122) 266

processes. According to Porter, the government's role in this stage of development is distinct from that in the previous stages. The government's direct intervention is not as relevant as it used to be. The innovation must come from the private sector.¹²⁸ It is best for governments to indirectly influence by, *inter alia*, preserving domestic rivalry and improving the quality of domestic demand.¹²⁹

Countries which are at this stage remain competitive if their businesses are able to compete using the most sophisticated production processes (pillar 11) and by innovating new ones (pillar 12).¹³⁰ Their GDP is more than US\$ 17,000 per year. Singapore has been at the Innovation-Driven stage since 2004. It is the only country in ASEAN which is at this stage.

Regarding competitiveness of these countries, the WEF gives the most weight to Efficiency Enhancers (50%), then Innovation and Sophistication Factors (30%), and the least to Basic Requirements (20%). It is clear that Efficiency Enhancers play an important role in determining the competitiveness to a different degree in each stage of development.

In this chapter, particular attention is given to the Goods Market Efficiency pillar and the Efficiency Enhancers subindex, because the 16 indicators used to determine the goods market efficiency are relevant to competitiveness (see Annex 2 of this chapter for details on the 16 indicators). One can conjecture that an efficient market is also a competitive market.

¹²⁸ Porter *The Competitive Advantage of Nations: With a New Introduction* (n 40) 555

¹²⁹ *ibid* 556

¹³⁰ Klaus Schwab (ed), *The Global Competitiveness Report 2015 – 2016* (n 97) 37

The AEC Blueprints strategies on creating efficient competition policy are coherent with the Goods Market Efficiency because they introduce competition law to AMSs, build capacity in developing national competition law, establish a platform for competition agencies to exchange best practices, publish regional guidelines on competition policy, develop a regional strategy on convergence, establish effective competition regimes, and strengthen the capacities of NCAs for an effective enforcement of national competition laws.

Mateus and Lianos found the connection between competition law and policy and development level. They argued that the level of development of a country determines the types of competition law it adopts as well as the competition policy strategy. They applied Glaeser and Shliefer's regulatory state theory on 101 countries samples from all over the world and found that in countries where the check and balance system of legislature, administration, and judiciary is strengthened, and is largely immune to regulatory capture by private interests; high fines have a high dissuasive effect and private litigation can function as the main instrument of competition law enforcement. They concluded that this regime enables societies to reap all the benefits of modern competition law enforcement.¹³¹ They also found that out of 101 countries, there is no country with a GDP per capita of less than US\$ 13,570 that has a well-resourced NCA.¹³²

Although Mateus and Lianos did not specifically examine the relationship between competitiveness and competition law and policy, or the relationship between

¹³¹ Abel Mateus and Ioannis Lianos, "Cosi fan tutte?": Linking Levels of Development and Competition Law Regimes" (2011) CLES Working Paper Series 4/2011, 7 - 10 <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles_4_2011> accessed 14 June 2016

¹³² *ibid* 13

this and the stage of economic development, their findings are useful to this thesis because they address the impact of the government and of the effectiveness of institutions on competition law enforcement. Pillar 1 on Institutions is one of the determinants for measuring competitiveness. Well-resourced NCAs are more likely to cope with anticompetitive practices more effectively. This can improve the goods market efficiency pillar, and hence the Efficiency Enhancers subindex. If their findings on the GDP are applied to the AMSs, then Singapore is the only country in ASEAN which has an NCA that is well resourced and hence is likely to be able to cope with anticompetitive behaviours.

2.2.2 The European Union Competitiveness

Thus far, there are two publications on European competitiveness. The first is the EU Regional Competitiveness Index which was developed largely based on the GCI. It was first published in 2010.¹³³ There are three groups of competitiveness: Basic, Efficiency, and Innovation. Under each group there are altogether 11 pillars describing inputs and outputs of territorial competitiveness¹³⁴ similar to those of the GCI. The Basic group consists of 5 pillars: Institutions, Macroeconomic Stability, Infrastructure, Health, and Basic Education. The Efficiency group consists of 3 pillars: Higher Education/ Training and Lifelong Learning, Labour Market Efficiency, and Market Size. The Innovation group consists of 3 pillars: Technological Readiness, Business Sophistication, and Innovation.¹³⁵

¹³³ Paola Annoni and Lewis Dijkstra, *EU Regional Competitiveness Index RCI 2013* (Publications Office of the European Union 2013) i

¹³⁴ *ibid* 1

¹³⁵ *ibid* V

The EU RCI does not include competition law or the effectiveness of antitrust policy in any of the determinants. Competition in the EU market and dominance in the EU market are also not considered. However, the efficiency of the legal framework in settling disputes and in challenging regulations are among the determinants under the Institution pillar at country level. They are taken from the GCI.¹³⁶

The second is the Europe 2020 Competitiveness Report which is published in cooperation with the WEF. This report is published biannually, and came out in 2012 and 2014. The EU has initiated Europe 2020. Its strategy for Europe 2020 is to attain growth that is *Sustainable, Inclusive, and Smart*.¹³⁷ Therefore, the indexes in this report are in accordance with the WEF.

There are seven pillars for the three strategies in the Europe 2020 Competitiveness report. For *Sustainable growth*, the pillar is Environmental Sustainability; for *Inclusive growth*, the pillars are Social Inclusion and Labour Market and Employment, and for *Smart growth*, the pillars are Education and Training, Innovative Europe, Digital Agenda, and Enterprise Environment.¹³⁸ The report compliments the EU's endeavour to measure progress by offering an assessment based on the results of the WEF's EOS.¹³⁹

Under the Enterprise environment pillar of *Smart growth*, the four variables used to assess the enterprise environment are competition, clusters, entrepreneurship, and availability of financing. The competition variable is measured in accordance with the GCI. It is measured by; *inter alia*, intensity of local competition, effectiveness of antitrust

¹³⁶ *ibid* 25

¹³⁷ European Commission, 'EUROPE 2020: Priorities' (last updated 18 March 2014) <http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/priorities/index_en.htm> accessed 24 February 2016

¹³⁸ WEF, *The Europe 2020 Competitiveness Report: Building a More Competitive Europe 2014 Edition* (WEF 2014) 8

¹³⁹ *ibid*

policy, extent of market dominance, distortive effect on competition of taxes and subsidies, and the impact of rules on FDI.¹⁴⁰ However, the distortive effect on competition of taxes and subsidies is a new variable and is not yet used in the Global Competitiveness Report 2015 -2016.

2.2.3 The OECD's Indicators of International Trade and Competitiveness

In 1987, Durand and Giorno suggested that the ideal measurement of competitiveness should encompass three basic characteristics: first, cover all traded and tradeable goods which are subject to competition; second, cover all markets which are open to competition; and, third, should be constructed from data which is fully comparable internationally.¹⁴¹ But they also submitted that none of the indicators can fulfil these criteria due to various limitations.¹⁴² These indicators are often affected by the location and the structure of the markets for which they are assessed.¹⁴³ The calculation of these indicators is a matter of compromising with the available data, even if it is done under a well-defined conceptual framework.¹⁴⁴ The OECD measured the following indicators to determine the competitiveness: import competitiveness, export competitiveness, overall competitiveness, and competitiveness in the INTERLINK model.¹⁴⁵

¹⁴⁰ *ibid* 37

¹⁴¹ Martine Durand and Claude Giorno, 'Indicators of International Competitiveness: Conceptual Aspects and Evaluation' (1987) OECD Economic Studies, No. 9
<<http://www.oecd.org/eo/outlook/33841783.pdf> pp. 149-150> accessed 2 February 2016

¹⁴² *ibid* 150

¹⁴³ *ibid* 152

¹⁴⁴ *ibid* 153

¹⁴⁵ *ibid* 155 - 160

In 1992, the OECD's approach to measuring competitiveness was mainly through price competitiveness and other indicators such as real effective exchange rates, unit labour costs, and consumer price indices.¹⁴⁶ In 1998, the OECD appeared to opine that competitiveness was basically a concept for firms, but at the same time accepted that it was possible to use this concept to determine a country's ability to sell its products in world markets. However, measuring competitiveness still emphasised quantifiable data such as cost and price differentials. Less attention was given to non-price factors such as innovation or quality of products or services because these are more difficult to compare.¹⁴⁷

In 2005, the OECD published *Building Competitive Regions: Strategies and Governance* based on Porter's competitiveness of nations and diamond theory. However, the direction seems to go towards building clusters, developing estate based projects and linking research and industry rather than towards creating rivalry and ensuring the efficient enforcement of competition law.¹⁴⁸

In 2015, the OECD's approach to measuring international competitiveness has not changed. The indicators of international competitiveness consisted of total unit labour costs, manufacturing unit labour costs, real effective exchange rates, market share, and export performance.¹⁴⁹

¹⁴⁶ Martine Durand, Jacques Simon, and Colin Webb, 'OECD's Indicators of International Trade and Competitiveness' (1992) OECD Economics Department Working Papers No. 120, 6 <<http://www.oecd-ilibrary.org/docserver/download/5lgsjhvj88nr.pdf?expires=1470412474&id=id&accname=guest&checksum=81FF82D2161451FBBC9E2E3319BF9424>> accessed 5 August 2016

¹⁴⁷ Martine Durand, Christophe Madaschi, and Flavia Terribile, 'Trend in OECD Countries' International Competitiveness: The Influence of Emerging Market Economies' (1998) Economics Department Working Papers No. 195 ECO/WKP(98)8, 4 - 5 <<http://www.oecd.org/eco/outlook/1864948.pdf>> accessed 18 February 2016

¹⁴⁸ OECD, *Building Competitive Regions: Strategies and Governance* (OECD Publishing 2005) 26 - 28

¹⁴⁹ OECD, *OECD Compendium of Productivity Indicators 2015* (OECD Publishing 2015) 48

This does not infer that the OECD does not pay attention to competition law and policy. In fact, the OECD has extensively published and promoted best practices in competition law enforcement in developing countries to protect the investors' benefit when investing in developing countries and to ensure market access to foreign countries, as was mentioned in chapter 1. But it does not take effectiveness of competition law and enforcement into consideration when measuring competitiveness. The OECD's approach to measuring competitiveness differs from Porter's, which emphasised increasing productivity as a means to increase competitiveness with the goal to bring about a high quality of living. The OECD appears to prefer to measure mainly quantifiable indicators which are less complicated than non-price indicators. But this approach is too narrow and does not provide as well as an assessed result as the GCI.

2.3 COMPETITIVENESS OF THE AMSs

The aim of this section is to provide evidence that enactment of competition law and the efficiency of competition policy do not significantly contribute to the competitiveness of the AMSs. In order to prove this, this thesis uses data on the competitiveness of the AMSs as measured by WEF from 1999 – 2016.¹⁵⁰

This thesis uses the approach developed by the WEF to analyse the AMSs' competitiveness, because the GCI is carefully designed and is regularly updated and

¹⁵⁰ This thesis divides it into 3 periods. The first is from 1999 – 2004 because it was the period from the time Thailand and Indonesia enacted their competition laws until before Singapore and Viet Nam enacted theirs. Also, the WEF used the old methodology in measuring competitiveness. The second period is from 2004-2008 because the WEF has improved its methodology and begun to categorise countries into different stages of development. And it is also the period that Singapore and Viet Nam enacted their competition laws. The last period is from 2008 – 2016 because it was the beginning of the adoption of the AEC Blueprint 2015, the ASEAN Charter, and the Regional Guidelines.

improved to ensure the results represent the competitiveness as close to reality as possible. It takes into account many aspects of a country's ability to compete efficiently. It does not consider only economic statistics, but also considers health, education, and the environment for sustainable growth, which is compatible to the approaches prescribed in the AEC Blueprint 2025 on competition policy. The GCI has been widely accepted and is globally recognised.

This section analyses the AMSs' competitiveness by looking into the selected indicators which are directly relevant to competition law and policy. The selected indicators are: overall competitiveness rankings, effectiveness of antimonopoly policy, intensity of local market competition, extent of market dominance, and overall goods market efficiency.

2.3.1 The AMSs' Competitiveness from 1999 to 2004¹⁵¹

When the Asian financial crisis started in Thailand in 1997, this spurred AMSs leaders to accelerate their economic cooperation and integration. Although they had begun the elimination of trade barriers amongst member states, this did not seem to be sufficient for the AMSs to cope with losing on their inward FDI.

The top three among the AMSs remained the same throughout the period. Singapore, Malaysia, and Thailand occupied the top three of the list respectively. However, only Singapore was actually in the top ten of the overall rankings among all countries which were surveyed throughout the period. Singapore outranked the other AMSs both in the effectiveness of its antimonopoly policy and in intensity of its local competition without having enacted comprehensive competition law.

¹⁵¹ Please see Tables 1 to 4 in ANNEX 1: TABLES 1 – 16: COMPETITIVENESS OF AMSs FROM 1999 – 2016

During this period, the WEF had not yet divided countries into different stages of development. Therefore, this thesis divides the AMSs into two categories; countries which enacted comprehensive competition laws (Indonesia and Thailand), and countries which did not enact comprehensive competition laws (Malaysia, Philippines, Singapore, and Viet Nam).

Between Thailand and Indonesia, Thailand's antimonopoly policy was more effective at promoting competition. Consequently, Thai local competition was more intense than Indonesia's. Except in 2001 – 2002 when Thailand's local competition was slightly less intense than Indonesia's. Overall, Thailand's microeconomic competitiveness was ahead of Indonesia's throughout this period.

Among countries which did not enact competition laws (Malaysia, Philippines, Singapore, and Viet Nam), the data reveals mixed results. With the exception of Singapore, countries which had more effective antimonopoly policy and more intense local competition did not always have better overall microeconomic competitiveness as can be seen from the comparative data on Malaysia and Philippines from 2000 – 2002, and between Viet Nam and Malaysia in 2001 – 2002.

Interestingly, both of the countries with competition law (Thailand and Indonesia) were outranked by the countries without it (Singapore and Malaysia). Singapore and Malaysia have been the top two among the AMSs since 1999. Thus, observations for this period can be drawn as follows:

1. Enacting competition law did not necessarily correlate to the effectiveness of antimonopoly policy and the intensity of local competition, hence, the overall microeconomic competitiveness.

2. Countries without competition laws could have better microeconomic competitiveness than countries with competition law.
3. Among countries without competition law, it was possible to have a better overall microeconomic competitiveness even if the antimonopoly policy was less effective and local competition was less intense.
4. Having a more effective antimonopoly policy did not always result in a more intense local market competition and in better overall competitiveness.

2.3.2 The AMSs' Competitiveness from 2004 – 2008¹⁵²

In this period, The WEF grouped countries into five different stages of economic development as described in on page 59. Additionally, the WEF introduced a new indicator into the Goods Market Efficiency Pillar namely 'extent of market dominance'. Please see section 2.2.1 Global Competitiveness Index by the WEF for more details on these changes.

From 2004 onwards, the WEF introduced the GCI as a single index which combines the macroeconomic competitiveness and microeconomic competitiveness indexes. Therefore, the tables for 2004 – 2016 will use the GCI instead of the Business Competitiveness Index, Microeconomic Competitiveness Index, and Current Competitiveness Index.

Singapore and Viet Nam enacted their national competition laws. However, the Singapore Competition Act was not yet fully in force in 2004. Its enforcement was

¹⁵² Please see Tables 6 – 8 in ANNEX 1: TABLES 1 – 16: COMPETITIVENESS OF AMSs FROM 1999 – 2016

phased in over a period of 3 years.¹⁵³ It is also the period before the publication of the AEC Blueprints and the Regional Guidelines.

When dividing the AMSs into two categories: countries which have enacted competition laws (Indonesia, Thailand, Singapore, and Viet Nam), and countries which did not enact competition laws (Cambodia, Malaysia, and Philippines) the data of this period indicates the following:

1. Having enacted competition law did not necessarily correlate to a more efficient goods market, effectiveness of antimonopoly policy, intensity of local competition, and lesser extent of market dominance;
2. Countries which did not enact competition laws might be ranked at a higher GCI than countries which have enacted competition law;
3. Among countries which did not enact competition law, the overall goods market efficiency correlated to their GCI. However, it was not necessarily so that a more efficient goods market equates to more effective antimonopoly policies, more intense local competition, and lesser extent of market dominance (in the case of Cambodia and Philippines);
4. Among countries which enacted competition laws, their goods market efficiency does not reflect their GCI. Besides, it is possible for countries whose goods market are more efficient to have less effective antimonopoly policy, less intense local competition, or more extent of market dominance.

¹⁵³ It begins with the enforcement of the Preliminary provisions and the provisions on the Competition Commission of Singapore and its appointment and power on 1 January 2005. Then provisions on Appeals came into force on 1 September 2005, followed with enforcement of provisions on anticompetitive agreements and abuse of dominance on 1 January 2006. Provisions on merger came into force on 1 July 2007.

From the above conclusions on enactment of competition law, it suggests that enacting competition law does not necessarily result in a more efficient goods market and antimonopoly policy, lesser extent of market dominance, more intense local competition, and higher GCI. Additionally, it appears to ultimately suggest that competition law had no effect until countries had implemented other policies which enhance their competitiveness, as there are over a 100 indicators which the WEF uses to determine competitiveness.

However, the significance of competition law to competitiveness become clearer when the AMSs are divided into different categories according to their stage of development namely Factor-Driven (Cambodia, Indonesia, Philippines, and Viet Nam), transition from Factor-Driven to Efficiency-Driven (Thailand), Efficiency-Driven (Malaysia), and Innovation-Driven (Singapore). This leads to the following conclusions:

1. Among countries which were in the Factor-Driven stage (Indonesia, Philippines, and Viet Nam), having enacted competition law and a more efficient goods market did not always result in higher GCI than countries which did not enact competition law (as in the case of Philippines and Viet Nam from 2004 – 2006).
2. Countries at Factor-Driven stage had lower GCI than countries in higher development stage albeit having a more efficient goods market (as in the case of Thailand and Indonesia from 2006 – 2008). Moreover, when comparing Indonesia (Factor-Driven) with Malaysia (Efficiency-Driven), the data shows that despite having more effective antimonopoly policy, more intense local competition, and lesser extent of market dominance, Indonesia's overall goods

market efficiency was behind that of Malaysia. (as is the case in Malaysia and Indonesia from 2006 – 2008)

3. Although countries in Factor-Driven stage that enacted competition law (Indonesia and Viet Nam) improved their goods market efficiency considerably compared with their performance between 1999 – 2004, they could not reap the full potential of competition law on their overall competitiveness. For example, Indonesia improved the effectiveness of its antimonopoly policy in 2006 – 2008, but it could not outrank Thailand's GCI and other indicators which slightly fluctuated over the period.¹⁵⁴
4. On the other hand, Singapore's antimonopoly policy has been very effective at promoting competition even before the enactment of its Competition Act in 2004. After the enactment, Singapore continues to top the list and its overall goods market efficiency has dominated among the AMSs since 2004. When the Singapore Competition Act was fully enforced in 2007, Singapore's overall goods market efficiency was improved and ranked 2nd in the world. Since 1999, Singapore overall goods market efficiency has always been higher in rank than that of Malaysia even though not all of the indicators under this Pillar were higher in Singapore than in Malaysia.¹⁵⁵

From the conclusions above, one can surmise that countries in higher stages of development are highly likely to benefit more and quicker from the effect of competition law on market efficiency and competitiveness, provided that they effectively enforce this

¹⁵⁴ In 1999, Thailand's effectiveness of antimonopoly policy was at 43rd among 59 countries (3.64/7.00), and Indonesia was at 59th (2.59/7.00). But in 2007 – 2008, the effectiveness of Thai antimonopoly policy has improved slightly at 55th among 131 countries (4.1/7.00), while Indonesia shows a significant improvement in this aspect at 25th (5.1/7.00).

¹⁵⁵ For example, Singapore's antimonopoly policy was generally more effective at promoting competition than Malaysia's, but the extent of market dominance and intensity of local competition shifted between the two countries. Despite the fluctuation in some of the indicators, Singapore has always ranked better than Malaysia both at the GCI and at overall goods market efficiency.

competition law. The contrary is true for countries in lower stages of development, especially those in the Factor-Driven stage.

2.3.3 The AMSs' Competitiveness from 2008 - 2016¹⁵⁶

The conclusions above on the connection between the effect of competition law and the country's stage of development on competitiveness from 2004 – 2008 are affirmed in this period.

In this period Viet Nam (Factor-Driven) began to outrank the Philippines (Factor-Driven) on the GCI after four years of enforcement of competition law. This indicates that among Factor-Driven countries, countries which have enacted and enforced competition law can enhance their goods market efficiency to a certain extent and, hence, its GCI. Although the Philippines gained its position back in 2012, its goods market efficiency has not always been higher ranked than that of Viet Nam. The Philippines' competitiveness has overtaken that of Viet Nam's because the Philippines moved into the transition stage from Factor-Driven to Efficiency-Driven in 2011. As a result, Viet Nam (Factor-Driven) could not reap the full benefits of its competition law in the same way that the Philippines could.

Data from 2013 – 2016 of CLMV countries indicates that Viet Nam has led the GCI rankings despite its market efficiency not always being the highest ranking among the CLMV. Moreover, Viet Nam has moved from the Factor-Driven stage to the transition to Efficiency-Driven stage in 2015, ten years after the enactment of its competition law. The data also shows that CLMV countries which did not have

¹⁵⁶ Please see Tables 9 – 16 in ANNEX 1: TABLES 1 – 16: COMPETITIVENESS OF AMSs FROM 1999 – 2016

competition laws could have a more effective antimonopoly policy, and hence, better GCI.

In 2008 – 2009, Brunei (transition from Factor-Driven to Efficiency-Driven) entered the Global Competitiveness Report for the first time and outranked Indonesia (Factor-Driven) despite Brunei's overall goods market efficiency and all other indicators being much lower than those of Indonesia and its lack of competition laws. Thailand (Efficiency-Driven) continued to lead above Indonesia (Factor-Driven) despite its goods market efficiency and other indicators being much lower than those of Indonesia. The reason that Brunei and Thailand were leading over Indonesia is that Indonesia could not fully reap the benefits of its competition law due to its lower stage of development. The same applied to Brunei, Thailand, and Indonesia in 2009 – 2010.

In 2009 – 2010, Brunei (transition from Factor-Driven to Efficiency-Driven) did not only outrank Indonesia's GCI, but also Thailand's (Efficiency-Driven) despite having the least market efficiency, the least effective antimonopoly policy, the least intense local competition, and the worst extent of market dominance between the three. It is clear that Thailand's stage of development and enactment of competition law could not guarantee that Thailand's GCI would be higher than that of Brunei. In fact, Brunei outranked Thailand and Indonesia in 2009 – 2014.

This proves that in order to gain overall competitiveness, a country does not depend only on the enactment of competition law or on its stage of development. There are many other indicators which can improve a country's competitiveness. This strongly supports the thesis that competition law and policy is not the only key to competitiveness. Brunei's overall competitiveness is higher than Thailand's because of its strong macroeconomic stability (1st) and good labour market efficiency (10th). Its

Institutions and Health and Primary education were also much better than Thailand's. However, if Thailand had enforced its competition law more effectively, its overall competitiveness could have increased.

When comparing Thailand with Indonesia from 2011 – 2016, it is easy to jump to the conclusion that Indonesia is less competitive than Thailand because the GCI indicates this is so. However, one should not take for granted Indonesia's economic developmental progress over the years 2004 – 2016. In 2004, Indonesia was at the Factor-Driven stage. It moved to transition to Efficiency-Driven stage in 2009, which is 10 years after its competition law came into force. Then in 2011, it moved up to Efficiency-Driven. Thailand, on the other hand, had been in the transition to Efficiency-Driven stage since 2004. In 2007, Thailand moved into the Efficiency-Driven stage. And it has stagnated at this stage. This means that over a period of 12 years, Indonesia has moved two steps up from Factor-Driven to Efficiency-Driven, while Thailand has only moved one step up to Efficiency-Driven. In terms of developmental progress, Indonesia is more successful than Thailand.

When comparing Brunei to Viet Nam from 2009 – 2011, the result shows that Viet Nam's overall goods market efficiency and all other selected indicators in Tables 11 and 12 of Annex 1 were much better than Brunei's. However, Viet Nam's GCI was at respectively 75th and 59th in 2009 and 2010, while Brunei's was respectively at 32nd and 28th in 2009 and 2010. Viet Nam was at the Factor-Driven stage, while Brunei was in the transition from Factor-Driven to Efficiency-Driven stage. This indicates that countries which are in the Factor-Driven stage do not fully reap the benefits from having an efficient market and competition policy as much as countries in the transition to Efficiency-Driven stage and Innovation-Driven stage do. This is a result of the weight

accorded to the Efficiency Enhancers as explained earlier. Additionally, if the countries in the Factor-Driven stage do not have an effective antimonopoly policy and an efficient market at all, they could be left behind as is the case of Cambodia, Laos, and Myanmar.

Data on Malaysia's competitiveness suggest that Malaysia was competitive throughout 1999 - 2016, even before the enactment of its Competition Act in 2010. Considering Malaysia's performance from 2008 -2012 when it was at the Efficiency-Driven stage of development, the data reveals that Malaysia has consistently had efficient antimonopoly policy, intense local competition, less market dominance, and an efficient goods market. After the Competition Act entered into force in 2012, Malaysia has moved up to the transition stage of development from Efficiency-Driven to Innovation-Driven. And its overall goods market efficiency has consistently improved ever since. In fact, Malaysia's goods market efficiency has been in the top ten since 2013.

On the other hand, Thailand's GCI and its overall goods market efficiency have not significantly improved. The country's GCI has shifted between 4.60 – 4.64 out of 7.00. Its effectiveness of antimonopoly policy has fluctuated from 3.8 – 4.2 out of 7.00. When comparing Thailand with Malaysia from 2008 -2012 when they were both at the Efficiency-Driven stage of development, the data reveals that Malaysia has consistently performed better than Thailand in its effectiveness of antimonopoly policy, intensity of local competition, extent of market dominance, and overall goods market efficiency albeit its enactment of the competition law was only in 2010 and the law did not come into force until 2012. This confirms that for countries in the same stage of development, having enacted competition law or not does not always correlate to their GCI, because there are many other factors and variables that need to be included.

Since the full enforcement of its Competition Act in 2007, Singapore continues to top the list in all indicators shown in this chapter. Its overall goods market efficiency has ranked at 1st since 2008 and its GCI has ranked at 2nd since 2011. Singapore's competitiveness clearly does not depend on the enactment of its Competition Act. It has been an advanced economy and it has been in the top ten of the global competitiveness ranking long before the enactment of the law. In 2004, when the WEF started to categorise countries into 5 stages of development, Singapore was categorised in the Innovation-Driven stage right from the start. Having said that, the data shows that after the full enforcement of the law, Singapore's goods market efficiency has become more efficient and stayed at the top of the GCI since 2008.

The progress of Singapore and Malaysia indicates that a country which is at least at the Efficiency-Driven stage of development can reap the benefits of having a competition law in enhancing its market efficiency more quickly than countries in the Factor-Driven stage, although their competitiveness does not depend on enactment of the competition law due to the weight attributed to the Efficiency Enhancers. However, Thailand has shown different results. Thailand has not reaped any benefit from the enactment of its Trade Competition Act, because its enforcement has been lax and entirely inefficient. Thailand should have had better GCI than it does, because it is in the Efficiency-Driven stage, in which the WEF attributes the most weight to Efficiency Enhancers and Thailand has enacted and enforced its competition law for 10 years before it reached the Efficiency-Driven stage of development. Had Thailand been effectively enforcing its competition law and policy, its GCI could have been higher than it is.

However, when considering data on the AMSs' progress on the stages of development, there appears to be a connection between the effect of competition law and development. Singapore has been at Innovation-Driven stage since 2004. After it enacted its competition law in 2004 and the law became wholly in force in 2007, Singapore's goods market efficiency reached the 1st on the Global Competitive Report in the following year. Malaysia had been at the Efficiency-Driven stage since 2004. When its competition law entered into force in 2012, Malaysia moved to the transition to innovation stage in the same year. Viet Nam had been at the Factor-Driven stage since the enactment of its competition law. It took Viet Nam 11 years to move into the transition to Efficiency-Driven stage. Indonesia had been in Factor-Driven stage since 2004. But it moved into the transition stage in 2009 which is 10 years after the enactment of its competition law. Just two years later, Indonesia moved into the Efficiency-Driven stage. Thailand, although it had been in the transition to Efficiency-Driven stage since 2004, moved into the Efficiency-Driven stage in 2007 which is almost 10 years after enactment of its competition law. And Thailand has not progressed further than that since then.

The above paragraph demonstrates that countries in the Factor-Driven stage (Viet Nam and Indonesia) take a longer time to progress to the next stage even if they have enacted competition laws. Countries at the transition to Innovation-Driven stage (Malaysia) and in the Innovation-Driven stage (Singapore) did not take as long as those in the Factor-Driven stage to reap benefits from their competition laws or to progress to the next stage (in case of Malaysia).

The Philippines (Factor-Driven) took seven years to progress into the transition to Efficiency-Driven stage in 2011 under the sectoral competition law approach. It

passed a comprehensive competition law in 2015. Although Brunei has not been on the Global Competitive Report since 2014 its stage of development can be assumed to be at least, at the transition to Efficiency-Driven stage. Brunei passed its competition act in 2015 as well. It is highly likely that Brunei and the Philippines can progress to the Efficiency-Driven stage within 10 years after the enactment of their competition laws if these are properly enforced.

If Thailand continues not to enforce its competition law, it is likely that Brunei can surpass Thailand in the not too distant future. Cambodia and Myanmar are still at the Factor-Driven stage. Myanmar passed a competition law in 2015, but Cambodia has yet to pass the law. This suggests that both countries still have many years until they will develop into the transition to Efficiency-Driven stage and will benefit from the full potential of competition law.

The data on AMSs' competitiveness from 2008 – 2016 can be summarised as follows:

1. It confirms the finding that the enactment of competition law does not correlate to the effectiveness of antimonopoly policy and market efficiency when comparing countries which are in the same stage of development. However, effective enforcement of competition law and effective antimonopoly policy correlate with market efficiency and GCI.
2. Countries which have not enacted competition law can have a more efficient market, more intense local competition, and less extent of market dominance than countries which have enacted competition law. They can hence be more competitive if they are either at a higher stage of development, or if they are

measured against countries which do have competition laws, but do not effectively enforce these.

3. The effectiveness of competition law and policy is not the determining factor of competitiveness. There are many more factors that influence competitiveness due to the differences in weight attributed at the particular stages of development.
4. Countries which are at the Factor-Driven stage do not seem to reap the benefit of effective competition law and policy and market efficiency as much as, and as quick as countries which are at higher stages of development.

2.4 POLITICAL ECONOMY OF EAST ASIAN ECONOMIES

This section provides political economy of two East Asian Economies as examples of how they develop their competition law. It takes into account their political economy, political stability, government ideology, and influence of private sectors on the government competition law and policy. Taiwan and South Korea are chosen to represent the once aid-recipient countries turned advanced and highly competitive economies.

2.4.1 Taiwan

The historical background of Taiwan is very similar to many of the AMSs. It was colonised by the Dutch and the Japanese.¹⁵⁷ But it was mainly dominated and ruled by mainland China. According to Williams, the beginning of the Chinese administration after the Japanese ruling was not a smooth transition. It began with ‘economic mismanagement’, followed by ‘a reign of terror’.¹⁵⁸ There was only one political party back then, Kuo Ming Tang (KMT) which is considered ‘an alien political force on Taiwan.’¹⁵⁹ Until in 1986, Democratic Progress Party (DPP), a political party which represents indigenous Taiwanese was established.¹⁶⁰ The country has moved toward democratisation as part of the reason to maintain long-term stability of the KMT in Taiwan in 1987. Press freedom, opposition political parties and civil society are allowed to consolidated through the lifting of the Martial law which had been in force in Taiwan for almost 40 years during Lee Teng Hui administration.¹⁶¹ Taiwan had the first democratic Presidential election in 1996.¹⁶² Although democracy in Taiwan is quite recent compared with many AMSs and military threat from mainland China is not new, Taiwan has dealt with corruption issues quite well.

In Transparency International’s Corruption Perceptions Index 2016 shows that Taiwan was ranked 31st out of 176 countries with no. 1 being the least corrupted (score

¹⁵⁷ Worldatlas, Taiwan History Timeline
<http://www.worldatlas.com/webimage/countrys/asia/taiwan/twtimeln.htm> accessed 14 April 2017

¹⁵⁸ Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005) 367

¹⁵⁹ *ibid* 368

¹⁶⁰ *ibid*

¹⁶¹ *ibid* 369 - 370

¹⁶² Worldatlas (n 157)

of 100 being very clean and Taiwan received 61 out of 100).¹⁶³ Taiwan's Corruption Perceptions Index has always been stagnant at 60 – 61 (or 6.1 in the report until 2012). It could have been better if the judicial corruption is dealt with effectively. In 2004 when Williams wrote his book, Taiwanese judicial system was corrupt. Judges were involved in illegal business and wrongdoing.¹⁶⁴ Now in 2017, the situation is not getting much better. Chang Ching, a former prosecutor and judge, claimed that 5 – 10 percent of the judiciary is corrupt.¹⁶⁵ Back in 2010, three senior judges were detained on an allegation that they took bribes.¹⁶⁶

Regarding economic development and structure, many of Taiwan's strategic industries were monopolised by the State-owned Enterprises (SOEs) for example petroleum industry was monopolised by The Chinese Petroleum Corporation, Taiwan (CPC) since 1946. However, as part of the effort to improve Taiwan's international competitiveness, the petroleum market was liberalised in 1987, then the Formosa Petrochemical Corporation (FPCC) entered the market.¹⁶⁷ Taiwan has opened its market to more competition from foreign investors. According to Williams, its political economy was a mixed economy. It is called 'The Principle of Social Welfare' and it somehow mirrored the German Ordoliberalism.¹⁶⁸

¹⁶³ Transparency International, 'Corruption Perceptions Index 2016' <http://www.transparency.org/news/feature/corruption_perceptions_index_2016> accessed 14 April 2017

¹⁶⁴ Williams *Competition Policy and Law in China, Hong Kong and Taiwan* (n 158) 373 – 374

¹⁶⁵ Jason Pan, 'Former judge's claim on corruption sparks debate' *Taipei Time* (Taipei 1 March 2017) <<http://www.taipeitimes.com/News/taiwan/archives/2017/03/01/2003665916>> accessed 14 April 2017

¹⁶⁶ 'Corruption in Taiwan: Confirming the worst suspicions' *The Economist* <<http://www.economist.com/node/16647375>> accessed 14 April 2017

¹⁶⁷ Yun-Hsun Huang and Jung-Hua Wu, 'Energy Policy in Taiwan: Historical Developments, Current Status and Potential Improvements' (2009) 2 *Energies* <<file:///C:/Users/LAW/Downloads/energies-02-00623.pdf>> accessed 14 April 2017

¹⁶⁸ Williams *Competition Policy and Law in China, Hong Kong and Taiwan* (n 158) 376 – 377

The Ordoliberal ideology has much influence on Taiwan's adoption of competition law and policy especially on the legal-academic side, although the academic economists preferred the US antitrust system.¹⁶⁹ The result is the Fair Trade Act 1992 (FTA 1992) resembles the EU approach.¹⁷⁰

The history of the effort of the adoption of the FTA 1992 started six years earlier. It started with the political will to liberalise the economy in 1985. According to Williams, there are two main reasons for such adoption. First, as a result of market liberalisation, some market forces could potentially lead to monopoly, oligopoly and cartels. Second, unfair trade practices might ensue and the government was under constant pressure from trading partners.¹⁷¹ The opponent party, DPP, also welcome the FTA 1992 because they saw it as the chance to break up ties between big conglomerates and the KMT.¹⁷²

The performance of the Fair Trade Commission (FTC) which is an independent organisation¹⁷³ overseeing the enforcement and application of the FTA 1992 in regard to abuse of dominance is very impressive. According to Williams, the FTC succeeded in ending the exclusionary abusive conduct engaged by CPC in the Liquefied Petroleum Gas (LPG) market. The CPC was instructed by the government to grant an exclusive dealership to the Veterans Affairs Commission hence foreclose market access to other undertakings in relation to bottled LPG for household consumption. After the investigation, the FTC concluded that CPC abused its dominances and ordered such exclusive agreements shall not be renewed after the expiration. As a result, CPC allowed

¹⁶⁹ *ibid* 382

¹⁷⁰ *ibid*

¹⁷¹ *ibid* 379 – 380

¹⁷² *ibid* 380

¹⁷³ Fair Trade Act 1992, Art 28

retail dealership based on qualification. This has shown that FTC could impose and discipline undertakings which violate the FTA 1992 even in the area where it was under other governmental department's supervision. This is very much different from the case of Thailand which will be dealt later in chapter 5.

When considering Taiwan and Thailand, there is some common characteristic. Taiwan used to be governed under the authoritarian regime influenced by the mainland China and KMT. Thailand is under constant military administration every now and then. But Taiwan's corruption perceptions index has always been much better than Thailand. Political will in enforcing the FTA 1992 is evident. The FTC is not shy in enforcing the law even in the area where there is a regulator.

2.4.2 South Korea

South Korea was not colonised by Western countries like Taiwan, but 36 years of colonisation by Japan has left South Korea with a deep mental scar.¹⁷⁴ After Japan left, the country was divided into North and South. Then a brutal civil war began when North Korea invaded the South. The war lasted for 3 years and South Korea was devastated as a result.¹⁷⁵ After that, the country was ruled by authoritarian military governments for decades. During this period, the governments used the government-led development paradigm or static approach to restoring the country. General Park Chung-Hee was the first General to govern the country with this approach.¹⁷⁶

¹⁷⁴ Jaemin Lee, 'Korea' in Mark Williams (ed) *The Political Economy of Competition Law in Asia* (Edward Elgar 2013) 49

¹⁷⁵ *ibid*

¹⁷⁶ Uk Heo et al, 'The Political Economy of South Korea: Economic Growth, Democratization, and Financial Crisis' (2008) Maryland Series in Contemporary Asian Studies 2(193) 1 – 24 <<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1192&context=mscas>> accessed 14 April 2017

General Park government assumed total autonomy and divide economic development plan into stages of the 5-year period. He aimed at export-oriented industrialisation and import substitution policy. Along the administration, the government and the powerful big business is known as the chaebol cooperated closely to improve the country's economy. The chaebol needed to ensure that government policy would benefit their business, while the government needed to cooperate with the chaebol to ensure economic progress to compensate the lack of legitimacy in their power. This resulted in the business' tie with the government deepened.¹⁷⁷

After General Park was assassinated in 1979, another general took over the power and disappointed the hope of democracy for the people. General Chun Doo-Wan inherited the tie between the government and the chaebol, which created a lot of problems on economic structure and unequal distribution of wealth. The gap between the rich and the poor enhanced. Finally, General Chun government curbed the problem caused by the chaebol and provided more support to small and medium enterprises.¹⁷⁸

Democratisation movement had become stronger. Finally, the first direct election of the President came in 1992 and the first civilian President was elected. The constitution only permits one term of Presidency of 5 years. President Kim Young-Sam had to solve many political and human rights issues and decentralise the administration. He also began economy liberalisation. Although the country has been democratised for some years, when the financial crisis hit in 1997 a severe institutional problem was found to have caused such crisis. The immature institutionalisation of political and economic organisation contributed to the crisis. This is because, during the authoritarian

¹⁷⁷ *ibid* 4 - 6

¹⁷⁸ *ibid* 7 - 10

governments, the chaebol received preference in seeking bank loans when they should not have received.¹⁷⁹

The democratisation does not automatically lead to economic growth. The political and economic institutions must be mature enough to be able to cope with the dynamic of world trade. If the government continues to use protectionism, favouritism, and nepotism approach in administrating the country, institutions will not be able to deal with the problem effectively.

South Korea passed the Monopoly Regulation and Fair Trade Act (MRFTA) in 1980 and the Korea Fair Trade Commission (KFTC) was established in 1981. At the beginning of its establishment, the KFTC was still under the political influence. Its policy priority was not to curb anticompetitive conducts, but industry-promoting policy.¹⁸⁰ However, according to Heo, in 1994, the KFTC became an independent body.¹⁸¹ The authority and status of the KFTC expanded considerably in the 1990s. Not only the status of Chairman of the KFTC was elevated to ministerial level, but the KFTC assumed jurisdiction over Adhesion Contract Act, Door-to-door sales, etc. Act and Instalment Transactions Act. In 2007, the KFTC became the sole competent authority on consumer protection in South Korea.¹⁸²

When the economic crisis occurred in 1997, the importance of curbing anticompetitive conducts was clear and the KFTC has shifted its focus to that effect.¹⁸³ Then in 2005, when the KFTC investigated and prosecuted Microsoft action on abuse of dominance, the public gained confidence in the capacity of the KFTC. This resulted in

¹⁷⁹ *ibid* 11 - 17

¹⁸⁰ Lee, 'Korea' (n 174) 64 – 65

¹⁸¹ *ibid* 64

¹⁸² Korea Fair Trade Commission, 'About KFTC: History' <<http://www.ftc.go.kr/eng/about/history.jsp?pageId=0104>> accessed 15 April 2017

¹⁸³ *ibid* 66

the role of the KFTC expanded. The KFTC is not merely a national competition agency, but the advisor to other government agencies when they enact laws that could affect undistorted competition in South Korea.¹⁸⁴ Some commentator positively asserts that South Korea's economic success is partly because of the democratisation of the country and enforcement of competition law.¹⁸⁵

2.5 CONCLUSION

Although economists may not agree on the exact definition of competitiveness of nations, regions, or on whether a nation competes, at least they agree that firms compete. There appear to be two types of competition, zero-sum game and positive-sum game. Certainly the competitiveness of firms that compete in a zero-sum game will be measured against their rivals' competitiveness. There will be a winner at the expense of the losers. Competition law is necessary to establish the rules of the game. Competitiveness of firms in a zero-sum game refers to superior over rivals, more efficient, more productive, more market share, and more revenue.

Firms, therefore, need to implement relevant strategies which enable them to be more efficient, more productive, gain more market share and more revenue. Competition law can be enforced to ensure that firms do not engage in anticompetitive practices, that incumbents will not abuse their dominance, that mergers and acquisitions will take place for the sake of efficiency. Firms in general respond more to pressure from

¹⁸⁴ *ibid* 65 – 66

¹⁸⁵ Hwang Lee, 'Development of Competition Laws in Korea' (2015) ERIA Discussion Paper Series <<http://www.eria.org/ERIA-DP-2015-78.pdf>> accessed 14 April 2017

new entrants and rivals than to pressure from customers, so as long as the market remains highly competitive and rivalry is high, firms will strive for more competitiveness.

For firms that compete in positive-sum games, their competitiveness is in their ability to upgrade constantly. They create their own markets. They do not compete merely by offering the same products and services as their competitors only to eventually arrive at competitive convergence. They compete to be unique, not to be the best. These firms tend to innovate and upgrade. Therefore, protection of intellectual property rights (IPRs) is crucial to keep them motivated enough to create or invent new technology or products. Competition law can ensure that firms that hold patents will not abuse their dominance in IPRs and exclude other new entrants from access to essential facilities. These are only some examples of the role of competition law.

However, competition law does not have a direct effect on firms' productivity, creativity, innovation, or efficiency. But competition law can ensure rivalry which is the most important incentive for firms to be competitive and to remain competitive.

The competitiveness of a nation is not that straightforward, because a nation does not consist only of firms and consumers. Certainly all citizens are consumers one way or another. But police and army cannot be treated as security service firms because citizens are not their customers. Public education may not create revenue because it is the service a government should provide to the people. Without access to public education, children cannot progress to more advanced education and cannot become high-skilled labour in the future. No government can treat public schools as firms that strive for profit. Therefore, in a nation, even if competition law is effectively enforced, competition policy is carefully planned, and rivalry is high, but if at the same time access to education, police services, and access to basic infrastructure are inadequate, it is hard

for a nation to prosper as it should, and hence its competitiveness may not be as high as it could be.

A firm's primary goal is to make profit. A nation's prime purpose is not the same. Each society may aim for different goals. Porter asserted that a nation's goal is to provide a high standard of living to its people. But a high standard of living is not as easily defined as it may seem. Measuring high standard of living by income, quality of infrastructure and other pecuniary aspects is convenient for economists. But is it the right approach? None of the economists mentions the happiness of the people in the nation as a goal. Happiness is when one is contented with what one owns and who one is. Of course this is even more complicated to measure than standard of living and very subjective. It is not the purpose of this thesis to discuss what should be the appropriate goal of a nation. This thesis assumes that high quality of living, as measured by economists, is the goal of the nation.

Nevertheless, this thesis argues that a nation does not engage in international trade as a zero-sum game, but as a positive-sum game, as a member of the world that naturally interacts, exchanges, and communicates with other members. Each country is unique because of its history, inherited endowments, location, and people etc. Each offers different products and services to the international trade. There are no identical countries which offer identical or interchangeable products or services. Therefore, competitiveness of a country does not necessary come at the expense of another as in the case of firms in a zero-sum game.

Because of the uniqueness of countries, it is hard to define what the competitiveness of a nation is. The WEF defines competitiveness of a country as 'the set of institutions, policies, and factors that determine the level of productivity of a country'.

As Porter suggested, the definition of competitiveness of a nation is not essential as long as what constitutes competitiveness is identified. Porter used the word competitive advantage of a nation. If it is accepted that the aim of a nation is to increase living standards, then a country which is susceptible to the prosperity of its citizens is certainly competitive.

Porter's competitive advantage has received much criticism. Some. However, many of which are raised because the commentators misunderstand the concept. Nevertheless, his theory is still relevant and very much followed globally. Porter's Diamond theory helps to identify that competitive advantage. However, it can be used only to determine one industry in a country at a time. It is not designed to find each country's all-sector competitive advantage because Porter opined that it was not possible for a country to be competitive in each and every industry. Approaching competitiveness on an individual industry basis seems logical.

In this regard, the diamond theory suggested that there are four determinants¹⁸⁶ which are interrelated and interdependent that will impact each industry's competitive advantage at a given period. Although competition law is among one of the variables in one of the determinants, it is crucial because it keeps rivalry going. And Porter asserted that rivalry is the most important factor that incentivises firms to be competitive and that this will also impact other determinants.

However, the role of governments undoubtedly can influence any of the determinants. Government's policy and spending have a direct impact on any of the determinants. Since the four determinants are directly affected by governments, the effectiveness of the government's competition law enforcement or the government's

¹⁸⁶ See Porter's Diamond Theory on page 38

competition policy is more important than just having the law or the policy itself. What matters is not whether competition law and policy exist, but whether these are effectively applied and enforced.

It is clear that even if competition law is crucial; its importance and impact on competitiveness can be countermanded easily by the acts of the government. This is evidenced by for instance Thailand's experience with its Trade Competition Act which entered into force in 1999, but the lack of enforcement of this Act results in Thailand's inability to reap the benefit from it. And Singapore has been a high income country since 1987 and reached the top of the Global Competitiveness Report in 1998 despite the Asian financial crisis and without the enactment of a competition Act.

At a regional level, academia appears to reach a consensus that a competitive region is a region that attracts and maintains competitive firms and people to live or work in this region. A region in this thesis refers to an economic integration region, not a geographical region in a country. It is a region such as ASEAN and the EU. The EU has planned for Europe 2020 and set itself a target of attaining a sustainable, inclusive, and smart growth. One of its measurements is Enterprise Environment which takes into account, *inter alia*, the intensity of local competition, the effectiveness of antitrust policy, the extent of market dominance, and the distortive effect on competition of taxes and subsidies. On the other hand, ASEAN has planned in the AEC Blueprint 2015 that by the end of 2015 the AEC will be established as a highly competitive single market and production base. But in reality, it resulted in the emergence of a highly competitive region rather than that this has been accomplished fully.

In this regard, ASEAN is doing well in planning for a competitive region. ASEAN aims at implementing various strategies such as an effective competition law

and policy in all AMSs, establishing a common ASEAN consumer protection framework, strengthening Intellectual Property Rights, and developing ASEAN system of E-Commerce and taxation cooperation,¹⁸⁷ encouraging good Governance, fostering sustainable economic development, engendering in industrial upgrading and investing in workers and firms to keep up with the global megatrends and emerging trade-related issues.¹⁸⁸ However, in terms of the legal system, Porter emphasised on the enforcement system in competition policy because it enhances rivalry.¹⁸⁹ This is the area that ASEAN needs to pay attention to.

Now ASEAN has implemented the new AEC Blueprint 2025 aiming at creating a competitive, innovative and dynamic ASEAN by the end of 2025. ASEAN has employed nine measures to achieve this goal. One of the measures is effective competition policy. It seems ASEAN is using the right approach to becoming a highly competitive region. Some of the strategic measures to achieve an effective competition policy in ASEAN are through achieving greater harmonisation of competition policy and law by developing a regional strategy on convergence; and by establishing Regional Cooperation Arrangements on competition policy and law to effectively deal with cross-border commercial transactions.¹⁹⁰ But what does ASEAN mean by harmonisation and convergence? To what extent competition policy and law need to be harmonised and converged to help ASEAN become competitive?

This thesis argues that the effectiveness of competition law and policy does not have a direct effect on the competitiveness of a country, because a country's

¹⁸⁷ ASEAN, *AEC Blueprint* (n 26) paras 41 - 59; ASEAN, *AEC Blueprint 2025* (ASEAN Secretariat 2015) paras 26 - 35

¹⁸⁸ ASEAN, *AEC Blueprint 2025* (n 187) paras 36 - 44

¹⁸⁹ Porter *On Competition: Updated and Expanded Edition* (n 50) 261

¹⁹⁰ ASEAN, *AEC Blueprint 2025* (n 187) para 27

competitiveness depends on various factors and especially on the stage of development they are at. Nevertheless, this does not compromise the importance of effective competition law and policy for market efficiency and competitiveness in any way. But the benefits of having an effective competition law and policy and an efficient market will be more prominent in more developed countries.

The data from 1999 – 2016 clearly supports this point as, despite having enacted competition law, some AMSs' competitiveness still fall behind. Having enacted the law does not necessarily result in more competitiveness. This is because when measuring competitiveness, there are many more indicators than just the effectiveness of antimonopoly policy.

The data of the AMSs, reveals that the AMSs will reap benefits from competition laws for competitiveness more fully when they are at least at the transition from Factor-Driven to Efficiency-Driven stage, and even more so at the Efficiency-Driven stage, because the WEF accords more weight to Efficiency Enhancers subindex when countries are at this transition stage. Also, countries which are at this transition stage are more exposed to competition from domestic and international trade. They still compete with countries that have competitive advantage in factor conditions such as cheap labour and an abundance of natural resources. And they also compete with countries which are already at the Efficiency-Driven stage to gain more market share.

Therefore, competition law and policy is still crucial, although not the sole determinant of the competitiveness of a country. The impact of government's policy is crucial to their competitiveness. Governments can implement policies that enable firms to be more efficient and more productive or to accomplish the opposite. Research by Mateus and Lianos as referred to on page 67 emphasises this point. Countries that

effectively exercise check and balance between legislature, administrative, and judiciary powers tend to reap the benefits that competition law can offer more fully. They also found that GDP per capita correlates with well-resourced NCAs which can impact the enforcement of competition law and policy.

The political economy of a country is also relevant to the efficiency of competition law enforcement. In this regard, this thesis provides two examples from East Asian economies namely Taiwan and South Korea. They are chosen because of their similarity in culture and history, and proximity to the AMSs.

Taiwan was also colonised for a very long period of time and it was under military administration before it is democratised. This is similar to many AMSs. The difference is the political will of the government to pursue competitiveness and economic progress through the promotion and enforcement of competition law. This thesis opines that although democracy might have played an important role in competition law enforcement, the true determinant factor of Taiwan's success in curbing anticompetitive conducts lies in the political willingness. This distinguishes the success of Taiwan's competition authority to those of many AMSs.

South Korea also has suffered from civil war, colonisation, and authoritarian military administrations for decades. The MRFTA was enacted during the military government. And the enforcement of the law was seen as crucial to the South Korean economy in the event of the financial crisis in 1997. The KFTC is entrusted with expanded power. It is well staff and resources. Its independence and significant role as advisor to other government agencies lead to efficient enforcement of the law. The government considers the organisation as a very important body. The chairman of the KFTC holds a ministerial position in the government. This is the evidence of political

will toward the enforcement of competition law in South Korea. Thus, this thesis concludes that for a country with certain economic development to reap the benefit of competition law, political will must be present. Without political will, competition law will not be effectively enforced.

This chapter has analysed the concept of competitiveness and relevant theory as well as the political economy which has an impact on enforcement. The next chapter will explore and examine the attempts to harmonise competition law and policy in the international arena and the approaches to the competition chapter or provisions in trade agreements.

CHAPTER 3

ATTEMPTS TO HARMONISE COMPETITION LAW AND POLICY

The previous chapter provides evidence that although competition law is important and can have significant impact on a country's competitiveness, it is not the sole determinant factor for establishing competitiveness. Political will also play a crucial role in competition law enforcement which in turn has a significant impact on the benefit that countries will reap from the merit of competition law on their competitiveness. ASEAN decided to engage in the harmonisation and convergence of the AMSs' competition law to achieve efficient competition law enforcement in the region. This chapter aims at providing evidence on the attempts countries made when they entered into different stages of integration to bring harmonisation to their competition law and policy. It also aims to demonstrate that not all attempts to institute a supranational approach in competition law and policy will yield a positive result.

However, Majone opined that harmonisation and unification of law do not necessarily need be the only way to achieve a satisfactory level of economic integration. Cooperation among regulators and ex post harmonisation induced by regulatory competition among the member states can also be used to achieve it.¹⁹¹ Additionally, he suggested that positive integration appears to be overrated, and negative integration might not be sufficiently appreciated. Negative integration such as removing national

¹⁹¹ Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge University Press 2014) 93

restrictions to the free movement of production factors, limiting monopoly power and market dominance, and protecting consumer interests are also useful tools to realise harmonisation.¹⁹²

Many scholars share the opinion that the mere existence of competition law in a country does not necessarily mean that there will be growth, efficiency and competitiveness. This was analysed in the previous chapter. Some have suggested that for a country to fully enjoy the benefits competition law has to offer, it needs the political will to fully embrace the law, with the necessary enforcement and reform to support it.¹⁹³ Others point to that socio-economy, political-economy, and the organisation of the competition authorities also play a vital role in the eventual success of competition law. Further suggestions were made that financial and human resources, the creation of a competition culture and judicial competence should be taken into account.¹⁹⁴

On the international platform, harmonisation of competition law and policy is hardly a new subject for discussion. Much has been done in this regard. The World Trade Organization (WTO) initiated a Working Group on the Interaction between Trade and Competition Policy (WGTCP) in 1996 but has ended its operation since 2004.¹⁹⁵ After eight years of cooperation and negotiations between member states, the WTO could not take the initiative any further. According to Hufbauer and Kim, it was the

¹⁹² *ibid* 95

¹⁹³ CUTS C-CIER, 'Competition Policy and Economic Growth – Is There a Causal Factor?' (Briefing paper No. 4/2008) <<http://www.cuts-international.org/pdf/CCIER-2-2008.pdf>> accessed 2 September 2013

¹⁹⁴ Michal S. Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries' in *Competition, Competitiveness and Development: Lessons from Developing Countries* UNCTAD/DITC/CLP/2004/1(UN 2004)

¹⁹⁵ World Trade Organization, 'Interaction Between Trade and Competition Policy' <https://www.wto.org/english/tratop_e/comp_e/comp_e.htm> accessed 13 April 2017

developing countries that opposed the cooperation.¹⁹⁶ They added that difficulties in harmonising national competition policies also played an important role in the developing countries' objection of the WTO approach to harmonise international competition law.¹⁹⁷

The use of hard law approach has proved to be very difficult. This thesis considers a piece of legislation as hard (or harder) law when it requires a higher degree of legal obligation, more precision in the language used, and delegation of interpretation of the law to the independent third party.¹⁹⁸ And the WTO approach falls into this category. To date, there is no success in realising an international competition law. The only hard law approach on competition law and policy which is generally agreed as successful is that of the EU. But the EU approach is unique which will be dealt with in details in chapter 4.

On the other hand, a lot of success stories in bringing competition law and policy issues into a smaller platform such as bilateral treaties, regional trade agreements, and free trade agreements is evident. This is a soft(er) approach compared with the ambition of the WTO. Soft law approach in converging competition law and policy can be very beneficial to developing and least-developed countries. Because it is easier and less costly to negotiate; it imposes lower sovereignty costs on states in sensitive issues; it is more flexible which allows states to cope with uncertainty and learn over time; its flexibility renders it cope better with diversity; and it is available to nonstate actors such

¹⁹⁶ Gary Clyde Hufbauer and Jisun Kim, 'International Competition Policy and the WTO' (One Year Later: The Antitrust Modernization Commission's Report and the Challenges that Await Antitrust, New York University, 11 April, 2008) <<https://piie.com/commentary/speeches-papers/international-competition-policy-and-wto>> accessed 13 April 2017

¹⁹⁷ *ibid*

¹⁹⁸ Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization*

as international secretariats, and business associations and nongovernmental organizations (NGOs).¹⁹⁹

At the level of regional integration, ASEAN established the ASEAN Expert Group on Competition (AEGC) in 2007 which published the non-legally binding Regional Guidelines on Competition Policy, AEC Blueprint 2015 and 2025, ASEAN Handbook for Business and ASEAN Core Competencies Guidelines in 2010, 2012, and 2013 respectively.

The Asia-Pacific Economic Cooperation (APEC) established the Competition Policy and Law Group in 1996 which issued Principles for Guiding the Development of a Competition-Driven Policy Framework for APEC Economies and APEC Principles to Enhance Competition and Regulatory Reform which are also not legally binding. The Common Market of the Southern Cone (MERCOSUR/MERCOSUL) also approved the Protocol for the Defense of Competition within MERCOSUR (Decision No. 18/96) in 1996. However, Decision No. 18/96 is *de facto* unenforced because it is not yet ratified by all MERCOSUR member states.²⁰⁰ Also, the EU established the supranational body, the Directorate-General for Competition (DGCOM), overseeing competition law and policy enforcement within the EU.

This chapter is divided into five sections. First, international attempts to harmonise and converge competition law and policy by OECD, UNCTAD, and ICN are analysed. Secondly, a brief definition of economic integration is provided to create a

¹⁹⁹ Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 Minnesota Law Review

²⁰⁰ Marco Botta, 'The Role of Competition Policy in the Latin American Regional Integration: A Comparative Analysis of CARICOM, ANDEAN Community and MERCOSUR' (IX Annual Conference of the Euro-Latin Study Network on Integration and Trade (ELSNIT): Revisiting Regionalism, Switzerland, 21 - 22 October 2011) <<http://www10.iadb.org/intal/intalcdi/PE/2012/09801a05.pdf>> accessed 30 June 2015

preliminary understanding of the different stages of economic integration. Thirdly, attempts in bilateral and multilateral trade agreements are scrutinised. The focus is on trade agreements that ASEAN, Thailand, and Singapore have concluded. Fourthly, the development of competition law on a regional integration level such as MERCOSUR and in Free Trade Area such as APEC is examined. Fifthly, an analysis and conclusion are provided.

3.1 ATTEMPTS BY INTERNATIONAL ORGANISATIONS

As mentioned earlier there are a number of significant forums for the discussion of competition law in a global setting. The first organisation that initiated discussions on international competition law and policy cooperation was the UN, through the work of UNCTAD, followed by the OECD, and then the ICN. This demonstrates the effort at the level of international organisations, whether in formal or informal frameworks, to promote harmonisation and convergence of competition law.

3.1.1 The UNCTAD

The UN's attempt to address competition law at the international level can be traced back to 1948 and the drafting of the Havana Charter, which was the first major attempt at creating a multilateral framework on trade and competition. The Charter was never enforced. But the UN continued to urge member states to deal with

anticompetitive practices committed by private and public sectors. UNCTAD is a UN body which is governed by its 194 member states.²⁰¹ UNCTAD is a forum for governments to discuss how to improve the world's macroeconomics, especially how to solve inequalities and promote sustainable development.²⁰² UNCTAD first met in 1964 in Geneva.²⁰³

Success finally arrived in 1976 at the fourth UNCTAD conference where the members agreed to formulate the Set of Multilaterally agreed Equitable Principles and Rules for the Control of Restricted Business Practices²⁰⁴ which is now renamed as the UN Set of Principles and Rules on Competition.²⁰⁵ It concerns international trade and pays attention particularly to the development of developing countries. The UN Set of Principles and Rules on Competition was unanimously approved and adopted by the UN General Assembly in 1980.²⁰⁶ This is considered the crucial starting point of UNCTAD's work on promoting competition law and policy.

The UN Set of Principles and Rules on Competition has three main objectives; to ensure that restrictive business practices do not impede or negate the realisation of benefits that should arise from the liberalisation of world trade; to attain greater efficiency in international trade and development; and to protect and promote social

²⁰¹ UNCTAD, 'About UNCTAD' <<http://unctad.org/en/Pages/AboutUs.aspx>> accessed 7 July 2015

²⁰² *ibid*

²⁰³ UNCTAD, 'A Brief History of UNCTAD' <<http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx>> accessed 7 July 2015

²⁰⁴ See Stuart E. Benson, 'The UN Code on Restrictive Business Practices: An International Antitrust Code is Born' (1981) 30 *The American University Law Review* 1031

²⁰⁵ UNCTAD, 'Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency' (OECD Global Forum on Competition, Paris, 10 - 11 February 2003) CCNM/GF/COMP/WD(2003)31, 2
<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP/WD\(2003\)31&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP/WD(2003)31&docLanguage=En)> accessed 1 August 2016

²⁰⁶ UNCTAD, 'Handbook on Competition Legislation: Consolidated Report 2001 – 2012' (UN 2012) 3
<http://unctad.org/meetings/en/SessionalDocuments/ditcclp2012_handbook_en.pdf> accessed 4 August 2016

welfare and the interests of consumers.²⁰⁷ In order to achieve these goals, UNCTAD has established the Intergovernmental Group of Experts (IGE) to meet, on yearly and five yearly bases at the UNCTAD Conference, to discuss ways of improving worldwide cooperation on competition policy implementation and ways of enhancing convergence.

UNCTAD also provides technical assistance to developing countries on implementing competition law and policy. In this regard, UNCTAD published its Model Law on Competition (UNCTAD Model Law), in 2010, and Handbook on Competition Legislation (UNCTAD Handbook), in 2012, to serve as a guide to members, especially developing countries, on implementation of their national competition law. Because of these characteristics, the UNCTAD approach is considered a soft law approach.

UNCTAD's stance on the link between FDI and competition law was made at the Global Forum on Competition held by the OECD.²⁰⁸ UNCTAD stated that without an effective competition law in place, liberalisation of FDI could lead to foreign firms engaging in anticompetitive practices and abuse of dominant positions in host countries.²⁰⁹ UNCTAD also added that a country with an effective competition law and policy is in a better position to attract FDI than one without it because many transnational enterprises are familiar with the law in their home countries and therefore are aware and know how to deal with competition-related problems. UNCTAD also claimed that these enterprises expect the competition agencies in the host countries to provide a level playing field for domestic and foreign enterprises. They further added that for developing countries to attract large FDI, sometimes it is necessary to offer

²⁰⁷ UN Set of Principles and Rules on Competition, Part IV, Section A: Objectives

²⁰⁸ UNCTAD, 'The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency' (n 205)

²⁰⁹ *ibid* 6

these corporations exclusive rights or privileges, which are clearly anticompetitive.²¹⁰ However, from UNCTAD's own documents,²¹¹ no country refers to attracting FDI as the objective of their competition laws and policies. Nevertheless, considering that ASEAN created AEC partly to attract FDI into the region,²¹² this is a good start.

There is evidence that the National Reform Council on Competition took the UNCTAD Model Law into consideration when proposing an amendment of the Trade Competition Act of Thailand on the structure of the Thai Trade Competition Commission.²¹³

3.1.2 The OECD

At present, there are 34 member countries globally, more than half of which are from Europe, eight of which are from APEC member economies and none of which are from ASEAN.²¹⁴ Although the EU Commission is not a member, it is a key contributor to the works of the OECD and its involvement is well beyond that of an observer.²¹⁵ The OECD is not an economic integration. It is a forum for member countries to identify, discuss and analyse economic issues. The aim of the OECD is to promote

²¹⁰ *ibid*

²¹¹ UNCTAD, 'Model Law on Competition (2010) Chapter I' (6th United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 8 - 12 November 2010) TD/RBP/CONF.7/L.1, 4-9; UNCTAD, 'Handbook on Competition Legislation: Consolidated Report 2001 – 2012' (n 206) 5 - 1550

²¹² Siow Yue Chia, 'Association of Southeast Asian Nations Economic Integration: Developments and Challenges' (2011) 6 Asian Economic Policy Review 43, 48

²¹³ สภากฎหมายแห่งชาติ, วาระปฏิรูปที่ ๑๒: การผูกขาดและการแข่งขันที่เป็นธรรม: การปฏิรูปกฎหมายแข่งขันทางการค้า (สำนักงานเลขาธิการสภาผู้แทนราษฎร 2558) [National Reform Council of Thailand, *Reform Agenda No. 12: Monopoly and Fair Competition: Trade Competition Law Reform* (Office of Printing, The Secretariat of the House of Representatives 2015)] <http://www.parliament.go.th/ewtadmin/ewt/parliament_parcy/download/parcy/029.pdf> accessed 30 May 2016. This issue is discussed further in chapter 5.

²¹⁴ OECD, 'Members and Partners' <<http://www.oecd.org/about/membersandpartners/>> accessed 7 July 2015

²¹⁵ *ibid*

policies that will enhance the economic and social well-being of people around the world.²¹⁶

Although no ASEAN member states are members of OECD, and none of the OECD work on competition law and policy is legally binding, this thesis argues that developed countries such as the US use the OECD as a platform to transmit and advocate the importance of harmonisation and convergence of competition law and policy in the world trade. Through this platform vigorous attempts are made to find a consensus on the goals and objectives of competition law and policy as well as best practices in competition enforcement.

Since 1990, the OECD has been cooperating mainly with competition authorities from both OECD countries and non-OECD economies in capacity building activities. It launched the Global Forum on Competition (GFC) in 2001 as a platform for discussion for high level authorities. The GFC issues 'best practices' which are voluntarily adopted by its participants. According to the GFC, there are about 103 economies regularly participating in the forum from all continents, eight of which are AMSs.²¹⁷

In 1999, the OECD cooperated with the World Bank to publish the Framework for the Design and Implementation of Competition Law and Policy (OECD-World Bank Framework).²¹⁸ This book aims at assisting countries when enacting the competition law on selected issues such as market definitions, abuse of dominance, mergers, and anticompetitive agreements. It provides suggested provisions for countries to use to suit their conditions.

²¹⁶ OECD, 'Our Mission' <<http://www.oecd.org/about/>> accessed 7 July 2015

²¹⁷ Global Forum on Competition, 'About the Global Forum on Competition' <<http://www.oecd.org/competition/globalforum/abouttheglobalforumoncompetition.htm>> accessed 19 February 2014

²¹⁸ R. Shyam Khemani (ed), *Framework for the Design and Implementation of Competition Law and Policy* (World Bank and OECD publication 1999)

In June 2000, OECD and APEC agreed on an APEC-OECD Co-operative Initiative on Regulatory Reform, which was endorsed in the APEC Ministerial Meeting in November 2000. This agreement resulted in an APEC-OECD Integrated Checklist on Regulatory Reform (APEC-OECD Checklist), which is an integrated self-assessed list. This APEC-OECD Checklist integrates the APEC and OECD principles of reform on good governance such as transparency, accountability and performance, competition policy, rule-making, and market openness policy.²¹⁹ It is right to conclude that the OECD approach to competition law and policy is a soft law approach.

APEC and the OECD share the same view which is that competition law and policy promotes economic growth and efficiency, and that the whole regime should move towards promoting efficiency. They object to the promotion of national champions but accept protectionist measures, such as on consumer welfare, innovation, international competitiveness and the efficiency and adaptability of the economy.²²⁰ The fact that APEC and OECD share the same view on competition law and policy is understandable because both organisations are led by major economies such as the US, Australia, Canada, New Zealand, Korea, and Japan who invested in many foreign countries.

It is reported that the OECD countries are interested in introducing competition law at international level because of their domestic export interest groups. These groups argue that anticompetitive conduct hampers their ability to sell goods and services in

²¹⁹ OECD, *APEC-OECD Integrated Checklist on Regulatory Reform: A Policy Instrument for Regulatory Quality, Competition Policy and Market Openness* (OECD Publishing 2008) <<http://www.oecd.org/regreform/34989455.pdf>> accessed 6 July 2015

²²⁰ *ibid*

foreign markets.²²¹ The US is said to have originally stimulated the support of international competition law because it perceived international cartels and the absence, or non-enforcement, of competition law as an obstacle to the ability of US firms to compete in markets.²²² Market access is said to be the predominant agenda driving US and EU support for international competition rules. Their main interests are in using competition policy to promote exports and to reduce the conflict of interest in approvals by foreign governments of mergers of large firms. They are less concerned in regulating the behaviour of their own firms in foreign markets according with international disciplines that will benefit foreign consumers.²²³ It is clear that the drive behind the effort to address competition related issues in the WTO was mainly the classic producer interests in major OECD countries with an export-promotion objective pursued by their governments, not consumer welfare or market efficiency.²²⁴

3.1.3 The ICN

The ICN was established in 2001 at the initiation of the US.²²⁵ It aims at ‘addressing practical antitrust enforcement and policy issues’. Its main goal is ‘to improve competition law enforcement and competition advocacy across the global antitrust community, for the benefit of business and consumers’.²²⁶ Its founding members were Australia, Canada, the EU, France, Germany, Israel, Italy, Japan, Korea, Mexico, South

²²¹ Bernard Hoekman and Peter Holmes, ‘Competition Policy, Developing Countries and the WTO’ (1999) 22 *The World Economy* 875, 875

²²² *ibid* 877

²²³ *ibid* 878

²²⁴ *ibid* 881

²²⁵ ICN, ‘History’ <<http://www.internationalcompetitionnetwork.org/about/history.aspx>> accessed 7 July 2015

²²⁶ ICN, ‘ICN Factsheet and Key Messages’ (last updated April 2009) 2 <<http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf>> accessed 4 February 2016

Africa, the UK, the US, and Zambia.²²⁷ Now it has 337 members, including national competition authorities from six AMSs (Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Viet Nam). Its members are not exclusively governmental authorities or international organisations, but also non-governmental advisers and private practitioners.

Unlike the OECD and UNCTAD, the ICN is devoted solely to work related to competition law and policy. It has an informal and flexible approach and it has no legally binding power over its members. The ICN publishes guidance, manuals and recommended practices and proposes these to their members on a voluntary basis. The aim of the ICN is to promote “greater convergence of competition law and analysis, common understanding, and common culture.”²²⁸ Clearly, the ICN approach is a soft law approach.

The ICN operates through various Working Groups. The current Working Groups are Advocacy, Agency Effectiveness, Cartel, Merger, and Unilateral Conduct. The works done by all the Working Groups are too many to mention here. There are report papers, conference materials, questionnaires, practical tools such as workbooks or toolkits, recommended practices, member submissions etc.

The Unilateral Conduct Working Group (UCWG) has published several useful materials such as the UCWG Workbook which is comprised of chapters on objectives and principles of unilateral conduct laws, assessing dominance, predatory pricing analysis, tying and bundling, and exclusive dealing; Recommended Practices on key topics such as dominance/substantial market power analysis, state created monopolies, and predatory pricing analysis pursuant to unilateral conduct laws; and multiple reports

²²⁷ ICN, ‘History’ (n 225)

²²⁸ *ibid*

on refusal to deal with a rival under unilateral conduct laws, on loyalty discounts & rebates, on tying & bundled discounting, single branding/exclusive dealing, on predatory pricing, and on the objectives of unilateral conduct laws, assessment of dominance/substantial market power, and state-created monopolies.

Members submit their views and best practices and share knowledge. There is evidence that Singapore used ICN Merger materials, namely the Guiding Principles for Merger Notification and Review Procedures, Recommended Practices for Merger Notification Procedures, Merger Notification and Procedures Template, Merger Notification Filing Fee, ICN Merger Guidelines Workbook, and Merger Remedies Review Project, in preparation of its new Merger enforcement.²²⁹ Brazil submitted that it implemented ICN's recommended Practices for Cartel Enforcement, Merger, and Leniency.²³⁰ These are evidence that ICN's works appears to receive positive responses from its members and that they adopt its suggestions when amending their competition laws.

According to Toh Han Li, Chief Executive, Competition Commission of Singapore, the ICN's approach to the introduction of competition law and recommendations are suitable for ASEAN to follow because of its non-legal binding,

²²⁹ CCS, 'Use of ICN Merger Materials in Preparation of New Merger Regime' (6th ICN Annual Conference, Moscow, 30 May - 1 June 2007 <<http://www.internationalcompetitionnetwork.org/uploads/library/doc423.pdf>> accessed 26 January 2016.

²³⁰ Mariana Tavares de Araujo, 'Brazil: Implementing ICN's Recommended Practices' (6th ICN Annual Conference, Moscow 30 May - 1 June 2007) <<http://www.internationalcompetitionnetwork.org/uploads/library/doc420.pdf>> accessed 27 January 2016

consultation, and cooperation approach.²³¹ At the minimum Singapore and Brazil have taken into account its recommendations and guidance when modifying their laws.

In conclusion, it appears that no attempts by developed countries and their forums to negotiate with developing countries on unified international competition law have been successful. The most promising approach is using informal, non-legally binding measures based on consensus, and sharing best practices such as the ICN promotes. This suggests that countries prefer to approach the issues on anticompetitive conducts in a tailor-made fashion to suit their own economy, society, and development which is a rational approach because it is generally accepted that there is no one-size-fit-all competition law.

3.2 STAGES OF ECONOMIC INTEGRATIONS

Before examining how members of trade agreements or regional integration agreements deal with harmonisation and convergence of competition law and policy, this section will provide brief explanations of the characteristics of the different stages of economic integration. The meaning of economic integration, in general, is the agreement between countries to lower trade barriers between or among themselves in order to increase trade in the trading bloc. The cooperation could be solely economic or include other dimensions of integration such as social and political, depending on the level of integration.

²³¹ Toh Han Li, 'Regulator Discussion on New Competition Law Regimes in ASEAN' (Panel discussion at the 5th Annual Asia-Pacific Law Leaders Forum, Singapore, 3 – 4 March 2016)

There are many levels, stages or forms of such integration, ranging from loose cooperation to unified integration. They are commonly divided into four stages, namely 1) free trade area 2) custom union 3) common market and 4) economic union. However, some economists break these further down in more detailed stages and some may refer to some of the stages by a different name.

3.2.1 Free Trade Area

A free trade area is a form of loose cooperation among member states. It could be done through signing a bilateral or multilateral Free Trade Agreement (FTA). Under this arrangement, tariffs between members are substantially reduced or completely removed. The key to this form of integration is to reduce trade barriers among members and increase trade intra-region as much as possible without having common external trade policies with external trading partners. This practice requires the implementation of Rule of Origins (ROO) because goods from a third party are taxed differently from goods originating within the trading area.²³² Some scholars divided this stage further into simple and second-generation free trade areas. The difference between the two is that a simple free trade area emphasises reduction or removal of tariffs on trade in goods, while a second-generation free trade area also covers trade in services. Therefore, in the second-generation type, a certain level of convergence and harmonisation in regulations concerning professional qualifications and skilled labour are required.²³³

ASEAN falls into this category. All member states cooperate through multi trade agreements. ASEAN created the ASEAN Free Trade Area (AFTA) in 1993 which

²³² Michael Holden, 'Stages of Economic Integration: From Autarky to Economic Union' (Economic Division, 13 February 2003) PRB 02-49E <<http://publications.gc.ca/Collection-R/LoPBdP/inbrief/prb0249-e.htm>> accessed 30 June 2015

²³³ Sean Burges, 'Economic Integration', *Encyclopedia Britannica* <<http://www.britannica.com/topic/economic-integration>> accessed 30 June 2015

enables free intra-region trade. ROO has been implemented under ASEAN Trade in Goods Agreement (ATIGA) which entered into force on 30th April 2010. ASEAN signed the ASEAN Framework Agreement on Services (AFAS) on 15th December 1995. ASEAN does not have a Common External Tariff (CET) imposed on products imported from outside the region, although it has signed the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (CEPT) on 16th December 1998. But CEPT applies to goods originating from AMSs only.²³⁴ Therefore, it can be concluded that ASEAN's stage of economic integration is a second-generation free trade area. Although ASEAN aims to establish AEC as a single market, all action plans to realise a single market target abolishing trade barriers for intra-regional trade.²³⁵ Therefore, the realisation of AEC as a single market and production-based region should not be confused with the EU single market.

3.2.2 Custom Union

A custom union represents a further level of integration within a free trade area or trading bloc. In a custom union, the trading bloc has common trade policies toward external trading partners, such as establishing a CET, which implies not only a common customs policy but also a common foreign trade policy.²³⁶ The implementation of ROO is not necessary because goods entering the trading bloc are subject to the same tariff and import quotas wherever the point of entry is.²³⁷ This level of integration requires deeper harmonisation and convergence of national rules and regulations. Thus, it means

²³⁴ Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area art 1(1)

²³⁵ ASEAN, *AEC Blueprint* (n 26) 6 – 18

²³⁶ Nicholas Moussis, *Access to the European Union: Law, Economics, Policies* (20th ed, Intersentia 2013) 95 – 96

²³⁷ Holden, 'Stages of Economic Integration: From Autarky to Economic Union' (n 232); Felix Fuders, 'Economic Freedoms on Mercosur' in Marcilio Toscano Franca Filho, Lucan Lixinski and Maria Belen Olmos Giupponi (eds) *The Law of MERCOSUR* (Hart Publishing 2010)

member states have a less independent trade policy toward external trading partners which consequently could limit their foreign policy.²³⁸ It can be considered as the very early stages of member states lessening direct control over their sovereignty.

3.2.3 Common Market

A common market requires greater and deeper integration. Not only is a CET established, but border controls among member states are significantly minimized to allow free movement of goods and labour intra-region. The rules on transportation of goods and people intra-region are alleviated to reduce transaction costs. The expected gain from this level of integration is economic efficiency.²³⁹ The convergence and harmonisation of trade policies are far deeper than in the first two stages. Consequently, the economic policy of member states is more interdependent within the trading bloc.²⁴⁰ The effective implementation of proper labour policy concerning immigrants within the region could be difficult, as in the case of the U.K's opposition to EU policy on free movement of labour, which contributes to the decision to leave the EU or Brexit on 23rd June 2016. It is claimed that the founders of the EU envisioned the EU as a common market from the start²⁴¹ and that it was fundamental to the Treaty of Rome.²⁴² This differs considerably from other trading blocs such as NAFTA, APEC, and ASEAN.

Some terms should be clarified here: 'single market' and 'internal market'. These phrases are used by the EU in different ways. Moussis explained that 'common market' is the term referring to a stage of international economic integration, while, in the

²³⁸ Holden 'Stages of Economic Integration: From Autarky to Economic Union' (n 232)

²³⁹ *ibid*

²⁴⁰ Holden 'Stages of Economic Integration: From Autarky to Economic Union' (n 232); Burges, 'Economic Integration' (n 233)

²⁴¹ Moussis *Access to the European Union: Law, Economics, Policies* (n 236) 96

²⁴² *ibid* 115

judgment of the Court of Justice, the term 'single market' is used to refer to the ultimate outcome of the common market. 'Internal market' is used in the TFEU, and refers to “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”.²⁴³ Therefore, any reference to a 'single market', means the same as a 'common market' in the EU context. As mentioned earlier, 'ASEAN single market' means single intra-regional market. This differs considerably from the 'EU single market' as explained above.

3.2.4 Economic Union

The last type of economic integration is an economic union. Some believe that this includes having a common monetary policy and possibly a common currency.²⁴⁴ Some places a monetary union before an economic union.²⁴⁵ Some consider economic and monetary union as the same stage.²⁴⁶ Whichever approach is taken, it represents the ultimate integration of not only common external trade policy, but also common monetary policy or common currency to save transaction costs, industrial policy and competition policy. It is a political union.

This stage differs greatly from previous stages in that it requires genuine political will to enforce it and enable harmonisation in macroeconomic trade policy. Giving up some economic sovereignty is necessary to accomplish this. Common legal procedures and laws that are enforceable equally and harmoniously throughout the region are

²⁴³ *ibid* 116

²⁴⁴ Holden 'Stages of Economic Integration: From Autarky to Economic Union' (n 232)

²⁴⁵ Burges 'Economic Integration' (n 233)

²⁴⁶ Moussis *Access to the European Union: Law, Economics, Policies* (n 236) 161

essential to ensure equal treatment and the integrity of the region. Thus, supranational institutions are the key to achieve this.²⁴⁷

At this stage, the region is presenting itself as one region, one jurisdiction toward external trading partners, rather than an association of many countries. Disparities and gaps in economic development and growth, cultural differences, political economy, the interdependency in economics and foreign policies, as well as giving up some sovereignty could deter integration and instigate resistance from citizens in the region.

As this section explained the definitions of economic integration and the stages of integration, the next section will examine the approaches countries employ to address competition law and policy issues when they integrate for economic purposes.

3.3 BILATERAL AND MULTILATERAL TRADE AGREEMENTS

Bilateral and multilateral trade cooperation is mostly undertaken in the form of free trade areas. Countries are allowed under the WTO principles to form trading blocs which enables them to trade freely with their trading partners. Free trade areas do not have to consist of only neighbouring countries. Countries which are in different continents can form a free trade area by concluding FTA. Concluding a FTA undoubtedly allows market access between member states. The most common form of FTAs involves trade in goods. This section compares chapters or provisions on

²⁴⁷ Holden 'Stages of Economic Integration: From Autarky to Economic Union' (n 232)

competition in selected FTAs in order to attest of the awareness of competition law and policy in international trade and how this is incorporated.

3.3.1 North American Free Trade Agreement (NAFTA)

At the level of bilateral and multilateral cooperation, competition law and policy is included in the majority of trade agreements. NAFTA was signed by Canada, Mexico and the US and came into effect in 1994. NAFTA does not impose common tariffs on products from outside the trading bloc. It does not have a common policy on free movement of goods, people and capital. It is clear that NAFTA is only a free trade area. There is no evidence that the leaders intend to establish a closer and deeper integration among the member states.

Chapter 15 of NAFTA, 'Competition Policy, Monopolies and State Enterprises', recognises the importance of curbing anticompetitive practices because it will enhance the fulfilment of NAFTA's objectives.²⁴⁸ Interestingly, disputes relating to competition among parties cannot be resolved through NAFTA dispute settlement measures. The Agreement calls for cooperation among the members and establishes a Working Group on Trade and Competition.²⁴⁹ NAFTA's chapter on competition does not provide substantive provisions, but obligates the parties to adopt such rules without providing details about what these rules should address.²⁵⁰ The Working Group on Trade and Competition had several meetings, resulting in no changes, or none of significance, at

²⁴⁸ NAFTA art 1501

²⁴⁹ *ibid* Art 1504

²⁵⁰ Clifford A. Jones, 'Leveling the Playing Field in the EU, NAFTA, CAN, Mercosur and Beyond: Comparing the Role of Competition Rules in Regional Economic Organizations' (Drafted, Unpublished, Authorised by author, Paper presented to the European Union Studies Association Conferences, Texas, 31 March – 2 April 2005)

either national or NAFTA level. Moreover, the Working Group itself was defunct and expired without making any substantial impact on the competition laws of the Parties.²⁵¹

Although it can be said that NAFTA approach to competition law and policy among its members is a hard law approach, but little achievement or impact on competition policy of the group is done as a result of the Agreement. To opt for a hard law approach does not guarantee an effective enforcement, especially when the member states opt out the chapter on competition policy to be subject to the Treaty's dispute settlement mechanism.

It should be noted that by the time NAFTA was signed, all the parties to it had competition law already, especially, the US and Canada, whose competition laws (or antitrust in the US terminology) had been in force for over a 100 years. In Mexico, the modernised competition law was adopted in December 1992 and came into force in June 1993.

The inapplicability of the dispute resolution chapter to the competition chapter of NAFTA has had a contradictory result in anticompetitive conduct disputes among NAFTA parties. In *UPS v Canada*, United Parcel Service (UPS), a US Company, complained that Canada Post, a Crown Corporation, engaged in anticompetitive practices – predatory pricing and cross-subsidising its rapid letter packet service with revenues from its monopolistic postal service. An independent investigation committee concluded that Canada Post did indeed engage in such business conducts, but Canada decided not to take any action. UPS then claimed damages from the Government of

²⁵¹ Clifford A. Jones, 'Competition Dimensions of NAFTA and the European Union: Semi-Common Competition Policy, Uncommon Rules, and No Common Institutions' (2006) 6 Jean Monnet/Robert Schuman Paper Series No. 18 (The V International Symposium on Comparative Regionalism and the European Union. "The European Union in Comparative Perspective: A Model and Reference for the Americas", Florida, 4 November 2005) 7 - 10

Canada under NAFTA through an arbitration tribunal. However, the tribunal ruled that it did not have jurisdiction over the dispute, as any disputes arising from the competition chapter are excluded from dispute settlement measures under NAFTA.²⁵² The tribunal concluded that Canada's failure to protect a foreign investor (UPS) under NAFTA against the anticompetitive conduct of its national monopoly did not violate the minimum standard of treatment, since there was no customary international law to that effect.²⁵³

In *Mexico – Telecoms*, the US complained that Mexico unfairly treated its telecommunication companies in the provision of long distance calls from the US to Mexico. The US filed the complaint to the WTO dispute settlement procedures instead of to NAFTA, which does not provide remedies for competition disputes. The US claimed, *inter alia*, that Mexico's failure to maintain measures to prevent its incumbent, Telmex, from engaging in anticompetitive practices resulted in breach of its obligation under Mexico's General Agreement on Trade in Services (GATS) Schedule of Specific Commitments by enabling Telmex to engage in a cartel dominated by itself to fix rates for international connections and to restrict the supply of scheduled basic telecommunications services.²⁵⁴ The Dispute Resolution Body Panel finally ruled in favour of the US as follows: 1. Telmex was a major supplier;²⁵⁵ 2. Practices required

²⁵² *United Parcel Service of America Inc v Government of Canada* (Award on Jurisdiction, ICSID Arbitral Tribunal, Case No UNCT/02/1, 22 November 2002) paras 99 and 134 <<http://www.italaw.com/sites/default/files/case-documents/ita0884.pdf>> accessed 19 January 2016 (*UPS v Canada*)

²⁵³ *ibid* paras 186 - 187

²⁵⁴ *Mexico – Telecom*: Panel Report, Mexico - Measures Affecting Telecommunications Services, WT/DS204/R, adopted 1 June 2004, DSR 2004: IV, 1537, para 3.1 (b) (*Mexico – Telecoms*)

²⁵⁵ *ibid* para 7.227

under Mexico's law can be anticompetitive practices;²⁵⁶ and 3. Mexico has failed to maintain appropriate measures to prevent anticompetitive practices.²⁵⁷

3.3.2 The European Free Trade Association (EFTA)

The EFTA is an intergovernmental organisation established to promote free trade and economic integration to the benefit of its four Member States.²⁵⁸ Objectives of the EFTA are set out in Article 2 of the Convention Establishing the European Free Trade Association (EFTA Convention) and focuses specifically on cooperation in trade and investment.

The Association aims at providing fair conditions of competition.²⁵⁹ Competition rules incorporated in the Convention are in line with international practices as Article 18 of the EFTA Convention prohibits anticompetitive agreements and concerted practices which have as their object or result the prevention, restriction or distortion of competition,²⁶⁰ and abuse of dominance.²⁶¹

Dispute arising out of competition nature could be resolved by consultations and cooperation to reach mutually satisfactory solutions. The disputes on interpretation or application of the EFTA Convention can be submitted to the Council.²⁶² If anticompetitive practices arise and cause serious economic, societal or environmental

²⁵⁶ *ibid* paras 7.237 – 7.238, 7.242, 7.245, and 7.264.

²⁵⁷ *ibid* paras 7.269 and 8.1

²⁵⁸ EFTA, 'About EFTA' <<http://www.efta.int/about-efta/european-free-trade-association>> accessed 11 November 2015. EFTA comprises of Iceland, Liechtenstein, Norway, and Switzerland. It was established in 1960 with 7 Member States (Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the UK). Then Finland, Iceland, and Liechtenstein joined. Then most of the members left the Association to join the EC.

²⁵⁹ Convention Establishing the European Free Trade Association, consolidated version, last amended on 1 July 2013 art 2 (a) and (e)

²⁶⁰ *ibid* art 18 (1)(a)

²⁶¹ *ibid* art 18 (1)(b)

²⁶² *ibid* arts 43 (1)(h) and 47

difficulties of a sectorial or regional nature in the member states, the affected member state can take safeguard measures necessary to remedy the situation with priority given to safeguard measures that will least disturb the functioning of the Convention.²⁶³

However, Article 18 of the EFTA Convention does not create any direct obligations, and anticompetitive practices prescribed in this Article shall be interpreted in the light of the national competition laws of the member states.²⁶⁴

In September 1992, seven EFTA Member States²⁶⁵ concluded the European Economic Area (EEA) Agreement. But Switzerland remains outside of the EEA Agreement due to non-ratification.²⁶⁶ This EEA Agreement provides Norway access to European market.

Hence, Norway is bounded by the EU's four freedoms – the free movement of goods, services, persons and capital.²⁶⁷ In exchange for market access, Norway has to apply certain EU laws such as those on competition, without having the right to make decisions on any EU laws and policies concerning the four freedoms. The EU is the most significant trading partner of Norway because over 80% of Norway's export is to the EU and over 60% of its import is from the EU.²⁶⁸ Access to the international market

²⁶³ *ibid* art 40

²⁶⁴ EFTA, 'Joint Declaration on Competition' <<http://www.efta.int/media/documents/legal-texts/efta-convention/joint-declarations/Declaration-Competition.pdf>> accessed 21 January 2016

²⁶⁵ Seven States were Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland.

²⁶⁶ *Halsbury's Laws of England* (5th edn, 2009) vol 18, para 36

²⁶⁷ EFTA, 'EEA Agreement' <<http://www.efta.int/eea/eea-agreement>> accessed 11 November 2015; Norway Mission to the EU, 'Norway and the European Union' <http://www.eu-norway.org/eu/norway_and_the_eu/#.VkSGs7fhDcs> (last updated 10/03/15) accessed 12 November 2015

²⁶⁸ Norway Mission to the EU, 'Norway and the European Union' (n 267)

is a very important part of Norwegian trade policy which is made possible via conclusion of FTAs.²⁶⁹

Competition rules to which Norway is bound under the EEA Agreement are the same as the competition provisions in the Treaty Establishing the European Community (EEC Treaty).²⁷⁰ The EEC Treaty has been amended, renumbered and renamed as the TFEU.²⁷¹ The EEA competition rules have direct effect on Norway, and Norwegian courts must interpret these rules in accordance with the judgments of the European Union Court of Justice prior to September 1992. Undoubtedly, the EEA approach to competition law and policy is a hard law approach the same as in the EU.

Although Switzerland is not part of the EEA, it has concluded numerous bilateral trade agreements with the EU in order to gain non-discriminatory market access.²⁷² In fact, Switzerland has signed FTAs with Japan, and China outside the framework of EFTA.²⁷³ Switzerland has been 1st in the overall GCI since 2009²⁷⁴ although its basic requirements and Efficiency Enhancers sub-indexes are lower than Singapore's (Singapore's basic requirement index is 1st while Switzerland is 2nd, and Singapore's efficiency enhancer index is 2nd and Switzerland is 4th). But Switzerland's

²⁶⁹ Ministry of Trade, Industry and Fisheries, 'Norway's Free Trade Agreements' <<https://www.regjeringen.no/en/topics/business-and-industry/frihandelsavtaler/Norways-free-trade-agreements/id457017/>> accessed 20 January 2016

²⁷⁰ *Halsbury's Laws of England* (n 221) para 36

²⁷¹ *ibid* para 24

²⁷² State Secretariat for Economic Affairs SECO, 'Free Trade Agreements' <<http://www.seco.admin.ch/themen/00513/00515/01330/?lang=en>> accessed 19 January 2016

²⁷³ SECO, 'Lists of Free Trade Agreements of Switzerland' <<http://www.seco.admin.ch/themen/00513/00515/01330/04619/index.html?lang=en>> accessed 19 January 2016

²⁷⁴ Klaus Schwab (ed), *Global Competitiveness Report 2009 - 2010* (World Economic Forum 2009) 13

Innovation and Sophistication index is 1st while Singapore ranks 11th.²⁷⁵ However, in terms of ease of doing business, Singapore has always been 1st since 2011.²⁷⁶

Switzerland is a small country. It is a member of EFTA which does not have a supranational competition law regime. Switzerland is not part of the EEA, but it gains access to the EU market through bilateral FTAs signed with the EU. Although Switzerland is not bound by the EU competition law, it has amended and revised its competition law in 2003 to align this with the EU and other OECD countries.²⁷⁷ The Agreement between the EU and Switzerland concerning cooperation on the application of their competition laws only concerns the administrative cooperation between the EU Commission and the Swiss Competition Commission (Comco).²⁷⁸ Comco is a very interesting governmental body. Its members serve part-time. Almost half of them represent interest groups, either consumers or businesses. Moreover, its members are allowed to have positions on company boards.²⁷⁹

3.3.3 Some FTAs Signed by Thailand, Singapore, and ASEAN

This section divides FTAs signed by Thailand, Singapore, and ASEAN into three groups; FTAs with no competition chapter or provision, FTAs with competition chapters or provisions which can be used as recourse through consultation, but are not

²⁷⁵ Klaus Schwab (ed), *Global Competitiveness Report 2015-2016* (n 86) 8

²⁷⁶ World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, Co-publication of the World Bank and the International Finance Corporation (The International Bank for Reconstruction and Development/The World Bank 2010) <<http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB11-FullReport.pdf>> accessed 27 January 2016

²⁷⁷ OECD, 'Policy Brief: Competition Law and Policy in Switzerland' (March 2006) 1 - 2 <<http://www.oecd.org/competition/36386974.pdf>> accessed 5 January 2016

²⁷⁸ Email from Holger Dieckmann, EU Commission, DG Competition – International Relations Unit to author (3 February 2016)

²⁷⁹ OECD, 'Policy Brief: Competition Law and Policy in Switzerland' (n 277) 3

subject to dispute settlement provisions of the FTAs, and FTAs with competition chapters which are subject to the dispute settlement provisions of the FTAs.

A) FTAs with no competition chapter or provision

There are the China-Singapore Free Trade Agreement, Agreement between the Government of the People's Republic of China and the Government of the Kingdom of Thailand on Accelerated Tariff Elimination under the Early Harvest Programme of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China (China – Thailand FTA), Framework Agreement on ASEAN - China Comprehensive Economic Cooperation (ASEAN-China FTA), Agreement on Trade in Goods Under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Republic of Korea and the Member Countries of the ASEAN (ASEAN – Korea FTA), Framework Agreement for Establishing Free Trade Area between the Kingdom of Thailand and the Republic of India, ASEAN - India Free Trade Agreement, ASEAN Free Trade Area (AFTA), ASEAN Trade in Goods Agreement (ATIGA), and ASEAN Framework Agreement on Services (AFAS).

B) FTAs with competition chapters or provisions which are not subject to dispute settlement provisions of the FTAs

There are the Japan - Singapore Economic Partnership Agreement,²⁸⁰ Japan - Thailand Economic Partnership Agreement,²⁸¹ Agreement on Comprehensive Economic Partnership Among Japan and Member States of the ASEAN (ASEAN – Japan FTA),²⁸²

²⁸⁰ art 105

²⁸¹ art 102

²⁸² There is no competition chapter or provision under this agreement, but Article 53 (l) of the agreement provides that the Parties shall explore and undertake economic cooperation activities in competition policy through the establishment of a Sub-Committee on Economic Cooperation,

Singapore - Australia Free Trade Agreement,²⁸³ Thailand - Australia Free Trade Agreement,²⁸⁴ New Zealand – Thailand Closer Economic Partnership Agreement,²⁸⁵ Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area,²⁸⁶ The US - Singapore Free Trade Agreement,²⁸⁷ Agreement between the EFTA States and Singapore,²⁸⁸ Korea - Singapore Free Trade Agreement,²⁸⁹ and Trans - Pacific Partnership Agreement.²⁹⁰

C) FTAs with competition chapters or provisions which are subject to dispute settlement provisions of the FTAs

There are the Agreement between New Zealand and Singapore on a Closer Economic Partnership, Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the ASEAN and the Republic of Korea (ASEAN - Korea Agreement on Trade in Services), Comprehensive Economic Cooperation Agreement between Republic of India and the Republic of Singapore, the EU - Singapore Free Trade Agreement.²⁹¹

That FTA's chapters on competition are not subject to their dispute resolution measures is not uncommon. Most Preferential Trade Agreements (PTAs) signed by

which has not begun yet at the time of writing (May 2015). However, pursuant to Article 58, the economic cooperation in Chapter 8 is not subject to dispute settlement provisions in Chapter 9.

²⁸³ Chapter 12 art 8

²⁸⁴ art 1208

²⁸⁵ art 11.10(1)

²⁸⁶ Chapter 14 art 4

²⁸⁷ Chapter 12 art 12.2 explicitly provides that Singapore shall enact general competition law by January 2005. And art 12.7 prohibits the Parties to recourse to dispute settlement under the agreement for matters on anticompetitive business conduct, cooperation, and consultations

²⁸⁸ art 50(3)

²⁸⁹ art 15.8

²⁹⁰ art 16.9

²⁹¹ Only against granted subsidies pursuant to Article 12.6 and against prohibited subsidies pursuant to Article 12.7 and 12.14

Latin American countries contained such provisions.²⁹² Additionally, the OECD conducted research on 86 Regional Trade Agreements (RTAs) which were notified to the WTO from 2001 to 2005 and found that at least 16 of them excluded competition related disputes from the specific dispute resolution measures.²⁹³ Another paper examines competition related provisions and the competition chapters of 74 RTAs and reveals that more than $\frac{3}{4}$ of them have competition chapters or provisions.²⁹⁴ However, out of 55 RTAs with competition provisions, 14 RTAs exclude all of these provisions from dispute settlement, and 2 RTAs partially exclude them.²⁹⁵

This raises the question why countries would exclude competition provisions from the dispute settlement measures. This also makes the usefulness of competition provisions questionable. Sokol concludes, in the aforementioned research on Latin American PTAs, that the importance of competition chapters in these agreements is not in their enforceability, but in their symbolic value, the symbolism to foreign investors that the Parties intend to commit to the functioning of a competitive market, and the symbolism to domestic constituencies that the governments consider competition policy important.²⁹⁶

²⁹² D. Daniel Sokol, 'Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements' (2007) 83 Chicago-Kent Law Review 231

²⁹³ Oliver Solano and Andreas Sennekamp, 'Competition Provisions in Regional Trade Agreements' [2006] OECD Trade Policy Papers No 31 <<http://dx.doi.org/10.1787/344843480185>> accessed 23 June 2015

²⁹⁴ Robert Teh, 'Competition Provisions in Regional Trade Agreements' in Antoni Estevadeordal, Kati Suominen, and Robert Teh (eds) *Regional Rules in the Global Trading System* (Cambridge University Press 2009)

²⁹⁵ *ibid* 481

²⁹⁶ Sokol 'Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements' (n 292)

Teh surmises in his research of 74 RTAs that extraterritorial application of competition policies can raise sovereignty concerns; developing countries²⁹⁷ are not familiar with competition laws and are not sure whether they can successfully and fully implement these measures.²⁹⁸ Despite their concerns, 50 of 68 RTAs which developing countries have concluded include a competition chapter or provisions.²⁹⁹ Teh concludes that these competition chapters are on a 'best endeavour' basis³⁰⁰ and asserts that the principal objective of the competition provisions in RTAs 'is to prevent the gains in market access arising from the RTA from being eroded by anti-competitive behaviour that is condoned or tolerated by RTA partners.'³⁰¹ These findings confirm that although developing countries are reluctant to take hard law approach to the international commitment on competition law and policy, they are willing to engage in soft law approach. And when it is the right time, a soft law could be legalised into hard law.

3.4 REGIONAL INTEGRATION LEVEL

As examined in the previous section competition chapters or provisions are included in bilateral and multilateral trade agreement as symbols of promotion of effective competition and to prevent gains in market access from being hindered by anticompetitive practices. In a regional integration setting, the approaches vary. There

²⁹⁷ It should be noted that under his research, Teh places Singapore as a developing country. This thesis disagrees with him in this regard, but it does not compromise his conclusion that the competition provision or chapter in the RTAs is used on the best endeavour basis and as a tool to prevent the gains from trade to be hindered by anticompetitive practices.

²⁹⁸ Teh 'Competition Provisions in Regional Trade Agreements' (n 294) 482

²⁹⁹ *ibid* 489

³⁰⁰ *ibid* 482

³⁰¹ *ibid* 489

are a good number of regional integrations and this thesis cannot address all of them.³⁰²

This thesis chooses to demonstrate the different approaches in dealing with competition law with the examples of ASEAN, APEC, and MERCOSUR. This is because Thailand and Singapore are members of both ASEAN and APEC. Therefore, it is interesting and important to scrutinise the different approaches and the impact that these approaches may have on both countries.

It should be made clear at this point that ASEAN and the EU are not to be compared in terms of regional integration as they are too different in nature and structure for such comparison. But the EU's approach to regional competition law is studied and examined in this thesis as a benchmark and example for ASEAN to learn from. Although MERCOSUR cannot be regarded as a leader in competition law, the similarities in the structures and economies of its member states with ASEAN's member states make it a good reference when considering the approaches to competition laws for ASEAN member states. The EU's approach is studied in chapter 4, and ASEAN's approach is examined in-depth in chapter 4.

³⁰² See G. Deniz Both, 'Regionalisation of Competition Policy: What Lessons Can Be Drawn for ASEAN from Other Region's Experience?' (Drafted, the Regionalisation of Competition Law and Policy: Implications for the ASEAN Economic Community, Singapore, 25 April 2016). Both examined 10 regional blocs' competition laws and policies. Both found that there is one regional trading bloc, which applies soft cooperation to competition law and policy, and that succeeds in the enforcement of competition law and policy among them. That trading bloc is the Trans-Tasman cooperation between Australia and New Zealand. This is possible because they have developed gradual convergence of economic laws and policies over 30 years; New Zealand's competition law was modelled after the Australian's; they have the same legal system, use the same language. If this is the secret to their success, it is highly unlikely that ASEAN can achieve it as AMSs do not have the same legal system, languages, and do not model their competition law after other AMSs (except Brunei which models its competition law after Singapore's Competition Act 2004).

3.4.1 APEC

APEC has 21 member economies.³⁰³ In terms of competitiveness in 2015 - 2016, 7 of the APEC member economies were ranked in the top 30, and 4 of them were in the top 10. The lowest ranking is Mexico, at 76th.³⁰⁴

APEC was established in 1989 with twelve founding member economies, six of which are ASEAN member states.³⁰⁵ APEC has always focused on, and advocated, economic cooperation to enhance prosperity and stability of the region. Only after the 9/11 attack occurred, did APEC include an antiterrorism agenda.³⁰⁶ It was created, at first, merely as a forum or movement, more than as an organisation.³⁰⁷ In 2014, the leaders have endorsed 'a roadmap to translate the vision of the Free Trade Area of the Asia-Pacific (FTAAP) into a reality.'³⁰⁸ This statement is clear evidence that APEC has yet to integrate further in order to become a real free trade area. There is no evidence showing that the APEC economies aim at deeper integration such as through a custom union. The work of APEC has always been to facilitate trade among member economies and to reduce border procedures in order to lower transaction costs for both exporters and importers. APEC serves as a forum for international cooperation among its

³⁰³ Australia; Brunei; Canada; Chile; People Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Philippines; Russia; Singapore; Chinese Taipei; Thailand; United States; and Viet Nam.

³⁰⁴ Klaus Schwab (ed), *The Global Competitiveness Report 2015 – 2016* (n 96) 100, 132, 138, 140, 194, 202, 214, 222, 248, 258, 278, 294, 296, 306, 320, 338, 344, 360, and 366. Noted that Brunei and Papua New Guinea were not evaluated.

³⁰⁵ Founding member economies are Australia, Brunei Darussalam, Canada, Indonesia, Japan, Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand and the United States. Viet Nam joined and became the 21th member economy in 1998.

³⁰⁶ APEC, 'History' <<http://www.apec.org/About-Us/About-APEC/History.aspx>> accessed 3 July 2015

³⁰⁷ Frank Langdon and Brian L. Job, 'APEC Beyond Economics: The Politics of APEC' (1997) Kellogg Institute, Working Paper #243 <<https://kellogg.nd.edu/publications/workingpapers/WPS/243.pdf>> accessed 6 July 2015

³⁰⁸ APEC, 'History' (n 306)

members. Commitment is on a voluntary basis; decisions are made through consensus and they are not legally binding.³⁰⁹

In terms of competition law and policy, APEC established its Competition Policy and Deregulation Group in 1996. In 2008, the name was changed to APEC's Competition Policy and Law Group (CPLG) as a platform for capacity building, exchanges of experience and best practice. CPLG is not an intergovernmental body. The cooperation is carried out via meetings, at which members update each other on their national competition laws and recent developments and cases. What CPLG produces can be considered as recommendations.³¹⁰ Most of the information presented at the meetings is contained in the reports prepared by members to provide their view on particular subjects or to convey experience and information about national competition law and policy development. They are not legally binding. There is no intergovernmental body under APEC to oversee the implementation of the recommendations by its members, because all commitments are undertaken on a voluntary basis. This clearly shows that the APEC approach to competition law and policy is a soft law approach.

In 1999, APEC Ministers endorsed the APEC Principles to Enhance Competition and Regulatory Reform (APEC Principles). From the APEC Principles, it is clear that APEC promotes competition law and policy to protect economic efficiency and consumer welfare through an open and competitive market. These principles are: non-discrimination, comprehensiveness, transparency, accountability, and implementation. It is doubtful how much impact these principles have on the actual enforcement of member economies' national competition law and policy.

³⁰⁹ APEC, 'About APEC' <<http://www.apec.org/About-Us/About-APEC.aspx>> accessed 3 July 2015

³¹⁰ APEC, 'Competition Policy and Law Group' <<http://www.apec.org/Groups/Economic-Committee/Competition-Policy-and-Law-Group.aspx>> accessed 3 July 2015

Other than the APEC Principles, the CPLG has also published eight reports. These provide information on member economies' deregulation and liberalisation processes, on competition development, on information exchange regarding competition in APEC and on training programmes to promote competition among APEC member economies. It can be considered that the attempts to promote competition law under the APEC framework promote the least commitment among those frameworks studied in this thesis because it only provides an understanding of the different stages of competition development and some recommendations.

From the APEC Principles, it is clear that APEC very much takes into account the diversity of economic development of its members and thus flexibility is at the core of implementing the APEC Principles. Therefore, the APEC approach on competition is moderate. There are no common competition rules and no recommended provisions for APEC economies to adopt into their national competition law. There is no necessity to create an intergovernmental body to oversee the application of the APEC Principles because they are not legally binding and member economies can adopt them voluntarily. In terms of enforceability, APEC Principles are not any different from competition chapters in the FTAs. Therefore, this thesis argues that the APEC Principles are best described as a symbolism of the recognition of the importance of a competitive market.

Although APEC is not even a Free Trade Area and has no provisions on competition that are enforceable, it does not seem to hinder APEC's member economies' economic growth and competitiveness. China's economy continues to grow; Singapore's and Hong Kong's competitiveness have been in the top ten of Global Competitiveness Report for many years. Singapore and Hong Kong have been in the top five of the Ease of Doing Business Ranking listed by World Bank for many years

although they are parties of many FTAs that contain competition chapters which are not subject to the dispute resolution mechanism contained in these FTAs.

In terms of dispute settlement, in 1999, APEC's Investment Experts' Group published a manual guide on arbitration and dispute resolution in APEC members.³¹¹ This only provides information on dispute resolution in APEC economies. In 2011, APEC also revised the APEC Non-Binding Investment Principles (APEC Investment Principles).³¹² According to the APEC Investment Principles, member economies accept that disputes related to foreign investment will be settled through consultation and negotiation or through international arbitration.³¹³ It is clear that APEC does not have its own dispute resolution mechanisms.

A study based on 14 bilateral and 14 multilateral international investment agreements (IIAs), between or involving APEC economies, found that practices in investor-States dispute settlement provisions in these IIAs vary greatly. Some follow the NAFTA model and some rely on arbitration rules governed by ICSID or the United Nations Commission of International Trade Law (UNCITRAL).³¹⁴ However, the study did not report on whether the competition chapters under the selected IIAs are subject to the dispute settlement provisions.

³¹¹ APEC, 'International Commercial Disputes: A Guide to Arbitration and Dispute Resolution in APEC Member Economies, 1999' (APEC#99-CT-03.2) <http://publications.apec.org/publication-detail.php?pub_id=705> accessed 6 July 2015

³¹² It was first published in 1994

³¹³ APEC, 'APEC Non-Binding Investment Principles (2011 updated)' (23rd APEC Ministerial Meeting, Hawaii, 11 November 2011) 2011/AMM/014app04

³¹⁴ APEC Committee on Trade and Investment APEC Investment Experts' Group, 'Identifying Core Elements in Investment Agreements in the APEC Region' (APEC Secretariat 2007) APEC#207-CT-01.14 <http://apec.org/~media/Files/Groups/IEG/07_ieg_core.pdf> accessed 6 July 2015

3.4.2 MERCOSUR/MERCOSUL

MERCOSUR was established in 1991 as an intergovernmental organisation³¹⁵ by the Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asunción).³¹⁶ It has five member states, namely Argentina, Brazil, Paraguay, Uruguay, and Venezuela.³¹⁷

The main objectives concern the integration of the economy and enhancing the competitiveness of the region, similarly to APEC. The goal of this integration is not a complex furthering integration like the EU, but it aims to become more than just a free trade area such as NAFTA is.³¹⁸ In terms of structure, MERCOSUR is an interesting regional integration. It is comprised of 6 organs: the Council of the Common Market (CCM), the Common Market Group (CMG), the MERCOSUR Trade Commission (MTC), the Joint Parliamentary Commission (substituted by the MERCOSUR Parliament) (JPC), the Economic-Social Consultative Forum (ESCF), and the MERCOSUR Administrative Secretariat (MAS).³¹⁹ Although MERCOSUR has established many intergovernmental bodies using the title ‘Common’, this does not mean that the region has reached a common market stage of integration. However,

³¹⁵ Andres Malamuc, ‘Theories of Regional Integration and the Origins of MERCOSUR’ in Marcilio Toscano Franca Filho, Lucan Lixinski and Maria Belen Olmos Giupponi (eds) *The Law of MERCOSUR* (Hart Publishing 2010)

³¹⁶ *ibid*

³¹⁷ Elisabeth Eljuri, ‘Venezuela Becomes a Full Member of Mercosur’ <<http://nortonrosefulbright.com/knowledge/publications/110871/venezuela-becomes-a-full-member-of-mercosur>> accessed 30 June 2015. Venezuela became a member of MERCOSUR on 18 December 2013.

³¹⁸ Marcilio Toscano Franca Filho, Lucan Lixinski and Maria Belen Olmos Giupponi, ‘Introduction to the Law of MERCOSUR’ in Marcilio Toscano Franca Filho, Lucan Lixinski and Maria Belen Olmos Giupponi (eds) *The Law of MERCOSUR* (Hart Publishing 2010)

³¹⁹ Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto (Protocol of Ouro Preto) art 1

MERCOSUR has implemented CET on imported goods into the region.³²⁰ From the definition given in section 3.2 it is right to conclude that at best, MERCOSUR is a custom market at this point.

It should be noted that the CCM, the CMG and the MTC are inter-governmental bodies with powers of decision-making.³²¹ The rulings of the CCM (which is at the top of the MERCOSUR hierarchy) are called Decisions. These are binding on all member states.³²²

The CMG is the executive body of the MERCOSUR.³²³ It has powers, *inter alia*, to propose drafted rulings to the CCM and take necessary measures to enforce the rulings of the CCM.³²⁴ Its decisions are called Resolutions and these are also binding upon all member states.³²⁵

The MTC oversees the application of the common trade policy instruments agreed by member states, and follows up and reviews questions and issues related to common trade policies, intra-MERCOSUR and involving third countries.³²⁶ Its decisions are called Directives or Proposals. Only Directives are binding on the member states.³²⁷

All decisions made by the MERCOSUR organs are made by consensus and in the presence of all the member states.³²⁸ There is neither community law nor a direct effect principle applicable to the member states. All significant decisions by officials

³²⁰ 'Mercosur Raised Maximum Allowed Tariff, 35% on 100 imported goods, say Brazil' *Mercopress* (28 May 2012) <<http://en.mercopress.com/2012/05/28/mercotur-raises-maximum-allowed-tariff-35-on-100-imported-goods-says-brazil>> accessed date 30 June 2015

³²¹ Protocol of Ouro Preto art 2

³²² *ibid* arts 3 and 9

³²³ *ibid* art 10

³²⁴ *ibid* art 14

³²⁵ *ibid* art 15

³²⁶ *ibid* art 16

³²⁷ *ibid* art 20

³²⁸ *ibid* art 37

must be transferred into the domestic legislation of all member states before they can take effect.³²⁹ It is therefore questionable whether there is enough delegation of sovereignty within the MERCOSUR to constitute a common market.

Article 1 paragraph 1 of the Treaty of Asunción provides that the States Parties decided to establish a common market, which was to be in place by 31 December 1994. This clearly shows that the MERCOSUR leaders intend that an ultimate goal of their integration will be a common market. However, that was not achieved in the specified time. What exactly is MERCOSUR now? Some scholars consider MERCOSUR as an incomplete Free Trade Area and an imperfect custom union.³³⁰ It is said that there is a common belief that MERCOSUR has only reached an imperfect custom union.³³¹

An extensive study on economic freedoms in MERCOSUR reveals that MERCOSUR has considerably liberalised its trades in goods, with the exceptions of automobile and sugar industries, but the trade in services remains relatively closed. However, free movement of goods, capitals and persons are not as free as they should be in a common market. The movement of goods is still diminished by double custom duty. Free movement of capital is impeded by many restrictions. Free movement of labour under the Multilateral Social Law Agreement is not considered a component of MERCOSUR *acquis communautaire* and any states joining MERCOSUR in the future are not obliged to enter into this Agreement. Yet, the study concludes that despite these imperfections, MERCOSUR is considered a common market in the making.³³² This

³²⁹ *ibid* arts 40 and 42

³³⁰ Lúcio Tomé Feteira, 'Competition Rules in MERCOSUR: the Fortaleza Protocol' in Marcilio Toscano Franca Filho, Lucan Lixinski and Maria Belen Olmos Giupponi (eds), *The Law of MERCOSUR* (Hart Publishing 2010); Eve Rimoldi de Ladnam, 'MERCOSUR' in Jürgen Basedow (ed) *Limits and Control of Competition with a View to International Harmonization* (Kluwer Law International 2002)

³³¹ Franca Filho, Lixinski and Olmos Giupponi, 'Introduction to the Law of MERCOSUR' (n 318)

³³² Fuders, 'Economic Freedoms on Mercosur' (n 237)

thesis concludes that MERCOSUR aims at creating a common market, but its current status is a custom union progressing slowly towards a common market.

A) MERCOSUR Competition Law

Provisions on competition law are contained in the Fortaleza Protocol, signed on 17th December 1996 and approved by the Council of the Common Market (CCM) Decision No 18/96. Article 33 of the Protocol states that

“the present Protocol, as an integral part of the Treaty of Asuncion, shall enter into force thirty days after the second instrument of ratification has been deposited, with respect to the first two States Parties ratifying it and, in the case of the other signatories, on the thirtieth day after the respective instrument of ratification has been deposited.”³³³

Unlike the Multilateral Social Law Agreement, any state entering into MERCOSUR shall *ipso jure* adhere to the Fortaleza Protocol.³³⁴ As of 2010, only Brazil and Paraguay have deposited their respective instruments of ratification of the Protocol (Article 33 of Fortaleza Protocol).³³⁵ All member states of MERCOSUR have now enacted national competition laws.³³⁶

³³³ All references to English version of Fortaleza Protocol was taken from Clifford A. Jones, ‘Leveling the Playing Field in the EU, NAFTA, CAN, Mercosur and Beyond: Comparing the Role of Competition Rules in Regional Economic Organizations’ (n 250)

³³⁴ **Article 36** of the Fortaleza Protocol “Adherence on the part of a State to the Treaty of Asuncion shall imply, *ipso jure*, adherence to the present Protocol.”

³³⁵ Lúcio Tomé Feteira ‘Competition Rules in MERCOSUR: the Fortaleza Protocol’ (n 330)

³³⁶ **Argentina’s** modern competition law, the Competition Defense Act 22.262, was enacted in 1980, but it was inactively enforced because the authority, National Commission of Protection of Competition, lacked independence. The Argentinean’s competition authority was established under the State Secretary for Trade and International Economic Negotiations which is an executive branch. But Argentinean’s current competition law, Law 25.156, repealed the Law 22.262. Law 25.156/99 was enacted in 1999 and established an independent competition authority. See Marco Botta, ‘The Cooperation between the Competition Authorities of the Developing Countries: Why Does It Not Work? Case Study on Argentina and Brazil’ (2009) 5 The Competition Law Review 153. This new authority is called National Commission for the

It should be reiterated that under MERCOSUR's system, there is neither direct-effect nor the principle of supremacy as there is in the EU. All Protocols will be enforceable as laws of the community only if all member states have incorporated them into their national law, in which case they are applicable to member states because they are part of national law, not because of direct-effect or the principle of supremacy.³³⁷ Therefore, at present, the Fortaleza Protocol has yet to come into force in the MERCOSUR.³³⁸

Defense of Competition (CNDC) whose members are appointed by the National Executive. (Article 19, Law 25.156/99) The CNDC was created by Law 22.262 in 1980 to oversee the application of the new law.; **Brazil's** first competition law was enacted in 1962, but the enforcement was active in the beginning of 1990s. In 1994, the Law 8884/94 was passed and repealed the old law. This law was amended in 2000 by adding leniency programme to it. See Marco Botta, *ibid.* Finally, in 2011, the Law No 12.529/2011 was enacted and entered into force in 29th May 2012. See Barbara Rosenberg, 'Brazil: The Enactment of the New Brazilian Competition Law: An Important Shift' Mondaq (26 Aug 2013) <<http://www.mondaq.com/brazil/x/253956/Antitrust+Competition/The+Enactment+Of+The+New+Brazilian+Competition+Law+An+Important>> accessed 1 July 2015; **Paraguay's** competition law was enacted on 21 June 2013, Law No. 4956/13, but the formal establishment of its enforcement authority, the National Commission for Protection of Competition, is expected to take place in September 2015 See MERSAN, 'Competition Legislation in Paraguay: Law No. 4956/13 and Its Regulatory Decree No. 1490/14' <<http://mersanlaw.com/2014/09/03/defensa-de-la-competencia-en-paraguay-ley-495613-y-decreto-reglamentario-no-149014/?lang=en>> accessed 1 July 2015; **Uruguay's** competition law was enacted in 2000, Law No. 170243 and was amended in 2001. The enforcement authority is the General Bureau of Commerce of the Ministry of Economy and Finance which is not the entity with specific competence in curbing anticompetitive conducts. Uruguay's competition law is claimed to allow a certain degree of distortion of competition as long as it does not harm the "general interest". The country is said to lack competition culture and favours government involvements. See Bruce M. Owen, 'Competition Policy in Latin America' (Conference on Sectoral Reform in Latin America, California, 13 – 15 November 2003) <www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/pdf/03-03.pdf> accessed 6 November 2012; See also Uruguay, <http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/newsviews/axberg_uruguay.pdf> accessed 1 July 2015; **Venezuela's** competition law was passed in late 1991 and took effect in January 1992. ProCompetencia was the enforcement agency. Despite small number of full time staff (20 people), the ProCompetencia has received much compliment of its vigorous enforcement records. However, it was reported that the 1999 Constitution called for a revised competition law and the agency resulted in uncertainty in competition enforcement. The ProCompetencia was reported to submit various proposals for the new law. See A.E. Rodriguez and Mark D. Williams, 'Recent Decisions by the Venezuelan and Peruvian Agencies: Lessons for the Export of antitrust' (1998) 43 Antitrust Bulletin 147; Owen, 'Competition Policy in Latin America' (n 336)

³³⁷ Malcom Rowat, Michele Lubrano and Rafael Porrata, Jr, *Competition Policy and MERCOSUR* (The World Bank 1997)17 - 18

³³⁸ Tomé Feteira 'Competition Rules in MERCOSUR: the Fortaleza Protocol' (n 330)

Decision No 1/03 of the MTC established the Commission for Defence of Competition (CDC), an intergovernmental body consisting of national competition agencies from member states, whose task is to ensure the application of the Fortaleza Protocol by the member states in collaboration with the MTC.³³⁹

In its preamble, the Fortaleza Protocol recognizes the importance of ‘equal condition of free competition’ and ‘increased competitiveness’. The Protocol is used as ‘an instrument capable of assuring free market access and a balanced distribution of the benefits of the process of economic integration’. The purpose of the Protocol is the defence of competition in MERCOSUR.³⁴⁰ The Protocol applies to anticompetitive acts occurring within MERCOSUR and those affecting competition in MERCOSUR and between MERCOSUR member states.³⁴¹

Article 6 of the Protocol provides a non-exhaustive list of conducts which are considered anticompetitive if they are committed with the purpose, or effect, of restricting, limiting, falsifying or distorting competition in, or access to, the market within MERCOSUR. They include horizontal and vertical agreements and unilateral conduct, such as market division, price fixing, cartels, bid rigging, tying and bundling, and denying access to essential facilities.

The provisions on supposed anticompetitive behaviours are not well structured. There is no distinction between anticompetitive agreements and unilateral conduct. Economic concentration and abuse of dominance are referred to very briefly in Article 7.

³³⁹ Fortaleza Protocol art 8; Tomé Feteira ‘Competition Rules in MERCOSUR: the Fortaleza Protocol’ (n 330)

³⁴⁰ Fortaleza Protocol art 1

³⁴¹ *ibid* arts 2 and 4

Perhaps the CDC will publish some guidelines to clarify these issues. Until then, the competition rules under the Fortaleza Protocol are confusing and ambiguous.

B) MERCOSUR Competition Law Enforcement

The Fortaleza Protocol provides procedural rules on the administration of competition cases. The rules appear complicated and it could be presumed that, if there is a case under this Protocol, it would require a long time to solve the dispute. The CDC and MTC are in charge of overseeing the application of competition rules within the MERCOSUR.³⁴² The Protocol requires the CDC to receive confirmation (ad referendum) from the MTC in many instances. Also, it appears that the CDC does not have the same authority as the Directorate General for Competition (DGCOM) in the EU, because the power to investigate the case remains with the national competition authority of the country where the defendant resides, while the CDC only establishes guidelines for defining the relevant market and analytical criteria of the economic effects of the alleged anticompetitive practice.

However, once the investigation is completed, the national competition authority shall present a conclusive ruling to the CDC, who will seek confirmation from the MTC to decide the case, taking into consideration the ruling provided by the national authority, and eventually impose sanctions. The CDC reaches its decision by consensus and, if it fails to reach a consensus, it has to refer to the MTC for an opinion.

The MTC's ruling is in the form of a Directive, which will be carried out by the national authority of the state where the defendant resides. However, if the MTC cannot reach a consensus, the MTC will refer the case to the CMG, which also has to reach a

³⁴² *ibid* art 8

decision by consensus. If the CMG cannot reach a consensus, the interested State Party will have to use the procedures under the Brasilia Protocol on the Settlement of Disputes.³⁴³

The Fortaleza Protocol provides a framework on competition law enforcement to the member states. The MERCOSUR aims at creating a common market with an intergovernmental structure. Given that all decisions by the CDC, MTC and CMG must be reached by consensus, and given the complicated procedural rules in administering and enforcing competition matters, this thesis argues that such complex and lengthy procedures may impair the effectiveness of MERCOSUR competition law enforcement. Additionally, taking into account the complexity and lengthy dispute settlement process under the Olivos Protocol, this thesis argues that the combination of these Protocols may not be suitable for the dynamic of international trade. It is highly doubtful whether MEROCUR's investors will benefit from such lengthy and complicated dispute settlement mechanisms. Moreover, one scholar expressed concern that the procedural rules under the Fortaleza Protocol are prone to regulatory capture.³⁴⁴

The Fortaleza Protocol requires that the national competition authority of the country where the defendant resides investigates the case. But the defendant's place of residence is not necessarily the easiest place for the authority to gather evidence of anticompetitive practices. This approach appears to be a distinctive character of MERCOSUR's competition law enforcement.

³⁴³ *ibid* arts 10 – 21

³⁴⁴ Tomé Feteira 'Competition Rules in MERCOSUR: the Fortaleza Protocol' (n 335)

Concern was expressed that the lack of supremacy and direct effect and disparities in the development of member states can harm the progress of integration.³⁴⁵ MERCOSUR is ‘the failed intergovernmental approach’³⁴⁶ because of lack of cooperation between national competition authorities, although the Fortaleza Protocol promotes just such cooperation in Article 30.³⁴⁷ Finally in 2010, MERCOSUR concluded the MERCOSUR Agreement for the Protection of Competition, which did not need any ratification by the national Parliaments. This agreement strengthens cooperation among the NCAs in MERCOSUR.³⁴⁸ It is clear that the MERCOSUR approach is a hard law approach. But its impact and significance on increasing competitiveness of MERCOSUR remain to be seen. As is the case of NAFTA, opting for a hard law approach to competition law and policy is not a guarantee for an effective competition law enforcement. It is the actual application and enforcement of the law among member states. This is the area where both NAFTA and MERCOSUR lack.

ASEAN is an intergovernmental organisation with far less formal commitment and legally binding instruments than MERCOSUR, because of the ASEAN way. In the ASEAN case, the lack of supremacy is obvious as it is a crucial part of the ASEAN way.

³⁴⁵ *ibid*

³⁴⁶ Botta, ‘The Role of Competition Policy in the Latin American Regional Integration: A Comparative Analysis of CARICOM, ANDEAN Community and MERCOSUR’ (n 200)

³⁴⁷ Botta, ‘The Cooperation between the Competition Authorities of the Developing Countries: Why Does It Not Work? Case Study on Argentina and Brazil’ (n 336)

³⁴⁸ Diego Petrecolla et al, ‘Economic Structure and Competition Policy Application in Latin American Countries’ in Michal S. Gal et al (eds) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar 2015)

3.5 CONCLUSION

This chapter established the unavoidable move of the harmonisation and convergence of competition law and policy movement in the world trade from the national level to the global level. The involvement and influence of the US in harmonising competition law and policy should be noted. The US is a founding member of the UN, the OECD, UNCTAD, APEC, and the ICN. The US also initiated the establishment of the OECD, APEC, and the ICN. Advocacy of competition law and policy, through the establishment of these forums, has always been on the US agenda. However, attempts to unify international competition law have never succeeded as evidence in the case of the WTO initiative. Perhaps the hard law approach has its limitation when it comes to global trade. Objection by developing states will prevent any attempt to unify or harmonise international competition law. It seems as if a soft law approach is more welcome as it provides flexibility and imposes less sovereign cost on developing and the least-develop countries. This is not to say that a hard law approach will never work. It can as we shall see in the case of the EU in the next chapter.

The UNCTAD promotes effective competition law to protect developing countries from anticompetitive practices by foreign firms, and as an incentive to attract FDI from transnational enterprises, which are familiar with the enforcement of competition law in their home countries and expect a level-playing field between them and domestic undertakings in host countries.

The OECD advocates competition law to its member economies as a tool to improve market efficiency, which can be suitable for countries whose markets are efficiency-driven.

The ICN, on the other hand, focuses on addressing competition enforcement and policy issues and establishing consensus between members on particular subjects. The ICN's project-oriented and result-based approach in finding agreed best practices among members appears more favourable than the OECD's and the UNCTAD's approach, though all of them produce non-legally binding documents and recommendations. Its soft law approach match with the ASEAN way, which is another reason why AMSs welcome dialogues and discussions on competition law and policy through the ICN.

But the formality of OECD and UNCTAD as intergovernmental organisations produces a certain degree of commitment by governments while the ICN is an entirely informal and non-intergovernmental body, and members interact largely via internet, telephone, teleseminars, and webinars.³⁴⁹ The result of this approach is that members are more willing to incorporate the ICN's recommendations in their competition law amendments, such as when Singapore and Brazil took these recommendations into consideration when they amended their competition laws.

Regarding the practicality of the competition chapter in trade agreements, this chapter demonstrates that the vast majority of FTAs and RTAs; whether they are bilateral or multi-lateral, include competition chapters or provisions which are not subject to the dispute resolution mechanisms under the FTAs. Most FTAs favour co-operation, capacity-building assistance, and exchange of publicly available non-confidential information. If there is any dispute related to anticompetitive conducts, signatories prefer to solve these disputes by consultation rather than directly submitting the disputes to an arbitral tribunal or the WTO Dispute Settlement Body.

³⁴⁹ ICN, 'About' <<http://www.internationalcompetitionnetwork.org/about.aspx>> accessed 4 February 2016

APEC is merely a co-operation among member economies, and it is not even a free trade area. However, APEC has published the APEC Principles which are principles that recognize the importance of competition law and policy enforcement to protect economic efficiency and consumer welfare. Although seven of the AMSs are members of APEC, and some of the FTAs concluded between APEC member economies and the AMSs include provisions which explicitly recognise the APEC Principles, the FTAs among APEC member economies and the AMSs continue to exclude the competition chapter from dispute settlement mechanisms. Only the New Zealand-Singapore FTA and the ASEAN-Korea Agreement on Trade in Services subject the competition chapter or provisions to their dispute settlement mechanisms.

In the case of NAFTA, member states also include a competition chapter which is not subject to NAFTA's dispute resolution mechanism. This results in two different interpretations by two different arbitral tribunals. Under ICSID, the arbitration tribunal in *UPS v Canada* ruled that it lacked jurisdiction over the case because disputes on competition are not subject to NAFTA. Moreover, it ruled that the host country's failure to protect a foreign investor under NAFTA against the anticompetitive conduct of its national monopoly did not violate the minimum standard of treatment, because there was no such customary international law.³⁵⁰ Hence, it is unlikely that any country will refer its anti-competition disputes to ICSID.

Relying on the WTO Dispute Resolution mechanism may yield a better result because in *Mexico – Telecoms*, the Dispute Resolution Body Panel ruled in favour of the investor.³⁵¹ However, it should be borne in mind that this case was decided under GATS, not under the General Agreement on Tariffs and Trade 1994 (GATT). And it

³⁵⁰ *UPS v Canada* (n 207)

³⁵¹ *Mexico – Telecoms* (n 209)

should be noted that the EU, as the third party to this case, had a different view than the panel. The EU considered that a practice required by law could not be an anticompetitive practice. Because if the law does not allow competition in a particular area, there cannot be an anticompetitive practice relating to that matter as it stated 'It is not possible to restrict competition where competition is not allowed.'³⁵² NAFTA's hard law approach has not added significant impact on the competitiveness of member states. The lack of authority which has jurisdiction on this matter within the trading bloc has proved to weaken NAFTA's competition law and policy.

The MERCOSUR's hard law approach to introduce regional supranational competition law through the Fortaleza Protocol is not yet successful. The lack of direct-effect and principle of supremacy are likely to contribute to the Fortaleza Protocol having yet to come into force. Although, MERCOSUR established many intergovernmental bodies with decision making power; and the decisions of the Council of Common Market are binding on member states; this is not sufficient. The lack of investigative powers of the CDC, and the confusing and ambiguous provisions on competition in the Fortaleza Protocol are highly likely to deter the effectiveness of dispute resolution in anticompetitive practice issues at the regional level. The Agreement for the Protection of Competition of 2010 is a step back from the ambitious supranational approach, which does not work well for MERCOSUR thus far.

One of the main reasons countries engage in Free Trade Areas is because of market access. It is how small countries such as Singapore, Norway, and Switzerland gain access to international trade. Once these countries gain market access, the competition in relevant market ensues. If disputes related to anticompetitive practices arise, none of

³⁵² *ibid* para 7.241

them can refer the dispute to arbitration prescribed in their FTAs. Should they decide to bring the dispute before other international arbitration tribunals such as WTO or ICSID³⁵³, the results are inconsistent.

The main objective of including a competition chapter or provisions in FTAs and RTAs is to be symbolic of the Parties' commitment to maintain competitive markets and to support the value of competition to investors and to prevent market access being hampered by anticompetitive conducts. One can see that although developing countries and the AMS consider competition law and policy as beneficial to trade and investment, they are reluctant to fully commit to it at the international level. This may be due to sovereignty issues. The existence of a competition chapter or provision in FTAs and RTAs represents the 'best endeavour' of countries to acknowledge the importance of competition law and policy. This suggests that a supranational approach to competition law and policy among countries with different development levels could be challenged and resisted by developing countries. And most AMSs are developing countries.

Many of the FTAs do not even include provisions or a chapter on competition at all such as for example the China-Thailand FTA, the ASEAN-China FTA, the China-Singapore FTA, the ASEAN-India FTA, and the ASEAN- Korea FTA. Only a minority of FTAs include a chapter on competition law which is subject to the dispute settlement chapter, for example the New Zealand-Singapore FTA, the ASEAN-Korea Agreement on Trade in Services, and the India-Singapore FTA.

Some of the trade agreements among the AMSs such as AFTA, ATIGA, and AFAS do not contain chapters on competition.³⁵⁴ ASEAN has started to promote the

³⁵³ International Centre for Settlement of Investment Disputes

enactment of competition laws in member states as part of the measures to take to make the AEC a highly competitive economic region. Singapore is a member of ASEAN, a Free Trade Area which does not have a regional competition law; Norway and Switzerland are members of EFTA which also states clearly that Article 18 of the EFTA refers to the national competition laws of the member states. These indicate that whether or not there is a chapter on competition or an enforceable competition chapter in these FTAs does not hinder or contribute to the competitiveness and economic growth of these countries. They have already benefited from the effects of globalisation even if competition rules are not extended to cross-border trade, and hybrid trade-and-competition restraints are not treated as a unified whole as advocated by Fox.³⁵⁵

Private investors have to rely on the national competition law of the host countries when disputes on anticompetitive practices arise. This only applies in cases outside of the EU because when anticompetitive behaviour affects trade in the EU, there are supranational mechanisms to curb such practices. China's FTAs with Singapore, ASEAN and New Zealand³⁵⁶ do not contain any provision on competition, let alone one which is subject to dispute resolution measures. All FTAs China has signed contain competition chapters which are not subject to provisions on dispute resolution.

Considering the aforementioned individual FTAs which Thailand and Singapore have signed as well as the FTAs signed under the ASEAN platform, this thesis argues that ASEAN does not envisage competition law and policy and competitive market as an essential part of its international trade, at least between ASEAN-China, ASEAN-India,

³⁵⁴ There are some trade agreements among AMSs which contain competition provisions and are subject to dispute settlement mechanism which are discussed in Chapter 4.

³⁵⁵ Eleanor M. Fox, 'The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition' (2006) 9 *Journal of International Economic Law* 271, 290

³⁵⁶ Although there are provisions on monopoly suppliers but those provision do not aim at competitiveness of the market or competition process as a whole. Thus, they are not relevant to this thesis.

and ASEAN - Korea FTA which form the majority of the FTAs signed between ASEAN and its dialogue partners. This thesis also argues that Singapore has gained more market access to major economies and conformed more to the international ideology of the competitive market than Thailand has. Out of 14 FTAs which Singapore signed individually, only 4 do not contain any provision on competition;³⁵⁷ whereas Thailand has only signed 5 FTAs individually.³⁵⁸

Clearly, the inapplicability of dispute resolution mechanisms on the chapter on competition does not stop countries from trading with each other and does not affect the competitiveness of a country. This confirms that there is no correlation between the competitiveness of a country and the enactment of competition law, but there is a correlation between competitiveness and the enforcement of competition law as analysed in chapter 2. Indeed, the use of ‘competitiveness’ to promote competition law and policy should be done with caution as warned by Krugman.

³⁵⁷ They are The GSFTA signed between Singapore and the Arab States of the Gulf (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates); the SJFTA which signed between Singapore and the Kingdom of Jordan; the CECA which Singapore signed with India; and CSFTA which Singapore signed with China.

³⁵⁸ They are FTAs between Thailand and Peru, Japan, India, New Zealand, and Australia.

CHAPTER 4

ASEAN WAY AND SUPRANATIONAL APPROACH TO COMPETITION LAW AND POLICY

The previous chapters concluded that the competitiveness of a country lies in its ability to provide a high standard of living for its citizens and that a competitive region is one which attracts skilled labour, businesses, and investments. Apart from being able to attract skilled labour and investment, there are other characteristics of a competitive region such as free movement of skilled labour, a high quality infrastructure to support sophisticated business operations, the promotion of free and fair competition, and free movement of goods, services, and capitals.

Free movement of labour, goods, services, and capital requires market access. If market access is compromised by domestic incumbents this is a deterrent for foreign investors. Likewise, opening up the market to a dominant foreign investor who abuses this dominance is not desirable for host governments and domestic businesses. Therefore, ASEAN needs a proper competition law and policy approach to effectively deal with potential problems. But is it necessary for this approach to be at the regional level? Is it not more ideal for AMSs to have an effective national competition law to promote competitiveness?

Chapter 2 proved that having an effective competition policy is not a determinant factor of competitiveness. This does not mean that competition law and policy has no effect on competitiveness – the importance of competition law and policy

for competitiveness is indirect. Having effective competition law enforcement can improve a country's competitiveness provided that this country is, at least, in the transition to the Efficiency-Driven stage of development. This thesis argues that if each AMS increases their competitiveness individually, ASEAN as a whole should become more competitive too.

Countries that engage in international trade expect their trading partners to promote free and fair competition, especially developed countries whose interest groups are powerful want to make sure that their investments in host countries will not be compromised by anticompetitive practices. FTAs and RTAs are entered into to ensure market access.

Chapter 3 examined the approach to competition law and policy at the international organisations level and at the bilateral and multilateral trade agreements level. It confirmed that promoting unified international competition law in a hard law approach has failed, and that at the governmental level issues arising out of competition chapters in trade agreements are to be solved by means other than the dispute settlement mechanisms provided under these same trade agreements. This implies that anticompetitive practices will be solved by national competition law. However, the UNCTAD model law on international competition law has not had any success because a one-size-fits-all competition law does not work given the disparities in development and approach to international trade between countries. The preferable approach to harmonisation of competition law is through informal consultations, consensus, mutual recognition and sharing of best practices which is a soft law approach.

The informal approach appears to suit the ASEAN way since ASEAN operates under such norms. ASEAN has adopted many instruments to promote competitiveness

in the AMSs. This thesis questions whether within the context of the ASEAN way, ASEAN's instruments on competition law and policy have as a significant impact on the AMS's competitiveness as anticipated. It also questions whether a supranational approach to ASEAN competition law and policy is necessary for ASEAN to realise a highly competitive AEC. Thus, this chapter aims to examine the ASEAN way, the EU supranational approach, and ASEAN's instruments on promoting competition law and policy and their impact on the AMSs' competitiveness.

This chapter is divided into four sections. The first section analyses the ASEAN way which is considered the fundamental norm of ASEAN and considers the sectoral approach to competition law and policy. Experience from electricity market in various countries will be studied. The second section explores the EU supranational approach, especially the functioning and powers of the European Court of Justice, the General Court, and the Commission, in order to assess the compatibility between the EU supranationality and the ASEAN way. The third section analyses the AEC and the establishment of the ASEAN Experts Group on Competition (AEGC) further. It will scrutinise the approach to competition law and policy in the AEC Blueprints, the Regional Guidelines on Competition Policy, and other published works by the AEGC to identify to what extent these works have impacted on ASEAN becoming a highly competitive single market. Special attention is paid to the recommendation on Abuse of Dominance in the Regional Guidelines. The fourth section provides an analytical conclusion.

4.1 THE ASEAN WAY AND ASEAN CHARTER

ASEAN is very unique in the way it operates. This section examines the ASEAN way which is embedded in the way the AMSs cooperate. To fully understand the ASEAN way would be facilitated by understanding the ASEAN Charter, because the ASEAN Charter is the most important formal and legally binding instrument that provides the rules to which the AMSs shall adhere and cooperate as one community – it modifies and codifies the ASEAN way. Hence, section 4.1 will examine both.

4.1.1 What is the ASEAN way?

There is no exact definition given to what it is. But it can be concluded that characteristics of the ASEAN way include *inter alia*, the use of extensive consultation,³⁵⁹ relies primarily on the consensus and non-legally binding agreements,³⁶⁰ non-interference in the internal affairs of other AMSs,³⁶¹ quiet diplomacy,³⁶² and soft regionalism.³⁶³ The ASEAN way also relies heavily on personal connections of political elites³⁶⁴ and policy

³⁵⁹ Shaun Narine, 'ASEAN and the ARF: The Limits of the "ASEAN Way"' (1997) 37 Asian Survey 961, 962; For discussion on origin of the consultation and consensus See Kim Hyung Jong and Lee Poh Ping, 'The Changing Role of Dialogue in the International Relations of Southeast Asia' (2011) 51 Asian Survey 953

³⁶⁰ Daniel Seah, 'The ASEAN Charter' (2009) 58 International & Comparative Law Quarterly 197, 199

³⁶¹ Tom Ginsburg, 'The State of Sovereignty in Southeast Asia' (2005) 99 American Society of International Law 419, 420; For discussion on the change in the ASEAN way approach, See Hiro Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"' (2003) 25 Contemporary Southeast Asia 104; Hiro Katsumata, 'Why is ASEAN Diplomacy Changing? From "Non-Interference" to "Open and Frank Discussions"' (2004) 44 Asian Survey 237

³⁶² Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"' (n 361)

³⁶³ Amitav Acharya, 'Ideas, Identity, and Institution-Building: From the 'ASEAN Way' to the 'Asia-Pacific Way'?' (1997) 10 The Pacific Review 319; For further discussion on the ASEAN way, See Taku Tamaki, 'Making Sense of 'ASEAN Way': A Constructivist Approach' (Drafted, the Annual Conference of the International Political Science Association, Japan, 9-13 July 2006) <http://paperroom.ipsa.org/papers/paper_5293.pdf> accessed 20 May 2016

³⁶⁴ One of the examples of personal connection between ASEAN leaders is the joint communiqué between the Thai and Cambodian governments signed on 18 June 2008 regarding the dispute over the Preah Vihear Temple. This instrument was signed when Pheu Thai Party was the government. This party was the third incarnation of Thai Rak Thai Party founded by the

makers to arrive at mutually acceptable agreements.³⁶⁵ The ASEAN way has been used primarily to manage boundary relations among the AMSs.³⁶⁶ The operation of ASEAN, in fact, upholds and reinforces sovereignty of the AMSs rather than reducing this.³⁶⁷ ASEAN employs the ASEAN way particularly when there is a regional security issue. And it is generally agreed that the ASEAN way has served well in maintaining peace in ASEAN.

ASEAN emphasises the sovereign equality of Member States regardless of the size or population. The ASEAN Charter provides that the AMSs have equal rights and obligations under the Charter.³⁶⁸ According to Severino, former Secretary General of ASEAN, ASEAN is reluctant to invest in anything that may resemble supranational authority or to get involved in bilateral disputes.³⁶⁹ State sovereignty has always been the cornerstone and behavioural norm of ASEAN.³⁷⁰

The ASEAN way has been heavily criticised for its suitability to the present economic integration. In terms of economic development and economic integration, the ASEAN way provides a weak framework for any agreement to be made because national interest and ASEAN interest often conflict; a consensus-based decision-making process

convicted Thaksin Shinawatra, former Thai PM who took the role of Economic Adviser of the Cambodian government in 2009 despite the ongoing clashes over the Preah Vihear Temple between the two countries during that time. This is only one of the examples of his close link to Hun Sen, Cambodian PM.

³⁶⁵ Beeson *Institutions of the Asia Pacific: ASEAN, APEC and Beyond* (n 15) 21

³⁶⁶ Nikolas Busse, 'Constructivism and Southeast Asian Security' (1999) 12 *The Pacific Review* 39, 47; Gillian Goh, 'The 'ASEAN Way': Non-Intervention and ASEAN's Role in Conflict Management' (2003) 3 *Stanford Journal of East Asian Affairs* 113; Ginsburg, 'The State of Sovereignty in Southeast Asia' (n 361) 420

³⁶⁷ Kay Möller, 'Cambodia and Burma: The ASEAN Way Ends Here' (1998) 38 *Asian Survey* 1087, 1100; Ginsburg, 'The State of Sovereignty in Southeast Asia' (n 361) 420

³⁶⁸ Article 5(1)

³⁶⁹ Severino, *Southeast Asia in Search of ASEAN Community: Insight from the Former ASEAN Secretary-General* (n 14) 12

³⁷⁰ Busse 'Constructivism and Southeast Asian Security' (n 366) 46 - 47

is extremely time-consuming.³⁷¹ Some commentators stated that it needs to be re-examined. Its informal approaches that worked fairly well in the past years may not be adequate for handling the complexities and challenges that lie ahead. ASEAN's present structure is too inadequate to deal with new issues.³⁷²

There is a suggestion that in order to realise the AEC, ASEAN should consider setting up two supranational bodies: an ASEAN Court, to be responsible for dispute settlement, modelled after the European Court of Justice and an ASEAN Economic Secretariat responsible for economic affairs relating to ASEAN economic integration.³⁷³ This thesis argues that although this idea seems ideal, it is highly unrealistic and is not suitable for ASEAN. As ASEAN took 40 years to finalise its legal personality as an intergovernmental organisation, it is unlikely that the ASEAN leaders would agree easily with the establishment of any supranational body within the region.³⁷⁴

Besides, one should not disregard the history of the AMSs which were colonised and suppressed by major powers before and after WWII. This has resulted in Southeast Asian people strongly embracing nationalism. It is unlikely that they will agree to their governments surrendering any part of their judicial sovereignty to a supranational body. Although Thailand has never been colonised, it experienced the extraterritoriality of the

³⁷¹ Narongchai Akrasanee and Jutamas Arunanondchai, 'Institutional Reforms to Achieve ASEAN Economic Integration' in Denis Hew (ed) *Roadmap to an ASEAN Economic Community* (ISEAS Publications 2005) 64

³⁷² Mohamed Ariff, 'Trade, Investment, and Interdependence' in Simon S. C. Tay, Jesus P. Estanislao and Hadi Soesastro (eds) *Reinventing ASEAN*, (2nd edn, Institute of Southeast Asian Studies 2004) 65 – 66; See Hyung Jong and Poh Ping 'The Changing Role of Dialogue in the International Relations of Southeast Asia' (n 359) for inefficiency of the ASEAN way in coping with natural disaster and haze issue from Indonesia

³⁷³ Akrasanee and Arunanondchai, 'Institutional Reforms to Achieve ASEAN Economic Integration' (n 371) 71 - 72

³⁷⁴ In the making the ASEAN Charter, Woon recorded that there was some discussion by the High Level Task Force on the dispute settlement mechanism whether to provide adjudication as well as arbitration, and it was decided that ASEAN is not quite ready yet for a formal court. See Walter Woon, 'The ASEAN Charter Dispute Settlement Mechanisms' in Tommy Koh, Rosario G. Manalo, and Walter Woon (eds) *Making of the ASEAN Charter* (World Scientific/IPS 2009)

British court in Thailand during 1855 – 1937³⁷⁵ (and extraterritoriality of the courts of many other nations). It was a shameful experience for a small country to be forced into this. The judiciary in Thailand assumes office after taking the oath before the King³⁷⁶ and exercise their power and duties in the name of the King.³⁷⁷ They take pride in their office and duties. One can surmise that this is a highly sensitive subject and should be approached carefully.

This unique character of ASEAN makes it even more challenging to find an appropriate approach to help ASEAN in becoming a highly competitive region. At the same time, it explains why ASEAN decided not to create a supranational body to oversee the implementation of regional competition law and policy.

However, since the late 1990s there is evidence that ASEAN changed the way it operates from behind closed door discussions to open discussions among AMSs in order to deal more effectively with new or challenging issues such as economics, terrorism, drugs, transnational crimes, and the environment.³⁷⁸ The reasons for this change are that in the late 1990s ASEAN faced two unprecedented challenges: the Asian financial crisis which began in Thailand and haze pollution from Indonesia which affected Singapore, Malaysia, Brunei, and the southern part of Philippines. The growing influence of human rights and democratic values triggered the AMSs' concerns over their credentials, standings, and reputation in the international arena.³⁷⁹

³⁷⁵ Turan Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge University Press 2010) Table I; Ministry of Foreign Affairs of the Kingdom of Thailand, 'Extraterritoriality' <<http://www.mfa.go.th/main/en/organize/1085/19295-Extraterritoriality.html>> accessed 19 May 2016

³⁷⁶ The Constitution of the Kingdom of Thailand B.E. 2550 (2007) s 201

³⁷⁷ *ibid* s 197

³⁷⁸ Katsumata, 'Why is ASEAN Diplomacy Changing? From "Non-Interference" to "Open and Frank Discussions"' (n 361)

³⁷⁹ *ibid*

4.1.2 ASEAN Charter: A possible new interpretation of the ASEAN way

The previous section shows that although the ASEAN way is embedded in ASEAN's operations and cooperation in security matters, this is changing in economic cooperation. This section aims to prove that the change has already begun and legally binds the AMSs. Hence, it is possible for ASEAN to use the tools it already has to realise a highly competitive region instead of creating a supranational body to achieve this. That tool is in the ASEAN Charter.³⁸⁰

The ASEAN Charter is a legally binding treaty signed by the AMSs in 2007. It gives ASEAN legal personality as an intergovernmental organisation.³⁸¹ Although it is criticised as a disappointment by outside critics³⁸², it is considered by those that drafted it a “Bible” for ASEAN³⁸³ and ‘mother of all documents’, a source of reference and it prevails over all other ASEAN instruments.³⁸⁴ The ASEAN Charter is the legal and institutional framework for ASEAN.³⁸⁵ It is considered a move towards a rule-based region to compliment the consensus and consultation of the ASEAN way.

The ASEAN Charter codifies the ASEAN way and provides the principles under which the AMSs will operate and cooperate in Article 2. The principles relevant to economic cooperation are:

³⁸⁰ For history and discussions on ASEAN Charter See Tommy Koh, Rosario G. Manalo and Walter Woon (eds) *Making of the ASEAN Charter* (World Scientific/IPS 2009)

³⁸¹ ASEAN Charter 2007 art 3

³⁸² For further discussion, see Mely Caballero-Anthony, ‘The ASEAN Charter: An Opportunity Missed or One That Cannot Be Missed?’ [2008] *Southeast Asian Affairs* 71

³⁸³ Nguyen Trung Thanh, ‘The Making of the ASEAN Charter in My Fresh Memories’ in Tommy Koh, Rosario G. Manalo, and Walter Woon (eds) *Making of the ASEAN Charter* (World Scientific/IPS 2009)

³⁸⁴ Tan Sri Ahmad Fuzy Abdul Razak, ‘Facing Unfair Criticisms’ in Tommy Koh, Rosario G. Manalo and Walter Woon (eds) *Making of the ASEAN Charter* (World Scientific/IPS 2009)

³⁸⁵ ASEAN Charter 2007 Preamble

‘(g) enhanced consultations on matters seriously affecting the common interest of ASEAN;

(h) adherence to the rule of law, good governance, the principles of democracy and constitutional government; and . . .

(n) adherence to multilateral trade rules and ASEAN’s rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.’

Other than the abovementioned principles, ASEAN continues to uphold and value consensus and consultation as the basic principles for decision making.³⁸⁶ This means the AMSs come to agreement through consensus and consultation even in matters seriously affecting ASEAN’s common interest. When disputes arise, the AMSs will resolve these peacefully and in a timely manner through dialogue, consultation, and negotiation.³⁸⁷

In case of disputes relating to specific ASEAN instruments, Article 24 of the ASEAN Charter provides that these disputes shall be settled by the stipulated dispute settlement mechanisms in the instruments themselves.³⁸⁸ This means that ASEAN economic instruments will be solved mainly by the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Vientiane Protocol), which is the most significant of the ASEAN dispute settlement mechanisms³⁸⁹ because it covers all ASEAN economic agreements.³⁹⁰

³⁸⁶ *ibid* art 20

³⁸⁷ *ibid* art 22

³⁸⁸ *ibid* art 24(1)

³⁸⁹ Woon, ‘The ASEAN Charter Dispute Settlement Mechanisms’ (n 374)

³⁹⁰ Vientiane Protocol art 1(1) and Appendix I

4.1.3 ASEAN Sectoral Competition Policy – Aviation Market

Examples of ASEAN trade agreements which fall under Article 24 of the ASEAN Charter are the ASEAN Multilateral Agreement on Air Services³⁹¹ (ASEAN Air Services), the ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services³⁹² (ASEAN Air Freight Services), and the ASEAN Multilateral Agreement on the Full Liberation of Passenger Air Services (ASEAN Passenger Air Services)³⁹³ (together referred to as the Aviation Agreements). These Aviation Agreements guarantee the rights of designated airlines to have a fair and equal opportunity to compete in ASEAN. They grant the AMSs access to the aviation market within ASEAN. As a result of market access, they require the AMSs to take action to eliminate all forms of discrimination and/or anticompetitive practices of the states and/or of the designated airlines which are deemed to adversely affect the competitive position of a designated airline of any other AMSs.³⁹⁴

A) Competition Provisions in the Aviation Agreements

The Aviation Agreements also provide that airline practices that may be regarded as possibly anticompetitive should be closely examined. Examples of such practices would be charging fares and rates on routes at levels which are, in total, insufficient to cover the costs of providing services (predatory pricing), practices which reflect an apparent intent or have the probable effect, of crippling, excluding or driving another

³⁹¹ Entered into force on 23 November 2009

³⁹² Entered into force on 23 November 2009

³⁹³ Entered into force on 30 June 2011

³⁹⁴ ASEAN Passenger Air Services art 12; ASEAN Air Services art 12; ASEAN Air Freight Services art 13

airline from the market (exclusionary conducts), and behaviour indicating an abuse of dominant position on the route.³⁹⁵

The Aviation Agreements also provide that other practices can constitute unfair competitive behaviour if they are in accordance with the examples listed above. Undue state aids and subsidy may be addressed by another AMS requesting consultation pursuant to the provision of consultations and amendment.³⁹⁶ And if the AMSs cannot reach a solution through consultations, any AMS may invoke the dispute resolution mechanism under the Vientiane Protocol.³⁹⁷ These Agreements do not prevent the AMS government from granting state aids and/or subsidy as long as it is transparent and does not distort competition among the designated airlines. The AMS that is concerned about such grants may request complete information on the grant and on a revision to or extension of such grant from the AMS who grants it, provided that such information shall be treated with the utmost sensitivity and confidentiality.³⁹⁸

This clearly shows that the AMSs can and will commit to competition rules which are more detailed than those under the all-sector approach, and are ready to exchange sensitive and confidential information when appropriate and necessary. It clearly shows that the AMSs have moved towards a more rule-based approach in competition law and policy. Although consultation is still available as a possible means of dispute settlement under these Agreements, the Vientiane Protocol is a formal and comprehensive mechanism which will play a major role in solving disputes among the

³⁹⁵ ASEAN Passenger Air Services art 13(1); ASEAN Air Services art 13(1); ASEAN Air Freight Services art 14(1)

³⁹⁶ ASEAN Passenger Air Services art 13(2); ASEAN Air Services art 13(2); ASEAN Air Freight Services art 14(2)

³⁹⁷ ASEAN Passenger Air Services art 13(3); ASEAN Air Services art 13(3); ASEAN Air Freight Services art 14(3)

³⁹⁸ ASEAN Passenger Air Services art 13(4); ASEAN Air Services art 13(4); ASEAN Air Freight Services art 14(4)

AMSs regarding air services. The core of the Vientiane Protocol is the ‘provision for the establishment of a panel to look into and objectively assess the dispute, make findings and recommend how it would best be resolved.’³⁹⁹

B) A Soft Law Approach to Dispute Settlement in the Aviation Agreements

The Vientiane Protocol reflects the ASEAN way very well. It keeps sovereign equality among the AMSs. It reinforces consultations and consensus and mutual trust between the parties to the disputes without using a supranational body. However, it is not within the scope of this thesis to discuss in depth the exact procedures of the Vientiane Protocol.

On the other hand, the lengthy procedures in competition cases under the Fortaleza Protocol cannot guarantee the effectiveness of competition law enforcement in MERCOSUR. This thesis does not claim that the MERCOSUR’s approach does not work. In fact, it submits that economic integration differs and is unique. Hence, what works for MERCOSUR or the EU, does not necessarily work for ASEAN and *vice versa*. There is no guarantee that the Vientiane Protocol will work perfectly for ASEAN either because it has not yet been invoked under the Aviation Agreements. But at least, it provides evidence of the AMSs’ commitment to integrate and cooperate in competition matters in a manner that corresponds to the ASEAN way.

These Aviation Agreements prove that ASEAN does commit to its Principles of adherence to multilateral trade rules and ASEAN’s rules-based regimes to effectively implement economic commitments. The aviation industry and the people of ASEAN

³⁹⁹ Woon, ‘The ASEAN Charter Dispute Settlement Mechanisms’ (n 374)

benefit from this open skies policy. What people in ASEAN experience is that there are many more airlines carrying out passenger air services and that there are more choices in low-cost airlines when travelling between AMSs.

ASEAN started the single market through a sectoral approach. Rules on competition for the aviation industry in ASEAN are clearly stated and contain specific language which differs from the usual competition law language, for example, unfair competitive behaviour (it is usually ‘anticompetitive behaviours’). The dispute settlement mechanism is straightforward and unified because all economic agreements are subject to the Vientiane Protocol.

C) Current Progress of ASEAN Single Aviation Market (ASAM)

As stated above, there are three aviation agreements among the AMSs. Each agreement provides different freedom of the air.⁴⁰⁰ Countries normally grant the First and Second Freedom, but the rest of the nine Freedoms will be granted upon negotiation. However, the International Civil Aviation Organization (ICAO) only recognise the first five.⁴⁰¹

The ASEAN Air Services has been ratified by all AMSs and entered into force on 23 November 2009. There are six Protocols under this Agreement. Protocol 1 and 2 allow unlimited third, fourth, and fifth Freedom for designated airlines of the AMSs to

⁴⁰⁰ “The Freedom of the Air are a set of commercial aviation rights granting a country’s airline the privilege to enter and land in another country’s airspace, formulated as a result of disagreements over the extent of aviation liberalization in the Convention on International Civil Aviation of 1944, known as the Chicago Convention.” See Arpad Szakal, ‘Freedoms Of The Air Explained’ <<http://www.aviationlaw.eu/wp/wp-content/uploads/2013/09/Freedoms-of-the-Air-Explained.pdf>> accessed 15 April 2017 for details of nine Freedom of the Air.

⁴⁰¹ ICAO, ‘Freedom of the Air’ <<http://www.icao.int/Pages/freedomsAir.aspx>> accessed 15 April 2017

operate air passenger services within the ASEAN Sub-Region.⁴⁰² However, these Freedom are limited to and from designated points fixed in the Protocols only.⁴⁰³ Protocol 3 and 4 allow unlimited third, fourth, and fifth Freedom for airlines of the AMSs to operate passenger services between ASEAN Sub-Regions.⁴⁰⁴ Protocol 5 and 6 allow an unlimited third, Fourth, and Fifth Freedom for designated airlines of the AMSs to provide passenger services between ASEAN capital cities.⁴⁰⁵

ASEAN Air Freight Services has been ratified by all AMSs and entered into force on 23 November 2011. There are two Protocols under this Agreement. Protocol 1 provides unlimited Third, Fourth, and Fifth Freedom to designated AMSs airlines to provide international air freight services to and from designated points which are listed in Article 4. Protocol 2 provides unlimited Third, Fourth, and Fifth to designated airlines of the AMSs to provide international air freight services to and from all points with international airports in ASEAN.

ASEAN Passenger Air Services has been ratified by all AMSs and entered into force on 30 June 2011. Protocol 1 allows unlimited Third and Fourth Freedom to designated airlines of the AMSs to operate the agreed services to and from any ASEAN

⁴⁰² Article 1 of Protocol 1 Unlimited Third and Fourth Freedom Traffic Rights within the ASEAN Sub-Region and Article 1 of Protocol 2 Unlimited Fifth Freedom Traffic Rights within the ASEAN Sub-Region provide 4 specific sub-regions: 1. Brunei, Indonesia, Malaysia, and Philippines 2. CLMV countries 3. Indonesia, Malaysia, and Singapore growth triangle 4. Indonesia, Malaysia, and Thailand growth triangle.

⁴⁰³ Article 2, of Protocol 1 Unlimited Third and Fourth Freedom Traffic Rights within the ASEAN Sub-Region and Article 2 of Protocol 2 Unlimited Fifth Freedom Traffic Rights within the ASEAN Sub-Region

⁴⁰⁴ Article 1 of Protocol 3 Unlimited Third and Fourth Freedom Traffic Rights between the ASEAN Sub-Regions and Article 1 of Protocol 4 Unlimited Fifth Freedom Traffic Rights between the ASEAN Sub-Regions provide 4 specific sub-regions the same as in Protocols 1 and 2 in note 402 above.

⁴⁰⁵ Article 3 of Protocol 5 on Unlimited Third and Fourth Freedom Traffic Rights between ASEAN Capital Cities; Article 4 of Protocol 6 on Unlimited Fifth Freedom Traffic Rights between ASEAN Capital Cities

cities with international airports.⁴⁰⁶ Protocol 2 allows the unlimited fifth Freedom to the designated AMSs' airlines to operate the agreed services to and from any ASEAN cities with international airports.⁴⁰⁷

D) Why Aviation?

Why should ASEAN focus at the air transportation first? Because ASEAN is negotiating a collaboration with other dialogue partners on air transportation such as China, Japan, South Korea, the US, and the EU.⁴⁰⁸ If ASEAN's aviation sector is competitive, it will be in a better position to compete with international carriers from these countries once the market access has been granted. Besides, tourism is one of the key industries in ASEAN. ASEAN is the destination of millions of tourists per year. The statistic shows that in 2013 alone, there were 9,8001,000 visitors came to ASEAN. And almost half of them are from within ASEAN.⁴⁰⁹ The more competitive ASEAN's aviation market becomes the more visitors, which leads to better connectivity among AMSs and great potential for the tourism industry. With Indonesia's ratification of the Aviation Agreements, this ASAM should foster a gradual convergence in policy and market liberalisation.⁴¹⁰

⁴⁰⁶ Article 1 of Protocol 1 Unlimited Third and Fourth Freedom Traffic Rights between any ASEAN Cities.

⁴⁰⁷ Articles 1 and 2 Protocol 2 Unlimited Fifth Freedom Traffic Rights between any ASEAN Cities

⁴⁰⁸ 'Building the ASEAN Community: ASEAN Single Aviation Market One Sky, One Region' <<http://www.asean.org/storage/images/2015/October/outreach-document/Edited%20ASAM-2.pdf>> accessed 7 June 2016

⁴⁰⁹ ASEAN Secretariat, ASEAN Statistical Yearbook 2014 (ASEAN Secretariat Jakarta 2014) 146 <<http://www.asean.org/storage/images/2015/July/ASEAN-Yearbook/July%202015%20-%20ASEAN%20Statistical%20Yearbook%202014.pdf>> accessed 15 April 2017

⁴¹⁰ ASEAN Briefing, 'The State of ASEAN Aviation in 2016' <<http://www.aseanbriefing.com/news/2016/05/06asean-aviation-2016.html>> accessed 15 April 2017

Transportation is one of the key strategic measures in the AEC Blueprint 2025 to help AEC realise its goal to enhance connectivity and sectoral cooperation.⁴¹¹ Thus, it is strategically sound to start improving competitiveness in these sectors first. This thesis argues that ASEAN does not have enough resources to support and enable the AEGC to provide all-sectoral supervision and hinder anticompetitive conducts. It is very doubtful whether the AEGC would have enough experts who can assist the AEGC in such highly demanding tasks.

An all-sector approach to competition law and policy has shown a slow progress. This is not to say that the progress ASEAN has made in competition law and policy is a waste of time. In fact, it is a remarkable success that finally, all AMSs use their best effort to introduce comprehensive competition law in their countries. But it could have been better and quicker if ASEAN chose a sectoral approach. The capacity building still has a long way to go. It took ASEAN more than 10 years to realise the goal of introducing national competition law, how long AMSs take to create competent NCAs to curb anticompetitive behaviours in their countries and in the region? Can ASEAN wait that long? This is the reason why this thesis proposes that ASEAN takes sectoral approach. As Porter suggests that it is better for a country to focus on one industry at a time to increase its competitiveness. ASEAN should also focus on what it has already started – ASAM.

E) Evidence of Effectiveness of ASAM Policy

For the purpose of this thesis, an effective sectoral approach to competition law and policy is measured by the increase in activities and new entrants because it is presumably competitive. Because this thesis argues that in order to become a highly

⁴¹¹ ASEAN, AEC Blueprint 2025 (n 187) paras 45 - 66

competitive region, ASEAN does need an effective competition law and policy alongside with economic development. However, a regional approach to competition law which is suitable to ASEAN way is a soft law approach.

The first aviation Agreement among AMSs came into force since 2009. Before that period number of air passengers travelling from ASEAN was approximately 100 million. However, it is evident that the volume of people travelling by airplanes has triple in 2015 from 2009 (Table 1 in Annex 4). Table 2 of Annex 4 also shows the correlation between numbers of passengers carried with the number of carrier departure from AMSs as the number of registered carrier departure from the ASEAN triple. All data used in Table 1 and Table 2 was extracted from the World Bank database.⁴¹²

A statistic from ASEAN confirms that the ASAM has a positive impact on ASEAN aviation market as aircraft traffic on international routes has significantly increased (Table 3 in Annex 4). Although the roadmap of ASAM indicates that AMSs intend to apply an all-sector approach to competition law and policy in ASEAN aviation market,⁴¹³ this thesis argues that it will delay effective enforcement of competition law in this area and the chance of AEC to become a highly competitive region.

F) Experience of Sector Specific Regulatory from Other Countries

Wisuttisak has conducted research on sectoral regulation on electricity of the US, the UK, Australia, New Zealand, Japan, and South Korea.⁴¹⁴ He found that these

⁴¹² World Bank, 'World Bank Open Data' <<http://data.worldbank.org/>> accessed 15 April 2017

⁴¹³ ASEAN, 'Implementation Framework of the ASEAN Single Aviation Market' <http://asean.org/wp-content/uploads/images/archive/documents/111219-17th%20ATM_Agenda%20Item%208%20ASAM%20Implementation%20Framework.pdf> 5 accessed 15 April 2017

⁴¹⁴ Pornchai Wisuttisak, 'Competition Law and Sectoral Regulation in the Electricity Sector in Thailand: Current Problems, International Experience and Proposals for Reform' (DPhil thesis, University of New South Wales 2013)

countries have specific regulators to ensure undistorted competition in the relevant electricity sectors. Their specific regulators also collaborate with competition authorities in their countries to optimise the effectiveness of competition policy enforcement.

According to Wisuttisak, In the US, the Federal Energy Regulatory Commission (FERC) oversees the wholesale of electricity pricing and regulates interstate transmission of natural gas, oil, and electricity. FERC collaborate with Department of Justice (DOJ) and the Federal Trade Commission (FTC), the two prominent federal antitrust enforcement authorities. The FTC advises the FERC on various issues such as merger regulation and regulatory reform.⁴¹⁵

However, the FERC does not have authority in Texas. Texas has its own independent system operator, the Electricity Reliability Council of Texas (ERCT). The ERCT is regulated by the Public Utility Commission of Texas (PUCT) and the Texas Legislature.⁴¹⁶ Texas is considered one of the most competitive electric markets in the world.⁴¹⁷ New entrants were encouraged to enter the market. The number of active retail electric providers (REPs) had increased from 10 to 52 in 2013 and number of products had increased from 11 to 322. It has 110 REPs alongside with other providers. PUCT plays a key role in promoting competition in the market and educate consumers to empower them to act in the market.⁴¹⁸

In the UK, Wisuttisak found that Office of the Gas and Electricity Markets (OFGEM) regulate both wholesale and retail electricity market. Its tasks involve

⁴¹⁵ *ibid* 188 – 191

⁴¹⁶ ERCOT, 'About ERCOT' < <http://www.ercot.com/about> > accessed 21 April 2017

⁴¹⁷ Stephen Pointing, 'A look at the world's most competitive retail electricity market' (Lexology, August 2015) <<http://www.lexology.com/library/detail.aspx?g=9ad49e03-e782-4550-935a-32355d3ac5ca>> accessed 21 April 2017

⁴¹⁸ *Ibid*

ensuring market competition and consumer welfare are pursued.⁴¹⁹ OFGEM will coordinate with Competition and Markets Authority (CMA) which oversee market competition in the UK. The two authorities have concurrent power and work together under the framework of competition law.⁴²⁰

In Australia, Wisuttisak found that the Australia approach to regulation of energy market is similar to that of the UK. In Australia, the Australian Energy Market Commission (AEMC) which has authority to making rules on National Electricity Market.⁴²¹ The AEMC collaborate with the Australian Competition and Consumer Commission (ACCC) and the Australia Energy Regulator (AER). The AER is responsible for monitoring wholesale and retail energy market.⁴²² It has independent board and shares staff, resources, and facilities with the ACCC.⁴²³ These authorities have made a memorandum to coordinate by *inter alia* keeping each other informed, sharing information, and not disclosing confidential information received from each other, consulting and cooperating.⁴²⁴

In the case of New Zealand, Wisuttiak found that the country applied overall competition policy on its electricity market through the work of the Commerce

⁴¹⁹ Pornchai Wisuttisak, 'Competition Law and Sectoral Regulation in the Electricity Sector in Thailand: Current Problems, International Experience and Proposals for Reform' (n 414) 191 – 192

⁴²⁰ OFGEM, 'Memorandum of understanding between the Competition and Markets Authority and the Gas and Electricity Markets Authority – Concurrent Competition Powers' (24 February 2016) <<https://www.ofgem.gov.uk/publications-and-updates/memorandum-understanding-between-competition-and-markets-authority-and-gas-and-electricity-markets-authority-concurrent-competition-powers>> accessed 16 April 2017

⁴²¹ ACCC, 'Memorandum of Understanding between Australian Energy Market Commission and Australian Energy Regulator and Australian Competition and Consumer Commission' (23 June 2014) <<https://www.accc.gov.au/system/files/Memorandum%20of%20Understanding%20between%20AER%2C%20ACCC%20and%20AEMC.pdf>> accessed 16 April 2017

⁴²² AER, 'About Us' <<https://www.aer.gov.au/about-us>> accessed 16 April 2017

⁴²³ ACCC, 'Memorandum of Understanding between Australian Energy Market Commission and Australian Energy Regulator and Australian Competition and Consumer Commission' (n 421)

⁴²⁴ ACCC, 'Memorandum of Understanding between Australian Energy Market Commission and Australian Energy Regulator and Australian Competition and Consumer Commission' (n 421)

Commission which was not very effective because it was not rigorously enforced.⁴²⁵ The government later established the Electricity Authority in 2010 (formerly known as Electricity Commission) to oversee wholesale and retail electricity market.⁴²⁶ The two authorities coordinate through a series of memoranda of understanding they signed.⁴²⁷

In Japan, Wisuttisak found that Japan has a progressive approach to liberalisation of its electricity market. The Electricity Utilities Industry Law was amended many times. In 2003 as part of liberalisation, Ministry of the Economy, Trade and Industry (METI) had to support the establishment of the Electricity Power Council of Japan (ESCJ),⁴²⁸ which is a private organisation which provide neutral advice as to rules and regulation of the fair and transparent use of electric power.⁴²⁹ According to Wisuttisak, ‘the Japan Fair Trade Commission (JFTC) plays an indirect role in stimulating market competition’⁴³⁰

Wisuttisak found that in South Korea the Korean Electricity Commission (KOREC) regulate both wholesale and retail electricity market and ensures fair competition. According to him, KOREC has played a very active role in the market. The Monopoly Regulation and Fair Trade Act (MRFTA) is not applicable to regulated sector. Therefore, KOREC and the Ministry of Commerce, Industry and Energy (MCIE) assume the key role in this sector. However, the MRFTA is applicable to unregulated activities of Korea Electric Power Corporation’s (KEPCO). In this regard, the Korea

⁴²⁵ Wisuttisak, ‘Competition Law and Sectoral Regulation in the Electricity Sector in Thailand: Current Problems, International Experience and Proposals for Reform’ (n 414) 195 – 197

⁴²⁶ Electricity Authority, ‘About Us’ <<https://www.ea.govt.nz/about-us/who-we-are/>> accessed 16 April 2017

⁴²⁷ Commerce Commission, ‘MOU with the Electricity Commission’ (18 August 2011) <<https://www.comcom.govt.nz/the-commission/archive-10/mou-with-the-electricity-commission/>> accessed 16 April 2017

⁴²⁸ Wisuttisak, ‘Competition Law and Sectoral Regulation in the Electricity Sector in Thailand: Current Problems, International Experience and Proposals for Reform’ (n 414) 197 – 198

⁴²⁹ Federation of Electric Power Companies of Japan, ‘Fair Competition and Transparency’ <http://www.fepc.or.jp/english/energy_electricity/fair_competition/> accessed 16 April 2017

⁴³⁰ Wisuttisak, ‘Competition Law and Sectoral Regulation in the Electricity Sector in Thailand: Current Problems, International Experience and Proposals for Reform’ (n 414) 199

Fair Trade Commission (KFTC) is in charge of such supervision. KFTC collaborate with MCIE and KOREC in matters of adoption of regulations which may create an anticompetitive effect.⁴³¹

It is clear from Wisuttisak's research that sectoral approach to curbing anticompetitive conducts has been practised in many countries. Specific regulators and competition authorities collaborate together to enhance competitiveness in the market. Their role complements each other.

The difference between these countries' experience and ASEAN is the AEGC is not the competition authority of ASEAN. The role of the AEGC is only as a platform for the exchange of best practices among AMSs which is dealt below. Its expertise in any given market is doubtful. This sectoral approach to competition law and policy is suitable to AMSs as it allows the AMSs to agree on a specific industry with which they are confident and more comfortable to engage on in a rule-based fashion. The choice of dispute settlement mechanisms in the Vientiane Protocol provides consistency and predictability. Although no disputes on competition laws in the aviation industry among the AMSs have occurred so far, this shows a strong commitment by the AMSs to be bound by these rules. Besides, the sectoral approach allows ASEAN to improve its competitiveness in accordance with Porter's recommendations.

⁴³¹ *ibid* 199 – 201

4.2 THE EU APPROACH TO COMPETITION LAW AND POLICY

This section focuses on the centralised and decentralised powers of the Commission to enforce the EU competition law. It aims to support the thesis that the EU approach to competition law and policy is not suitable to the ASEAN way.

Since the very beginning of the integration of the European countries after the WWII, ensuring that the market is not distorted was incorporated in the Treaties between the European countries.⁴³² Members of the Union were aware of the regional competition rules imposed upon them. Upon accession, new members are also bound by the EU competition law.

Majone considered the importance attached to rules on market competition as strictly utilitarian i.e. ‘it would be impossible to integrate a group of heavily regulated economies without limitations on the interventionism of the national governments.’ He asserted that the European leaders did not agree to commit on regional competition law because they embraced the genuine free-market philosophy.⁴³³ This is true, because the EU pursues a social market economy.⁴³⁴ It is a type of market that combines market freedom with social balance and is at contrast with a *laissez-faire* market economy. It requires ‘a clear legal and political regulatory framework to ensure that competition is

⁴³² Under the Treaty Establishing the European Coal and Steel Community, the High Authority ensured that free competition was respected. See EUR-Lex, ‘Treaty Establishing the European Coal and Steel Community, ECSC Treaty’ <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm> accessed 2 June 2016; Treaty Establishing the European Economic Community, Article 3 provided that the EEC would establish a system of competition ensuring that competition shall not be distorted;

⁴³³ Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (n 191) 272

⁴³⁴ Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) art 3(3)

durably maintained'.⁴³⁵ This ideology corresponds to the legal platforms chosen in the establishment of the EU – centralised, law-based institutions.

The European model of regional integration is 'integration through law' as Majone put. The law is a substitute for democratic politics. The use of legal means is to compensate the lack of mutual trust among a growing number of member states.⁴³⁶ According to Majone, 'Miles Kahler argued that economic integration need not lead to centralized, law-based institutions that tend to expand the scope of their competencies'.⁴³⁷ Besides, the EU model has been heavily criticised as 'excessive policy harmonization'.⁴³⁸ It is argued that at the establishment of the European integration, the founding fathers were too concerned with overcoming the nationalism that had led Europe to the World Wars by focusing solely on the transferring of sovereign national state powers to the supranational body and lost sight on exploring other alternatives for inter-states relations.⁴³⁹

This is opposite to ASEAN. Regional competition law was not discussed at the establishment of ASEAN in 1967. ASEAN does not have regional competition law and policy. AMSs enacted their own competition laws and apply their own competition policy as they see appropriate. Moreover, ASEAN operates on mutual trust. There is no legal sanction on an AMS which does not or cannot fulfil its obligations. AMSs opt for consultation and consensus and dispute settlement mechanisms such as those prescribed in the Vientiane Protocol. The ASEAN way maybe regarded as slow when measured

⁴³⁵ Hans Tietmeyer, *The Social Market Economy and Monetary Stability* (Economica, London 1999) 6

⁴³⁶ Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (n 191) 8

⁴³⁷ *ibid* 112

⁴³⁸ Albert Breton, *Competitive Government* (Cambridge University Press 1996) 275

⁴³⁹ Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (n 191) 269

with the EU standard, but at least none of the AMS expresses the intention to leave the community yet.

It is evident that the excessive policy harmonisation cannot guarantee the stability of the EU. Brexit is the good example which speaks for itself. This undoubtedly raises the question whether such level of harmonisation is suitable and necessary for ASEAN. Is such a supranational organisation necessary for economic integration such as the AEC? Rodrik suggested that globalisation, states, and democracy cannot coexist, and that when they clash, it is global economy that has to give way. He further asserted that '[a] thin layer of international rules that leaves substantial room for manoeuvre by national governments is a *better* globalization.'⁴⁴⁰ He insisted that we need 'smart globalization, not maximum globalization.'⁴⁴¹

In the EU, the Union has exclusive competence in, *inter alia*, establishing the competition rules necessary for the functioning of the internal market.⁴⁴² The Commission is entrusted with the power to propose legislative acts,⁴⁴³ It was conferred the sole power to enforce EU competition law, especially to grant exemption to anticompetitive agreements pursuant to Article 101(3),⁴⁴⁴ jurisdiction over large mergers in 1990,⁴⁴⁵ and 'is responsible for fact-finding, and taking action against anticompetitive practices which affect the common market and imposing fine and penalties, adopting block exemption regulations, conducting sectoral inquiries, investigating mergers and

⁴⁴⁰ Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, and Democracy Can't Coexist* (Oxford University Press 2011) xix

⁴⁴¹ *ibid*

⁴⁴² Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 3(1)(b)

⁴⁴³ TEU art 17(2)

⁴⁴⁴ Council Regulation (EEC) 17/1962 first regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 013, 21/02/1962 (Reg 17/1962) art 9(1)

⁴⁴⁵ European Commission, *The EU Explained: Competition* (Publication Office of the European Union 2014) 3

state aids'.⁴⁴⁶ Such decisions by the Commission are subject to review by the EU Courts.⁴⁴⁷

However, Reg 1/2003 decentralised that power to grant exemption under Article 101(3) to the national competition authorities and the national courts⁴⁴⁸ and created the European Competition Network (ECN). The Commission's infringement decisions are subject to review by the EU Courts.⁴⁴⁹

Within the Commission, the DGCOM is responsible for making competition policy⁴⁵⁰ and manages the day-to-day operations of the Commission. There are two Hearing Officers who work independently from the DGCOM and who report directly to the Commissioner for administrative purposes. Their tasks are to safeguard the due process and parties' procedural rights, conduct oral hearings, and to act as an independent arbiter in antitrust and merger disputes between the parties and DGCOM regarding the exercise of procedural rights.⁴⁵¹ It was reported that the DGCOM had 947 permanent staff in 2010.⁴⁵²

The fact that the Commission has the power to propose laws, to investigate suspicious anticompetitive practices, to issue statements of objection, to accept commitments proposed by undertakings, and to impose fines against undertakings appears to combine the inclusive power of the enforcement of EU competition law in one organisation.

⁴⁴⁶ Richard Whish and David Bailey, *Competition Law* (8th ed, OUP 2012) 56

⁴⁴⁷ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty [2003] OJ L1/1 (Reg 1/2003) art 15

⁴⁴⁸ *ibid* arts 3, 5, and 6

⁴⁴⁹ *ibid* art 15

⁴⁵⁰ Lisa Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP 2010) 15

⁴⁵¹ See European Commission, 'Hearing Officers: Mission' <http://ec.europa.eu/competition/hearing_officers/index_en.html> accessed 6 January 2016.

⁴⁵² *Butterworths Competition Law Service* (Issue 119, July 2016) para 84

The EU Courts include the Court of Justice (ECJ), the General Court (EGC), and the Civil Service Tribunal. Their powers are stated in Article 19 of the TEU. There are two major doctrines established by the ECJ which enable the Commission to effectively enforce and implement the EU competition law: the doctrine of direct effect⁴⁵³ and the doctrine of supremacy.⁴⁵⁴ The ECJ has one judge from each Member State and 11 Advocate Generals (AG)⁴⁵⁵. The EGC has one judge from each Member State, but there is no position of AG separated from the judges. Hence, a judge in the EGC must be designated to perform the function of AG in a plenary session.⁴⁵⁶ One Advocate General will be assigned to a case and has the power to question both parties in a public hearing. If the ECJ decides that an Opinion of the AG is necessary, the AG will provide his opinion of the case which may or may not be followed by the judges who will render judgement after this.⁴⁵⁷

It is very clear that the EU approach to competition law and policy is a hard law approach. The language of the competition provisions in the TFEU is precise; the legal obligation and commitment which is required of the member states are enforceable, and the issues of anticompetitive behaviours are solved and interpreted by internal dispute resolution system. What makes the EU hard law approach successful (in terms of enforceability and applicability of member states), but the WTO one fails?

The European Competition Network (ECN) and the Commission form a network of competition authorities. The ECN is a forum for discussion and cooperation

⁴⁵³ Case 127/73 *Belgische Radio en Televisie (BRT) v SABAM* [1974] ECR 313

⁴⁵⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1; Kalypso Nicolaïdis and Raymond Vernon, 'Competition Policy and Trade Policy in the European Union' in Edward M. Graham and J. David Richardson (eds) *Global Competition Policy* (Institute for International Economics 1997)

⁴⁵⁵ *Halsbury's Laws of England* (5th edn, 2014) vol 47A, para 57

⁴⁵⁶ *ibid* para 60

⁴⁵⁷ *ibid* para 204

in the application and enforcement of EU competition law.⁴⁵⁸ The ECN ‘does not have any autonomous powers or competences. It is not an institution, and it does not have any legal personality.’⁴⁵⁹ The establishment of the ECN is necessary because of the decentralisation of powers away from the Commission to enforce competition law. So that NCAs can enforce Article 101 and 102 more fully, a forum of discussion to ensure that all NCAs are on the same page must be created. The ECN does not need any power to enforce the law, as that power rests with the NCAs and the Commission.

Considering the DGCOM comprises of nearly 1,000 staff members, the size of this organisation is enormous. ASEAN has a higher total population than the EU. That implies a bigger organisation would be needed to be able to oversee the enforcement of competition law and policy at the regional level effectively should a supranational approach be chosen.

In 2009, the ASEAN Secretariat was reported to function on a small annual operational budget of US\$ 9.05 million, while the EU and its Commission have nearly US\$ 190 billion.⁴⁶⁰ In 2015, it was reported that the ASEAN Secretariat’s budget was US\$ 19 million.⁴⁶¹ It is unlikely that contributions from the AMSs would be increased to afford a new supranational body, because AMSs equally contribute to the operational annual budget of the Secretariat.⁴⁶²

⁴⁵⁸ Commission, ‘Commission Notice on Cooperation within the Network of Competition Authorities’ (Notice) 2004/c 101/03 OJ C101/43 para 1 (Network Notice)

⁴⁵⁹ European Commission, ‘Competition: Frequently Asked Questions’ <<http://ec.europa.eu/competition/ecn/faq.html>> accessed 2 June 2016

⁴⁶⁰ Termsak Chalermpananupap, ‘In Defence of the ASEAN Charter’ in Tommy Koh, Rosario G. Manolo, and Walter Woon, (eds) *Making of the ASEAN Charter* (World Scientific/IPS 2009)

⁴⁶¹ Quratul-Ain Bandal, ‘ASEAN Secretariat Getting Funds to Raise Staff Salaries’ *The Brunei Times* (Brunei, 29 November 2014) <<http://www.bt.com.bn/news-national/2014/11/29/asean-secretariat-getting-funds-raise-staff-salaries>> accessed 5 May 2016

⁴⁶² ASEAN Charter art 30(2)

According to Rodrik, Cameron's study of 18 advanced economies found that the governments have grown the largest in the economies that were the most exposed to international markets. Rodrik also found a strong positive correlation between a nation's exposure to international trade and the size of its government due to social insurance motives. Once the markets expand and are more exposed to competition internationally, people demand compensation against that risk. The government must 'establish peace and security, protect property rights, enforce contracts, manage the macroeconomy, . . . preserves the legitimacy of markets by protecting people from the risk and insecurities markets bring with them.'⁴⁶³ Hence, the government needs to expand to be able to deal with these responsibilities efficiently. Additionally, the political transaction costs of setting up, maintaining and changing a system's formal and informal political organisation, costs of running a polity⁴⁶⁴ should be taken into account when considering setting up a supranational body to oversee the market of the AEC.

The above paragraph strongly supports the pragmatic point of view of the unsuitability of a supranational body for the ASEAN way. If a country which is exposed to international trade needs its government to expand to effectively deal with the challenges it will face, a region as big as ASEAN which exposes itself to the globalisation and international market must have even larger government-like body, provided that ASEAN pursues a supranational approach to its functioning.

The aim of the economic integration is to reduce the transaction costs between members of the trading bloc to facilitate and promote trade between them, not to raise the costs of transactions. Trade barriers are abolished; labour, goods, and capitals can

⁴⁶³ Rodrik, *The Globalization Paradox: Why Global Markets, States, and Democracy Can't coexist* (n 440) 17 - 19

⁴⁶⁴ Eirik G Furubotn and Rudolf Richter, *Institutions & Economic Theory: The Contribution of the New Institutional Economics* (2nd ed, University of Michigan Press 2010) 55 - 57

move freely in the intra-regional trade area. This is the point of the economic integration. AMSs desire to increase trade among them and to increase competitiveness of their markets and undertakings. The AEC is not for political stability, but to enhance prosperity. Setting up a supranational body will increase transaction costs among the AMSs which contradicts the reasons for this integration.

4.3 ASEAN'S APPROACH TO REGIONAL COMPETITION LAW AND POLICY

For ASEAN as a regional block the formation of other territorial economic organisations such as NAFTA and the EU was perceived as an economic threat.⁴⁶⁵ The emerging economies of India and China and the loss of incoming FDI in these countries made ASEAN leaders reconsider ASEAN's position in the world trade. Once again ASEAN was driven by the fear of being left behind in the world economy.

At the fourth ASEAN Summit in Singapore on 28th January, 1992, the heads of the six ASEAN Member States signed three documents: the Singapore Declaration of 1992, the Framework Agreement for Enhancing the ASEAN Economic Cooperation (Framework Agreement), and the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (CEPT Agreement). The AMSs agreed to fully establish the AFTA within 15 years (by 2008) and agreed that the main mechanism for enhancing trade amongst the member states was the CEPT.

⁴⁶⁵ Colin Ong, 'The ASEAN Free Trade Area and the Necessity for the Creation of a Legal Mechanism for Resolving Private Disputes of an International Nature' [1998] J.B.L. 213

It took ASEAN five years to realise the importance of regional integration and competitiveness. In its Leaders Summit in Kuala Lumpur in 1997, the leaders finally committed themselves and declared in ASEAN Vision 2020 that they would work towards closer economic integration and narrowing the gap of development levels among member states. Among many other promises, they expressed the desire to create a highly competitive ASEAN economic region.

In the Declaration of ASEAN Concord II in Bali, on 7 October 2003, the leaders of ASEAN declared their intention to create an ASEAN Community by 2020 which is comprised of three pillars namely ASEAN Political-Security Community, ASEAN Economic Community (AEC), and ASEAN Socio-Cultural Community.

The leaders agreed to accelerate the establishment of the AEC by signing the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015 on 13 January 2007. It is believed that the rising economic power of countries such as India and China was the reason why ASEAN accelerated the process to establish a single market and production base.⁴⁶⁶

They also signed the Declaration on the ASEAN Economic Community Blueprint in Singapore, on 20 November 2007, to adopt the AEC Blueprint (AEC Blueprint 2015).

The AEC Blueprint 2015 describes the characteristics and elements of the AEC as a single market and production base and as a highly competitive region.⁴⁶⁷ In order to become a highly competitive economic region, it put forward six areas to be developed by the ASEAN Member States (AMSs). They are: 1. Competition policy, 2. Consumer

⁴⁶⁶ Daniel Seah, 'The ASEAN Charter' (2009) 58 I.C.L.Q. 197

⁴⁶⁷ ASEAN, *AEC Blueprint* (n 26) para 6

protection, 3. Intellectual Property Rights, 4. Infrastructure development, 5. Taxation, and 6. E-Commerce.

Regarding competition policy, the AEC Blueprint 2015 laid down only four strategies to be undertaken by the AMSs by the end of 2015 which are:

1. Introducing competition law in all ASEAN Member States (AMSs) by 2015. At the time of writing (April 2016), all AMSs except Cambodia have enacted national competition laws. However, the competition laws of Myanmar and Laos are not yet in force.
2. Establishing a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies. The ASEAN Experts Group on Competition (AEGC) was created in 2007 to undertake this role.
3. Encouraging capacity building programmes/activities for AMSs in developing national competition policy. The AEGC is in charge of this task.
4. Developing a regional guideline on competition policy by 2010, based on country experience and international best practices with the view to create a fair competition environment.⁴⁶⁸ The AEGC has published the Regional Guidelines on Competition Policy (Regional Guidelines) and Handbook on Competition Policy and Law in ASEAN for Business in 2010 (Business Handbook). In 2012, it published Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN (RCC Guidelines).

As can be seen, the strategies for ASEAN competition policy from 2007 – 2015 were limited. Most of the works have been done in time except introducing competition

⁴⁶⁸ *ibid* para 41

law in all AMSs. The ambitious goal of becoming a highly competitive single market and production base in 2015 was, indeed, ambitious. It is evident that on 31 December 2015, ASEAN has only begun its route to become a highly competitive region, and has not yet reached the finishing line. The impact of the AEC Blueprint 2015 on the AMSs' competitiveness is marginal. The AMSs' overall competitiveness, the effectiveness of antimonopoly policy, and the goods market efficiency in 2008 – 2016 have not significantly improved compared to the period before the adoption of the AEC Blueprint 2015. (See Tables 10 – 17 in Annex 1 of chapter 2 for details). ASEAN has opted for a soft law approach in competition law and policy of the region, which is more suitable to ASEAN due to the ASEAN way.

4.3.1 THE AEGC

A network of agencies under the AEC Blueprint 2015⁴⁶⁹ was established in August 2007 by the ASEAN Economic Ministers called the ASEAN Experts Group on Competition (AEGC) to serve as a forum for discussion and cooperation among ASEAN member states and as an official ASEAN body to exchange policy experiences and institutional norms on competition law and policy. Its goal is to promote a healthy competitive environment in ASEAN⁴⁷⁰ and to foster culture of fair competition.⁴⁷¹

The AEGC has published a number of publications on advocacy of competition law to the AMSs and their stakeholders. It is not an authority. The AEGC has no authoritative power to implement, enforce, apply, interpret, or impose any fine on any firm engaged in anticompetitive acts against ASEAN. The AEGC has no jurisdiction and

⁴⁶⁹ *ibid*

⁴⁷⁰ AEGC, *ASEAN Regional Guidelines on Competition Policy 2010* (ASEAN Secretariat 2010) ii

⁴⁷¹ AEGC, 'About ASEAN Experts Group on Competition (AEGC)' <<http://www.aseancompetition.org/aegc/about-asean-experts-group-competition-aegc>> accessed date 15 May 2015

supranational status over AMSs as the DGCOM has over the EU member states. Some may compare AEGC with the ECN, but they were established for different purposes.

The AEGC is comprised of the heads of national competition authorities from member states. Each AMS will chair the AEGC by rotation.⁴⁷² There is no physical office or secretariat of AEGC. The AEGC is divided into 5 working groups. Most of the works and goals set for the AEGC have been completed. It has yet to develop and finalise the AEGC Capacity Building Roadmap.⁴⁷³ The latest work under the AEGC, which was led by the Competition Commission of Singapore, is the Toolkit for Competition Policy, Law and Advocacy in ASEAN.⁴⁷⁴

The AEGC has developed a strategic plan for 2016 – 2025 called the ASEAN Competition Action Plan (ACAP) which is identical to the strategic measures for competition policy provided in the AEC Blueprint 2025.⁴⁷⁵ The AEGC also works with partners such as Australia-New Zealand through the “Competition Law Implementation Program” under the ASEAN-Australia-New Zealand FTA⁴⁷⁶ and Germany in the “Competition Policy and Law in ASEAN” project.⁴⁷⁷

⁴⁷² As of 6 April 2016, Laos chairs the AEGC

⁴⁷³ AEGC, ‘About ASEAN Experts Group on Competition (AEGC)’ (n 468)

⁴⁷⁴ ASEAN Competition Policy and Law, ‘First Meeting of ASEAN, Australia and New Zealand Heads of Competition Agencies on Competition Cooperation’ (27 April 2016) <<http://www.asean-competition.org/read-news-first-meeting-of-asean-australia-and-new-zealand-heads-of-competition-agencies-on-competition-cooperation>> accessed 19 May 2016

⁴⁷⁵ ASEAN Competition Policy and Law, ‘ASEAN Experts Group on Competition’ <<http://www.asean-competition.org/aegc>> accessed 17 May 2016

⁴⁷⁶ It was reported that two experts from the Australian Competition and Consumer Commission visited Thailand and shared with the Office of Trade Competition Commission some experiences and practices in competition law from 15 – 18 March 2016. See ASEAN Competition Policy and Law, ‘Assistance to Thailand under the Competition Law Implementation Program (CLIP) ACCC Expert visit to Thailand (15-18 March 2016)’ News Thailand, 21 March 2016 <<http://www.asean-competition.org/read-news-assistance-to-thailand-under-the-competition-law-implementation-program-clip-acc-expert-visit-to-thailand-15-18-march-2016>> accessed 19 May 2016

⁴⁷⁷ GIZ, ‘Competition Policy and Law in ASEAN’ <<https://www.giz.de/en/worldwide/14574.html>> accessed 17 May 2016; ASEAN Competition Policy and Law, ‘Development Partners’ <<http://www.asean-competition.org/development-partners>> accessed 17 May 2016

4.3.2 The AEGC's Works on ASEAN Competition Law and Policy

A) The AEC Blueprint 2025

In November 2015, ASEAN leaders adopted the new AEC Blueprint 2025 which envisions 'a competitive, innovative, and dynamic ASEAN'.⁴⁷⁸ In order to increase the region's competitiveness and productivity, the AEC Blueprint 2025 focuses on elements which can improve ASEAN's competitiveness by aiming at 1 engendering a level playing field for small firms through effective competition policy, 2 fostering the creation and protection of knowledge, 3 deepening ASEAN participation in global value chains, and 4 strengthening related regulatory frameworks and overall regulatory practices and coherence at the regional level.⁴⁷⁹

A competitive, innovative and dynamic ASEAN has eight key elements as set out in the AEC Blueprint 2025.⁴⁸⁰ It is clear that the visions of the AEC in 2025 are relatively more sophisticated and advanced than those in the AEC Blueprint 2015. As mentioned earlier the deadline in the AEC Blueprint 2015 resulted in the beginning of the AEC rather than the completion of its ambitious goals, therefore, it remains to be seen whether the vision for the AEC in 2025 will be realised or will be yet another beginning of the competitive, innovative, and dynamic ASEAN.

⁴⁷⁸ ASEAN, *AEC Blueprint 2025* (n 187) para 3

⁴⁷⁹ *ibid* para 27

⁴⁸⁰ They are effective competition policy, consumer protection, strengthening intellectual property rights cooperation, productivity-driven growth, innovation, research and development, technology commercialisation, taxation cooperation, good governance, effective, efficient, coherent and responsive regulations, and good regulatory practice, and sustainable economic development.

The AEC Blueprint 2025's strategies for effective competition policy are more detailed and comprehensive than those of the 2015 version. There are seven strategies as follows:⁴⁸¹

1. Introducing competition laws to the AMSs that do not have them to establish an effective competition regime in ASEAN. And effectively implementing the national competition laws based on international best practices and the ASEAN guidelines. At the time of writing, only Cambodia has yet to pass the law. According to Saroeung Kem, Director of Department of Legal Affairs, Ministry of Commerce, the Cambodian's Competition Bill is expected to be enacted by the end of 2016.⁴⁸² Thus far, the most recent guideline is the Regional Guidelines on Competition Policy which was published in 2010. According to Toh Han Li, Chief Executive, Competition Commission of Singapore, the international best practices which seem to be the most suitable for ASEAN are those recommended by the International Competition Network.⁴⁸³ The fact that ASEAN managed to introduce competition laws in 9 of the 10 member states is a remarkable success considering that the AMSs cooperate through consensus and non-legally binding methods. This should not be taken for granted. This thesis has included the current status of competition laws of the AMSs as well as provisions on unilateral conducts or abuse of dominance of each AMS in Annex 3.
2. Strengthening the capacities of the AMSs' competition-related authorities to effectively enforce competition laws by providing technical assistance and

⁴⁸¹ ASEAN, *AEC Blueprint 2025* (n 187) paras 25 - 44

⁴⁸² Saroeung Kem, 'Regulator Discussion on New Competition Law Regimes in ASEAN' (Panel discussion at the 5th Annual Asia-Pacific Law Leaders Forum, Singapore, 3 – 4 March 2016)

⁴⁸³ Han Li, 'Regulator Discussion on New Competition Law Regimes in ASEAN' (n 231)

capacity building. This strategy is carried over from the AEC Blueprint 2015. In this regard, ASEAN has cooperated with strategic partners such as Australian and New Zealand, and received support from Germany and the OECD. But it depends on the AMS leaders to make the most of this cooperation for the benefit of the people in ASEAN.

3. Fostering a “competition-aware” region with fair competition by establishing platforms where businesses can have access to information and are encouraged to comply with the law and to promote competition advocacy and sector-studies on industry structures and practices that affect competition. The AEGC published the Business Handbook to provide businesses with information on substantive and procedural rules on the competition laws of the AMSs in simple language. Regarding competition advocacy, the AEGC published the Toolkit for Competition Policy, Law and Advocacy in ASEAN to provide practical guidance, tools and templates to develop and deliver advocacy activities for competition law and policy.⁴⁸⁴
4. Establishing Regional Cooperation Arrangements on competition policy and law to effectively deal with cross-border commercial transactions by establishing competition enforcement cooperation agreements. One can conjecture that the new platform will deal with cross-border issues while national competition authorities (NCAs) remain in charge of domestic anticompetitive practices. The AEGC, with its existing network of NCAs and resources, is in a good position to deal with cross-border commercial transactions and it would be counterproductive to establish another body to oversee this matter. However, it can be argued that the AEGC serves only as a

⁴⁸⁴ AEGC, *Toolkit for Competition Advocacy in ASEAN* (ASEAN Secretariat 2016) 4

forum for discussions and is not vested with the power to enforce competition law; consequently, for the AEGC to effectively deal with this issue is a rather ambitious plan. It remains to be seen whether AMSs will opt for establishing a separate body to administer this agreement or not. If this regional competition enforcement cooperation agreement is concluded as an economic agreement, it can provide consistency and predictability to the AMSs competition authorities and businesses in terms of dispute settlement because it will be subject to the Vientiane Protocol.

5. Developing a regional strategy on competition policy and law convergence to achieve greater harmonisation in the AMSs. A number of useful recommendations have been made by Both such as the alignment of wider political, trade and economic interests of the AMSs and focusing on competition advocacy.⁴⁸⁵ However, differences in economic development of member states can compromise the regional substantive competition law.⁴⁸⁶
6. Maintaining consistency on the approach to competition policy and law in the region by ensuring the alignment of those chapters which are negotiated by ASEAN under various FTAs. In this regard, ASEAN has been quite consistent. Most FTAs which ASEAN signed with dialogue partners do not include a chapter or provisions on competition at all. The exceptions are the ASEAN - Japan FTA which has a competition chapter which is not subject to the dispute settlement chapter and the ASEAN-Korea Agreement on Trade in Services which has a competition chapter which is subject to the dispute settlement measures in the FTA.

⁴⁸⁵ Both, 'Regionalisation of Competition Policy: What Lessons Can Be Drawn for ASEAN from Other Region's Experience?' (n 302) 28 - 29

⁴⁸⁶ *ibid* 20

7. Enhancing competition policy and law in ASEAN by taking into consideration of international best practices. As mentioned earlier, the work of the ICN appears to be most suitable to the ASEAN way of operation.

It is fair to say that ASEAN has started dealing with many of the strategies referred to above. The result of ASEAN's effort will have to be evaluated in 2025. On paper, these strategies should produce a great outcome for ASEAN provided that the AMSs come together and effectively pool their resources for the benefit of ASEAN as a whole. As mentioned in chapter 2 the AMSs should not compete with each other in a zero-sum game, but in a positive-sum game where each AMS continues to focus on increasing the competitiveness of its most important industries.

B) ASEAN Regional Guidelines on Competition Policy

The Regional Guidelines are non-binding and serve only as a reference.⁴⁸⁷ They were completed with assistance from InWEnt – Capacity Building International (Germany) and with the support from the AEGC and relevant Ministries in Member States.⁴⁸⁸ Member states may opt in or out from any recommendations made in the Regional Guidelines. The Regional Guidelines are not an exhaustive list of recommendations. It is rather short because it only outlines what competition law and policy is and should be.⁴⁸⁹

In terms of abuse of dominance or unilateral conducts⁴⁹⁰ the Regional Guidelines suggest that dominance refers to market powers that have the ability to sustain profitable

⁴⁸⁷ AEGC, *ASEAN Regional Guidelines on Competition Policy 2010* (n 467) 1

⁴⁸⁸ *ibid*, i

⁴⁸⁹ AEGC, *Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN*, (ASEAN Secretariat 2012) 5

⁴⁹⁰ Regional Guidelines, Chapter 3, 3.3 Prohibition of Abuse of a Dominant Position

prices above competitive levels⁴⁹¹ which correspond to the explanation of market power provided by the EU Commission in its Guidance on Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings⁴⁹² and the ICN Workbook.⁴⁹³ The Regional Guidelines allow the member states to decide whether they will adopt the market share threshold test.⁴⁹⁴

Abusive of dominance conducts consist of exploitative and exclusionary conducts, discriminatory behaviour and limiting production market, or technological development to the prejudice of consumers.⁴⁹⁵ However, Resale Price Maintenance is not included in the examples of anticompetitive conducts and agreements. The Regional Guidelines also clearly encourage the member states to consider applying effects-based approach instead of *per se* standard to determine whether the unilateral act in question constitutes an abuse of dominance.⁴⁹⁶

The Regional Guidelines are a product of the AEC Blueprint 2015, which did not contain much detail as to what the AMSs needed to achieve other than introducing national competition law, establishing the AEGC, encouraging capacity building, and developing regional guidelines. The Regional Guidelines fail to provide the AMSs with helpful recommendation and advice. It does not contain any explanations that can be expected in a guideline. For example, it only refers briefly to what can be considered as dominance, but it does not show how this can be analysed. It does not make any firm recommendation other than using generic and plain language such as ‘AMSs should

⁴⁹¹ AEGC, *ASEAN Regional Guidelines on Competition Policy 2010* (n 467) 3.3.1.1

⁴⁹² Commission, ‘Guidance on Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ (Communication) 2009/C 45/02 OJ C45/7 (EU Guidance 2009) para 11

⁴⁹³ ICN, ‘Unilateral Conduct Workbook Chapter 3: Assessment of Dominance’ (10th Annual ICN Conference, Netherlands, May 2011) para 5

⁴⁹⁴ AEGC, *ASEAN Regional Guidelines on Competition Policy 2010* (n 467) 3.3.1.1

⁴⁹⁵ *ibid* 3.3.2

⁴⁹⁶ *ibid* 3.3.1.2

consider prohibiting the abuse of a dominant position.’, and ‘AMSs may provide an illustrative list of such conduct:’

According to McEwin, the Regional Guidelines ‘were written by a European law firm and are based on European Community competition law with little account taken of the economic conditions and institutions in Southeast Asia and the appropriateness of the general model of competition law for the region.’ Hence, it has not been followed in detail by the AMSs.⁴⁹⁷ This is not a surprise as there is hardly any detail in the Regional Guidelines which the AMSs can use. When Thailand proposed amendments to the Trade Competition Act B.E. 2542 (1999), the Law Reform Commission of Thailand did not take the Regional Guidelines into account.⁴⁹⁸

The Regional Guidelines serve a purpose in outlining what competition law and policy should be and member states can refer to it when enacting competition law, but it does not help ASEAN becoming a highly competitive region by giving scant recommendations. One cannot see the concrete benefit the AMSs can gain from using the Regional Guidelines because there are four AMSs which enacted the national competition laws before the publication of the Regional Guidelines. However, the remaining AMSs have not taken the Regional Guidelines into account either. The ICN’s recommended practices, reports, and workbooks contain far more useful and helpful information which the AMSs could have used if they had been published earlier.

⁴⁹⁷ Ian McEwin, ‘Introduction to CPI Special Issue on ASEAN Competition Law’ (2015) 1 CPI Antitrust Chronicle 2, 3

⁴⁹⁸ คณะกรรมการปฏิรูปกฎหมาย, บันทึกความเห็นและข้อเสนอแนะ เรื่อง แนวทางการตรากฎหมายว่าด้วยการแข่งขันทางการค้า (กม.ดปค.(น) ที่ ๒/๒๕๕๗) dated 28 November 2557 (2014) [Law Reform Commission of Thailand, Memorandum of Comments and Recommendations on Guideline on Drafting of Trade Competition Law (gor mor. kor por gor. (nor) No. 2/2014)]

*C) Handbook on Competition Policy and Law in ASEAN for Business
2013 (Business Handbook)*

First published in August 2010, this Handbook is not a comprehensive guide to competition law and enforcement in member states; rather it simply documents and compiles information regarding both substantive and procedural issues of the competition laws and contains some case studies. It is aimed at ‘providing, in a language easily understandable to non-experts, basic notions of the substantive and procedural competition laws applicable in AMSs, to the benefit of regional and transnational businesses engaged in the ASEAN region.’⁴⁹⁹ This Handbook has been updated twice as more AMSs have enacted competition law.

*D) Guidelines on Developing Core Competencies in Competition Policy
and Law for ASEAN (RCC Guidelines)*

The RCC Guidelines were published in 2012 and funded by the German Federal Foreign Office under a joint project named “Capacity Building for the ASEAN Secretariat” between the ASEAN Secretariat and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Germany. This guideline focuses mainly on institutional building, enforcement and advocacy. It is said that while the Regional Guidelines provides an outline of competition law and policy, the RCC Guidelines provides a description to the national competition authorities of the process of how to develop a competition enforcement system.⁵⁰⁰

⁴⁹⁹ AEGC, *Handbook on Competition Policy and Law in ASEAN for Business* (3rd ed, ASEAN Secretariat 2013) 4

⁵⁰⁰ AEGC, *Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN* (n 489) 5

Recommendations for drafting an understandable competition law suggest possible drafting processes by formal or informal consultation, use of experts, public hearings, and advisory bodies. It is suggested that in transition economies, drafting a one-law model with simplified language is desirable. It is recommended that provisions on cartels, unilateral practices, and mergers are included, while unfair trade practices that harm consumers should be enacted in consumer protection laws.

However, the recommendation on unilateral acts or abuse of dominance does not provide much detail. It only suggests that anticompetitive conducts by incumbents should be distinguished into exploitative and exclusionary practices.⁵⁰¹ It provides more information on building agency competency. Hence, it was referred to in the proposed amendment of Trade Competition Act by the Law Reform Commission of Thailand.⁵⁰²

E) Toolkit for Competition Advocacy in ASEAN (Toolkit)

This is the latest publication under the AEGC and came out in early 2016. It provides the AMSs with practical guidance and templates for the national competition authorities to develop and deliver advocacy activities to different stakeholders.⁵⁰³ Its guidance takes into account the different levels of the NCAs' competencies. It identifies major stakeholder groups and gives sound recommendations to young NCAs as to what

⁵⁰¹ 'Selecting the appropriate substantive provisions

Unilateral practices: abuse of a dominant position, monopolisation

The second objective is met by implementing laws that forbid firms with market power (i.e. "dominant operators") from making it impossible for other businesses to compete with them. One classic example is for a business to get exclusive contracts with all suppliers of a key material or component necessary to make the product that the business makes. Another classic example is for a business to acquire all of its competitors. These kinds of prohibited activities are generally referred to as unlawful monopolization activities or abuses of dominant position.

Unilateral anticompetitive practices by dominant operators can take many forms. It may be useful to further distinguish them into two general categories: exploitative practices and exclusionary practices.' (the Core Competencies Guidelines, p. 19)

⁵⁰² คณะกรรมการปฏิรูปกฎหมาย [Law Reform Commission of Thailand] (n 498) 11

⁵⁰³ AEGC, *Toolkit for Competition Advocacy in ASEAN* (n 484) 4

should be their priorities. The Toolkit provides different strategies for different stakeholder groups. The strategies cover designing the right activities for different focus groups, maintaining campaign momentum, evaluation of the activities, templates of feedback form, and the sharing of success stories by the AMSs.

This Toolkit is a very impressive piece of work by the AEGC. It pays attention to details and provides substantial information which is readily used by the AMSs. It may not have a direct effect on ASEAN's competitiveness, because it was not designed to do so. However, if the AMSs adopt it fully, competition advocacy and creating a competition aware society should be achieved as anticipated.

4.4 CONCLUSION

ASEAN came into existence amid a strong sense of nationalism in the member states. They had been invaded and colonised by powerful countries. The start of their cooperation in 1967 was mainly to create security and stability in the region. ASEAN enlargement was seen as more for political than for economic reasons. The inclusion of Myanmar, Cambodia, and Laos was mainly to diminish China's influence over the region. The expansion to a market that is bigger than the EU's is seen as the consequence of the enlargement, but not as the reason for this.

However, the emerging NAFTA and single market of EU have urged AMSs to consider a deeper economic integration. It is not debatable whether the AEC will form a fully single market as the EU, because it will not. The AEC is definitely not going to be a custom union with a common currency. At best it is a free trade union that encourages

freer movement of skilled labour, goods, and capitals. The AMSs have no intention to give up their judicial sovereignty to a supranational organisation to oversee matters concerning the AEC.

However, changes have come to the ASEAN way. Although it is true that the AMSs prefer consultation and consensus, this does not mean that the AMSs will never move away from this norm. It is evident that AMSs can and will cooperate in a rule-based fashion where and when necessary. All ASEAN economic agreements are subject to the Vientiane Protocol which provides a formal and comprehensive dispute settlement mechanism. Moreover, AMSs have begun to adopt more detailed competition rules for the aviation industry. The competition provisions in the ASEAN Air Service, ASEAN Air Freight Services, and ASEAN Passenger Air Services demonstrate a deeper commitment to competition rules by all AMSs than what is included in agreements with other dialogue partners.

The EU experience and history is entirely different from ASEAN's. It used a supranational approach since the very beginning and has always emphasised free competition and an undistorted market. The annual operational budget of the EU, the Commission, and the amount of staff of the DGCOM is enormous compared to the whole ASEAN Secretariat. This is because ASEAN did not intend to create any supranational bodies to oversee any regulations.

The ASEAN way may take longer in arriving at a conclusion or reaching an agreement, but it is the way that AMSs have agreed upon in the ASEAN Charter. It is unique to ASEAN and one can conjecture that the AMSs are quite comfortable with it. At least, they are comfortable enough to formalise it into the ASEAN Charter. And at least, the ASEAN way has not resulted in excessive integration that AMSs would want to

leave the community. Harmonisation of competition law and policy can be done through a sectoral approach. ASEAN can take a different direction from the EU. The EU starts at centralised competition rules. ASEAN can start with sectoral competition rules. The more sectors reach trade agreements like the aviation industry, the larger the number of competitive industries in ASEAN. Eventually, ASEAN's competitiveness as a whole can be enhanced.

ASEAN has an embedded norm of cooperation through consensus and consultation. The functioning and the mode of operation of a supranational body such as the Commission are not compatible with the ASEAN principles as set out in the ASEAN Charter. In order to create an effective supranational body to administer regional cooperation of competition law and policy, ASEAN will have to turn 180 degrees from its Charter.

ASEAN has already begun with the sectoral approach to competition law enforcement in the aviation sector so any attempt to create a regional competition law to curb anticompetitive practices will pull away resources which can be used more effectively to invest in a sectoral approach. Why not try to make use of what ASEAN already has in place and try to make it work? This is not to suggest that the AEGC is irrelevant or insignificant or should be replaced with a sectoral regulator. The AEGC is crucial to the promotion of competitiveness and undistorted ASEAN single market. But to put all burden on an organisation which clearly is not sufficient funded and staff would be unproportioned.

Another problem with the supranational approach for ASEAN is that there is very little necessity for such a supranational body when there is no regional competition law for that body to administer. If ASEAN aims at creating a competitive region,

effective competition law and policy is only a small part of this. To accomplish this ASEAN can increase competitiveness by for instance improving the infrastructure and by investing in the training and education of skilled labourers for more sophisticated industries without relying on a supranational approach. However, this does not imply that competition law does not matter. This thesis has explained and emphasised in chapter 2 the impact of competition law and policy on competitiveness. Effective competition law and policy can and will have the most impact on competitiveness when a country is in, at least, transition from Factor-Driven to Efficiency-Driven stage.

Additionally, when considering the AMSs stance on regional competition law and policy platforms, the establishment and the works of the AEGC remain very informal and non-legally binding which is contrary to the sector specific approach. The purpose of the establishment of the AEGC is clear – to be a platform of discussion and exchange for countries experiences and best practices. The AEGC has done really good work in meeting all required tasks before the deadline so far. The AEGC has cooperated with many international organisations and liaised with member states' competition authorities to produce all its works. This is not an easy task to achieve. However, this thesis argues that the AEGC has substantially promoted building capacity, and provides guidance to member states as individual states in ASEAN rather than providing guidance on competition law and policy on a regional level.

The AEGC has promoted capacity building among AMSs and met almost all of the targets set in AEC Blueprint 2015. However, the Regional Guidelines, Business Handbook, and the RCC Guidelines are not legally binding. They are merely suggestions and recommendations to member states. There is no sanction in disregarding or nonconforming to the suggestions made in these documents.

However, the ASEAN Multilateral Agreement on Air Services, the ASEAN Multilateral Agreement on the Full Liberation of Passenger Air Services, and the ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services provide provisions on fair competition and safeguards which recognise the importance of fair and equal opportunity and agree that some business practices can be considered anticompetitive and cause an anticompetitive effect on markets which will eventually lead to market distortion. These trade agreements are subject to the Vientiane Protocol.

It can be implied that at the regional level, AMSs are reluctant to commit to an all-sectoral approach to competition law and policy. They prefer non-legally binding recommendations and focus on best practices exchange. But it is clear that AMSs are not reluctant to commit more deeply in competition law if this is beneficial to all AMSs such as with the aviation industry. It is easier to negotiate and agree on what constitute anticompetitive practices in a particular sector than agreeing on general competition law and policy. Although dispute settlement on this issue is not by means of a supranational body, the ASEAN way of dealing with this issue by a formal and comprehensive mechanism under the Vientiane Protocol is a good start. This corresponds with Porter's suggestion that it is easier to focus on competitiveness of a particular industry than to make a nation competitive as a whole. If ASEAN focuses on increasing competitiveness in a particular industry within the region, and continues the same approach with other industries; there is a very good chance that ASEAN's competitiveness will increase accordingly. Hence, a sectoral approach to increase competitiveness can eventually lead to an increase in competitiveness in all sectors.

However, having rules on competition in a particular market within ASEAN is unlikely to result in more competitiveness as proved in chapter 2. The level of

development in the AMSs is crucial to fully benefit from the effectiveness of competition law and policy. Especially on the ASEAN level where there are only voluntary recommendations for AMSs. Hence, AMSs need to endeavour to increase their economic development to fully benefit from an efficient competition law and policy.

If ASEAN continues to agree on specific industries and uses the Vientiane Protocol as the sole mechanism for settling disputes, there is a good chance that a body of knowledge in solving disputes on competition among the AMSs will form. However, its impact on the competitiveness of ASEAN or ASEAN's particular market needs to be evaluated with due care and process.

The success of the sectoral approach will depend on the political will of the AMSs to ensure that they adhere to the rules as agreed in the ASEAN Charter and other economic agreements. This corresponds to Porter's diamond theory that the government is the influential factor which can improve or hinder any facet of the diamond. Chances are uncontrollable and unpredictable. But the government's actions should be reliable and accountable to increase the competitiveness of the nation. However, in the case of ASEAN, stable and efficient governments are not common. Singapore which has such a stable government stands out in that respect. Since 2001, Thailand has changed governments 8 times and two coups d'état took place. One can surmise that under such constant political changes and government instability; it will be hard for Thai government agencies to effectively deliver government policy.

This thesis argues that for the time being the best possible way for ASEAN to increase its competitiveness is to not focus on all-sector competitiveness and creating a supranational body, but on the economic development of the AMSs, on how to make

the most of ASEAN way, and to maximise the use of all ASEAN trade agreements and instruments to the benefit of all AMSs on a sectoral basis. As Rodrik argued, ‘capitalism does not come with a unique model. Economic prosperity and stability can be achieved through different combinations of institutional arrangements. . . Nations are likely to – and indeed are entitled to – make varying choices among these arrangements depending on their needs and values.’⁵⁰⁴ So does ASEAN.

The next chapter will analyse and scrutinise competition provisions on abuse of dominance in Singapore and Thailand to understand the potential obstacles which ASEAN may face when trying to converge national competition laws.

⁵⁰⁴ Rodrik, *The Globalization Paradox: Why Global Markets, States, and Democracy Can't coexist* (n 440) xviii

CHAPTER 5

COMPETITION LAW AND ITS ENFORCEMENT IN SINGAPORE AND THAILAND: A STUDY OF ABUSE OF DOMINANT POSITION

This chapter analyses the disparities in the AMSs' national competition laws to demonstrate the difficulties which could be an obstacle for the AMSs when harmonising and converging their competition laws. This could compromise ASEAN's goal of becoming a highly competitive region. This chapter will prove that there is a better way to pursue that goal which ASEAN has already begun developing and which should be used more fully.

Both claimed that in order to have efficient cooperation in competition law enforcement, five driving forces must be attained: 1. substantial volume of cross-border trade among members; 2. laws protecting confidential information which may be gathered and exchanged by the national competition authorities (NCAs); 3. coherence of the competition law regime concerning the goals of competition law and policy, the interpretation of core competition law principles, the investigation process, the and design of competition law; 4. mutual trust between members which requires transparency and predictability of law enforcement; and 5. Sufficient resources such as

budget and personnel.⁵⁰⁵ If this is true, then it is unlikely that ASEAN can achieve effective competition enforcement because the incoherence in the competition law regime is obvious; it is doubtful whether the AMSs have mutual trust in each other's law enforcement. Other reasons are the lack of laws protecting confidential information at the regional level and insufficient resources for the NCAs of member states.

This chapter explains and scrutinises the enforcement of abuse of dominance of two AMSs, Thailand and Singapore. The example of abuse of dominance is used because market access within the AEC should not be hampered by local and foreign incumbents that abuse their dominance to the detriment of consumers and market competition. This chapter does not discuss abuse of dominance under a sector specific regime because the AEC Blueprints and Regional Guidelines aim at the harmonisation and convergence of general competition law. Thus, this chapter intends to demonstrate the obstacles to harmonising general competition law and policy. This thesis uses the examples of Singapore and Thailand because they demonstrate the disparities in capacities of their NCAs, the structures and powers of the NCAs, and competition culture, competitiveness, and stage of development. They each enacted their competition law over a decade ago, so there should be enough information on their competition law enforcement and advocacy.

This chapter is divided into five sections. Firstly, an examination of competition laws and their objectives in the two states. Secondly, a comparison of provisions on abuse of a dominant position. Thirdly, a comparison of the structure and the investigative and prosecution powers of their NCAs. Fourthly, an analysis of the case

⁵⁰⁵ G. Deniz Both, 'Drivers of International Cooperation in Competition Law Enforcement' (2015) 38 *World Competition* 301

studies on the abuse of dominance. The final section consists of an analysis and conclusion.

5.1 AN OVERVIEW OF COMPETITION LAW AND ITS OBJECTIVES IN SINGAPORE AND THAILAND

5.1.1 Singapore

Three important and closely related developments took place between 2000 and 2003 in the run up to Singapore's enactment of its generic Competition Act 2004.⁵⁰⁶ Firstly, the liberalisation policies which Singapore introduced at the end of the 1990s. The goal for this is to stimulate previous monopolies to compete more when they are exposed to market competitiveness. Secondly, a final report produced by the government-appointed Economic Review Committee (ERC) on the 4th February 2003.

The main focus of the ERC report is on the roles of the States Owned Enterprises (SOEs). The report strongly recommended that Singapore should not rely entirely on the SOEs as primary engines for Singapore's economic development. Contrarily, it should encourage small and medium enterprises (SMEs) in Singapore to compete with SOEs. Thirdly, the bilateral free-trade agreements that were entered into

⁵⁰⁶ Burton Ong, 'The Origins, Objectives and Structure of Competition Law in Singapore' (2006) 29 World Competition 269 <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan025141.pdf>> accessed 3 August 2012

between Singapore and the US. The US-Singapore FTA was seen as a trigger point for Singapore's decision to adopt a generic competition law. The Singapore Competition Act 2004 was largely influenced by Anglo-European competition laws.⁵⁰⁷

The Singapore Competition Act (SCA) does not discuss the goals and purposes of the law, but the Competition Commission of Singapore (CCS) emphasises in the Guidelines of Major Provisions that competition is a crucial part of Singapore's economy; open and vigorous competition brings efficiency, innovation and responds to consumer needs which leads to consumer welfare; and society in turn benefits from productivity and allocative efficiency.⁵⁰⁸

Singapore submitted to the ICN that the objectives of Singapore unilateral conducts laws are to ensure an effective competitive process (as a mean to achieve other goals) and to maximise efficiency,⁵⁰⁹ and asserted that the key objective of the SCA is economic efficiency.⁵¹⁰ Singapore's competition law aims at protecting the competition process, not the competitors and at efficiency because vigorous competition urges firms to be innovative and efficient. As a consequence, consumers enjoy better services and goods, more choices and at lower prices – consumer welfare is enhanced.⁵¹¹

In the second reading of the Competition Bill, Dr Vivian Balakrishnan, the then Senior Minister of State for Trade and Industry stated that 'the purpose of this piece of

⁵⁰⁷ *ibid* 274

⁵⁰⁸ CCS, 'CCS Guidelines on Major Provisions', para 2.1 <<https://www.ccs.gov.sg/legislation/~media/custom/ccs/files/legislation/ccs%20guidelines/majorprovisionsjul07final.ashx>> accessed 1 August 2012

⁵⁰⁹ ICN, 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies' (6th Annual Conference of the ICN, Moscow, May 2007) 8

⁵¹⁰ *ibid* 14

⁵¹¹ CCS, 'CCS Guidelines on the Major Provisions' (n 508) para 2.1; CCS, 'CCS Competition Philosophy' (last updated 30 December 2014) <<http://www.ccs.gov.sg/about-ccs/what-we-do/ccs-competition-philosophy>> accessed 3 August 2016

legislation is to ensure that we have an efficient functioning market in Singapore and, ultimately, a competitive economy with competitive firms.’⁵¹² Another reason why consumer welfare is not Singapore’s goal for competition law is that exploitative behaviours of incumbents do not necessarily constitute abuse of dominance.⁵¹³ Exploitative abuses such as excessive pricing (purchasing and selling) are not punishable under the Singapore Competition Act, Section 47(2).⁵¹⁴ Moreover, in the CCS’ Guidelines on Section 47 Prohibition does not mention exploitative abuses of consumers, and examples of conduct that may amount to an abuse in Annex C of the Guidelines do not provide any example of exploitative pricing abuses.

This thesis argues that the intention of the Singapore Competition Act is not to protect consumers from excessive pricing because that should be dealt with by consumer protection law, but to ensure that competition is not distorted. It is evident that consumers in Singapore have always been encouraged to be aware of their rights.

⁵¹² *Singapore Parliamentary Reports*, (19 October 2004) vol 78 (First Session) <http://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00070463-ZZ¤tPubID=00075146-ZZ&topicKey=00075146-ZZ.00070463-ZZ_1%23%23> accessed 19 August 2012

⁵¹³ Lim Chong Kin and Scott Clements, ‘Singapore’ in Thomas Janssens and Thomas Wessely (eds) *Getting the Deal Through: Dominance 2015* (Law Business Research 2015) 199; R. Ian McEwin, ‘Competition Law in Singapore’ (Global Economic Group 17 March 2011) <<http://www.globaleconomicsgroup.com/publication/competition-law-in-singapore/>> accessed 30 May 2015.

⁵¹⁴ **Abuse of dominant position**

47.—(1) Subject to section 48, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.

(2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in —

- (a) predatory behaviour towards competitors;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) In this section, “dominant position” means a dominant position within Singapore or elsewhere.

Caveat emptor is the key to consumer policy in Singapore because effective competition policy is seen as more efficient in delivering benefits to consumers in the long term.⁵¹⁵ It is also reported that Singapore's approach to welfare under competition law is total welfare, not consumer welfare.⁵¹⁶ This is supported by the CCS' first infringement decision on abuse of dominance, which clearly states that 'competition policy in Singapore adopts the total welfare standard instead of the consumer welfare standard.'⁵¹⁷

Therefore, it can be concluded that the SCA fundamentally aims at efficiency and protection of competition. Consumer welfare is considered as a by-product of an efficient, competitive market.

5.1.2 Thailand⁵¹⁸

Thailand has a very different philosophy towards competition law. Before it was enacted in 1999 as a single Act, Trade Competition Act B.E. 2542 (1999) (TCA),⁵¹⁹ there was another Act in force, the Price Fixing and Anti-Monopoly Act of 1979 which combined two key components – overseeing price-fixing and antimonopoly. Price fixing has long been used by Thai governments to control prices of goods.⁵²⁰ Consumer

⁵¹⁵ CCS, 'The Interface Between Competition and Consumer Policies: Contribution from Singapore' DAF/COMP/GF/WD(2008)3 (Global Forum on Competition, 21 – 22 February 2008) <<http://www.oecd.org/countries/singapore/39792372.pdf>> accessed 30 May 2015

⁵¹⁶ Chong Kin and Clements, 'Singapore' (n 513) 197; McEwin, 'Competition Law in Singapore, (n 513)

⁵¹⁷ *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2010] SGCCS 3, notes 364 and note 457

⁵¹⁸ The English translation of the Trade Competition Act B.E. 2542 (1999) which is referred to and quoted in this thesis, except indicated otherwise, is translated in the personal capacity of Dr Pinai Na Nakorn (Juridical Official of the Foreign Law Division of the Office of the Council of State), 'Tentative Translation of the Trade Competition Act B.E. 2542 (1999)' <<http://www.dit.go.th/en/backoffice/uploadfile/255609171741011889987.pdf>> accessed 8 August 2016

⁵¹⁹ Royal Gazette Vol 116 Part 22kor 31 March B.E. 2542 (1999), entered into force 1 May B.E. 2542 (1999)

⁵²⁰ For history of Thai competition laws please see: Mark Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (2004) 27 World Competition 459; Archanun Kohpaiboon, Paritrat Chantasakda, and Alongkorn Tanasritunyakul, 'Competition Policy in Thailand' (Workshop on

goods markets have always been under the governments' control. Every time when consumer goods prices are rocketing, Thai consumers demand that governments control the price instead of letting the rule of demand-supply plays its part. Thai Governments tend to use a protectionist approach in handling markets and consumers.⁵²¹

The antimonopoly part of the 1979 Act is aimed at promoting fair competition.⁵²² One can see clearly how the market could not function efficiently in Thailand – within the same act the Government wanted to protect fair and free competition on the one hand and to control how businesses set their prices on the other. It was unlikely an effective functioning of the market could be realised under this conflicting Act.

In 1999, the Department of Internal Trade which oversaw the 1979 Act, decided to separate the 1979 Act into two Acts: the Price of Goods and Services Act of 1999 and the TCA. The objective of the TCA is to promote fair and free trade within a competitive environment.⁵²³ The reason for enacting the TCA was included in the bottom of the last page of the Act as a note, stating that

Competition Policy in Southeast Asia: A Stock Take of Recent Development, Asian Development Bank, Manila, 11-12 January 2010) 15; เดือนเด่น นิคมบริรักษ์, *การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย* (пенไท พ.ศ. 2555 (2012)) 9 - 13 <<http://v-reform.org/market-reform/>> accessed 23 February 2016 [Duenden Nikomborirak, *A Reform to Alleviate Monopoly and Promote Competition in Thai Economy* (PenThai 2012)]

⁵²¹ Charging excessive high price is considered unfair practices under Sections 25 and 29 of the Trade Competition Act B.E. 2542 (1999). Also in case of retails and hypermarkets industry, the Government decided to limit the expansion of large discount stores to help local small groceries. See *Retail Super Store v Local Groceries* at p. 239

⁵²² OECD, 'Contribution from Thailand' CCNM/GF/COMP/WD(2001)8 (1st Meeting of the Global Forum on Competition, 17 – 18 October 2001) <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP/WD\(2001\)8&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP/WD(2001)8&docLanguage=En)> accessed 3 August 2016

⁵²³ *ibid*; UNCTAD, 'Handbook on Competition Legislation Consolidated Report 2001 – 2012' (n 206) 1287; Nipon Paopongsakorn, 'Thailand Trade Competition Act' (APEC-OECD Cooperative Initiative Workshop, Paris, December 2003) 133 <<http://www.apec.org.tw/doc/APEC-OECD/2003-12/013.pdf>> accessed 15 July 2013; Nipon Paopongsakorn, 'Institutional Arrangements for the Competition Authority in Thailand' (APEC-OECD Cooperative Initiative

The reason for enactment of this Act is because of the repeal of Price Fixing and Anti-Monopoly Act which contained provisions on price fixing and anti-monopoly in the same Act. Therefore, it is deemed appropriate to improve the provisions on anti-monopoly and enact the law regulating trade competition that can guard against monopolistic conducts, decrease or limit a systematic trade competition. This will promote free trade and prevent unfair trade practices. Hence, it is necessary to enact this Act.⁵²⁴

According to Thanitkul and UNCTAD, the TCA was modelled on Korean, Japanese, Taiwanese, and German competition laws.⁵²⁵ There are two views as to what influenced the Thai Government to enact the TCA. According to research by Sakda Thanitkul, it was the Thai Government who initiated the idea, while Thai business representatives believed that the Government was under pressure from the US⁵²⁶ ‘seeking to force open the Thai economy to benefit its global players.’⁵²⁷

The TCA does not provide its objectives in either its preamble or provisions. The Thai Government submitted its commentary on the objective of the Act as ‘to promote fair and free trade. Its principle is mainly to look after business practices.’⁵²⁸ A former Commissioner in Thailand’s first Trade Competition Commission (TCC) stated that the objective of the law ‘is to promote fair and free trade within a competitive environment and control anti-competitive practices.’⁵²⁹ He also submitted another paper to the same workshop stating that the TCA aims to protect competition and the

Workshop, Paris, December 2003) 92 <<http://www.apeccp.org.tw/doc/APEC-OECD/2003-12/005.pdf>> accessed 5 March 2014

⁵²⁴ Author’s own translation from original Thai text of the TCA.

⁵²⁵ Sakda Thanitkul, ‘Competition Law in Thailand: A Preliminary Analysis’ (2002) 1 Washington University Global Studies Law Review 171, 172; UNCTAD, *Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe* UNCTAD/DITC/CLP/2005/2 (UN 2005) 2 <http://unctad.org/en/Docs/ditccp20052_en.pdf> accessed 3 August 2016

⁵²⁶ Thanitkul, ‘Competition Law in Thailand: A Preliminary Analysis’ (n 525) 171 - 172

⁵²⁷ Williams, ‘Competition Law in Thailand: Seeds of Success or Fated to Fail?’ (n 520) 468

⁵²⁸ UNCTAD, *Handbook on Competition Legislation: Consolidated Report 2001 – 2012* (n 206)

⁵²⁹ Paopongsakorn, ‘Thailand Trade Competition Act’ (n 523) 133

competitive process.⁵³⁰ However, in 2013 there was another submission by Thailand to the APEC Competition Policy and Law Group Meeting on the recent development of TCA stating that the objectives of the TCA are ‘To promote free and fair business competition. To improve market efficiency and protect competition not competitors.’⁵³¹

Consumer welfare and total welfare are not mentioned in the TCA or the TCC’s guidelines. And from the enforcement record of the Thai Commission, Thai consumers have not benefited from its work since its establishment in 1999. It is correct to conclude that total welfare is not the real object of the TCA, let alone consumer welfare. Can it be construed that the TCA considers welfare as a result of free and fair competition? The answer is possibly yes. But then it remains to be seen whether free and fair competition in Thailand could enhance consumer welfare and how the TCC pursues this.

The fact that the Thai representatives decided to add market efficiency and the protection of competition to the APEC meeting in 2013 certainly cannot be construed as that this was the intention of the Act at the time of the enactment. Could it be construed that the Thai Competition Commission decided to pursue efficiency when enforcing the law in 2013? It is highly unlikely because the track records of the TCC on abuse of dominance cases reveal no reference to market efficiency in its decisions. The only possible conjecture is that it was only because many countries in APEC promote efficiency as the objective of their competition laws, that Thailand should include it too.

⁵³⁰ Paopongsakorn, ‘Institutional Arrangements for the Competition Authority in Thailand’ (n 523) 92

⁵³¹ Thailand, ‘Recent Development of Thai Trade Competition Act’ 2013/SOM1/CPLG/034 (APEC Competition Policy and Law Group Meeting, Jakarta, 3-4 February 2013) <http://www.apeccp.org.tw/doc/Workshop/w2013/13_cplg1_034.pdf> accessed 9 August 2016

Singapore's competition law takes a purist regime. It aims at purely economic purposes – market efficiency and protection of the competition process. It also applies an effect-based approach and economic analysis. This corresponds to the recommendation set in the Regional Guidelines. Although Singapore's Competition Act was modelled after the UK Competition Act, Singapore has certainly adapted the competition law to suit its own market conditions.

Singapore is an advanced economy despite its small market size. Its aim of becoming the FDI hub of the region cannot be achieved without focusing on efficiency and ensuring robust and undistorted competition in addition to providing a business friendly environment to investors. Singaporean consumers are made aware of the dynamic of the competition and the significance of the global market. They are protected not by control of consumer goods prices, ensuring everything is cheap and affordable, but by ensuring all firms are competing vigorously and strive for the most efficient way to produce and provide goods and services that have a better quality than those of their competitors. This results in that Singaporean consumers' welfare is enhanced along with total welfare, and not at the cost of total welfare.

The current TCA takes a mixed regime which aims at free and fair trade/competition which is the most basic objective of any country that enacts competition law. It is not easy to justify fairness. It is very subjective. However, since Thailand does not actually pursue efficiency, the problem of conflicting aims of competition law is unlikely to arise because there is no consideration of efficiency to take into account.

At the time of writing (June 2016), the TCA is undergoing an amendment. However, the draft Bill does not provide the objective of the law. According to Nynart

Gherdlarppon,⁵³² the Cabinet has approved the first draft of the Trade Competition Bill in March 2016. Now the Trade Competition Bill is under the reading by the Thai National Legislative Assembly and is expected to pass as an Act by the end of 2016. According to Gherdlarppon, the Bill aims at promoting free and fair competition and market efficiency.⁵³³

Regarding the competitiveness of ASEAN and AEC, as proved in chapter 2 there are multiple factors used to determine the competitiveness of a country, an effective competition law and policy is one of them. And chapter 3 demonstrated that an informal approach to harmonise competition law and policy is likely to be more welcome than a supranational approach. Most importantly, chapter 4 provides evidence that although the ASEAN way embraces consensus, consultation and non-legally binding agreements, AMSs are ready to commit to and adhere to a rule-based approach in economic cooperation such as in the aviation industry. A sectoral approach to harmonisation in competition law and policy practices among the AMSs appears to be more achievable than the harmonisation and convergence of all-sector general competition law and policy. If ASEAN's aviation industry can be more competitive as the AMSs adhere to rules on competition and safeguards, and the AMSs expand this approach to other industries, competitiveness will be further enhanced in these industries which could make ASEAN as a region more competitive.

A quick example supports that given the vastly different approaches of two of the AMSs in curbing anticompetitive agreements of taking a sectoral approach seems more plausible than a general all sector approach. In Singapore, an agreement between

⁵³² Senior Trade Officer, Bureau of Business Competition, Department of Internal Trade Ministry of Commerce, Royal Thai Government

⁵³³ Nynart Gherdlarppon, 'Regulator Discussion on New Competition Law Regimes in ASEAN' (Panel discussion at the 5th Annual Asia-Pacific Law Leaders Forum, Singapore, 3 – 4 March 2016)

undertakings to share markets is prohibited unless it falls into block exemptions i.e. the agreements which contribute to improving production or distribution or to promoting technical or economic progress,⁵³⁴ which clearly promotes the efficiency of undertakings.

In Thailand, the same agreement is also prohibited, unless it is allowed by the TCC. There is no block exemption. The TCC may allow undertakings to enter into contracts to share markets, fix quantity of their productions lower than market demand if: it is commercially reasonable and can promote business activities; does not cause serious damage to the economy; and does not impact fundamental consumers' benefits.⁵³⁵ It is obvious that the exemption under the TCC does not promote efficiency of undertakings and is very subjective. What does 'promote business activities' mean? Is it efficiency? Nobody knows. Moreover, a leniency programme is available under the SCA but not under the current TCA. A proposed amendment to introduce leniency into Thai law is under way.⁵³⁶

The discrepancies in practice create uncertainty and unpredictability for investors whether they can or cannot conclude such contracts. The exemptions are different in both countries. Therefore, the cost and time incurred in preparing all required documents to be filed to relevant authorities is higher than if both countries would use the same criterion for exemptions. How can Thailand and Singapore harmonise and converge their differences in curbing cartels? How does this practice help the AEC becoming a highly competitive region? If this is dealt with in a specific sector it would be more feasible that an agreement could be reached.

⁵³⁴ Competition Act (Cap 50B, 2006 Rev Ed) ss 34 (2)(c) and 41

⁵³⁵ Trade Competition Act B.E. 2542 (1999) ss 27(6) and 37 (At the time of writing, the TCA is proposed to be amended. However, Sections 60, 70 and 72 of the drafted Trade Competition Bill are not changed in substance. The exemptions are roughly the same.)

⁵³⁶ Gherdlarppon, 'Regulator Discussion on New Competition Law Regimes in ASEAN' (n 533); Drafted Trade Competition Bill s 68 (as of 15 March 2016)

5.2 PROVISIONS ON ABUSE OF DOMINANCE

In this section, the comparison between provisions on abuse of dominance of Singapore and Thailand will be compared concurrently without division into parts.

As mentioned briefly above that Section 47 prohibition does not aim to curb exploitative abuses in imposing excessive pricing on consumers which is a special characteristic of the SCA. This section prohibits abuse of dominance by one or more undertakings. The concept of an undertaking is the same as in the EU approach of any entity engaging in economic activity.⁵³⁷

However, Section 47 prohibition is not applicable to “any undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.”⁵³⁸ However, the CCS claim that it will apply this exemption very narrowly.⁵³⁹ It is hard to conclude whether the CCS does apply this exemption very narrowly since there is only one case on abuse of dominance even though in that case the CCS did apply the exemption very narrowly.

The TCA provide a specific definition of the word “business operator” as a producer, distributor for production, importer etc. who engage in these activities in the

⁵³⁷ SCA section 2; CCS, ‘CCS Guidelines on the Section 47 Prohibition’ (CCS June 2007) 4 <<http://www.ccs.gov.sg/legislation/~media/custom/ccs/files/legislation/ccs%20guidelines/s47jul07final.ashx>> accessed 29 May 2012

⁵³⁸ SCA section 48 and Third Schedule

⁵³⁹ CCS, ‘CCS Guidelines on the Section 47 Prohibition’ (n 537) 28

course of business.⁵⁴⁰ This definition, therefore, automatically excludes any entity which engages in business activity that may not be in the course of their business.

Apart from a narrowly defined 'business operator', the TCA also provide exemption to the application of the Act in section 4 that it does not apply to government agencies, State-Owned Enterprises (SOEs), farmer co-operative groups, other business as prescribed in the ministerial regulation (which no business has been prescribed as such yet). This is a major flaw in the TCA as the SOEs are protected when they indeed engage in business activity in the usual course of their business and compete with private sectors. It may seem that the SOEs have an advantage over the private sectors, in fact, the SOEs are in the disadvantage position. Because such lax approach toward them cause them to be uncompetitive.

The SCA does not provide the definition of a dominant position. An undertaking is considered dominant when it has market power. The CCS describes the assessment of dominance in its guidelines using the same strategy as the EU. An undertaking has market power when it can profitably sustain a price above competitive level without constraint from competitors or powerful buyers.⁵⁴¹ Dominant position, however, refers to a dominant position in Singapore or abroad.⁵⁴² There is no market share threshold for market dominance although the CCS may consider an undertaking whose market share is above 60% as likely to hold a dominant position.⁵⁴³

On the other hand, the TCA prescribed the definition of a dominant business operator as one that has market share and turnover above the limitation set by the TCC.

⁵⁴⁰ TCA section 3

⁵⁴¹ *ibid* 5

⁵⁴² SCA section 47(3)

⁵⁴³ CCS 'CCS Guidelines on the Section 47 Prohibition' (n 537) 6

And it took the TCC eight years to publish the threshold. A business operator has a dominant position when it has more than 50% market share and turnover of more than 1 billion Baht in the same year. In the case of collective dominance, the TCC explicitly limits to only collective dominance by the first three business operator of the relevant market whose market share is over 75% and total turnover more than 1 billion Baht.⁵⁴⁴ This is one of the major obstacles in the enforcement of the law in Thailand as in the case of Abbott's AIDS Medication below.

Abusive acts are listed in section 47, but it is not an exhaustive list.⁵⁴⁵ They include predatory behaviour toward competitors.⁵⁴⁶ The CCS takes into account pricing below cost, intention to eliminate a competitor, and the feasibility of recouping losses when determining whether predatory behaviour occurs.⁵⁴⁷ Dominant undertaking is prohibited from limiting production, markets or technical development to the prejudice of consumers;⁵⁴⁸ applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;⁵⁴⁹ or making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.⁵⁵⁰

⁵⁴⁴ ประกาศคณะกรรมการการแข่งขันทางการค้า เรื่อง หลักเกณฑ์การเป็นผู้ประกอบธุรกิจซึ่งมีอำนาจเหนือตลาด, ราชกิจจานุเบกษาฉบับประกาศและงานทั่วไปเล่ม ๑๒๔ ตอนพิเศษ ๑๕ง ลงวันที่ 7 กุมภาพันธ์ พ.ศ. 2550 (Hereinafter referred to as Notification of Dominance Criteria) [The Trade Competition Commission Notification titled Notification of Dominance Criteria, Royal Gazette issue 124 special edition 15ngor dated 7 February 2007]

⁵⁴⁵ *ibid* 22

⁵⁴⁶ SCA section 47(2)(a)

⁵⁴⁷ *ibid*

⁵⁴⁸ SCA section 47(2)(b)

⁵⁴⁹ SCA section 47(2)(c)

⁵⁵⁰ SCA section 47(2)(d)

Under the TCA the abusive conducts are different. A dominant business operator is prohibited from pricing unfairly,⁵⁵¹ unfairly impose vertical restraint to its customers such as tying and exclusive dealing,⁵⁵² unreasonably reduces, limit, withdraw of production, selling, delivery, an import or destroy or render goods damaged to reduce supply to increase the price⁵⁵³ and unreasonably intervene in other business operators.⁵⁵⁴ There is no prohibition on refusal to deal with competitors. Hence, under the TCA, it is illegal to engage in abusive pricing conduct toward competitors, but a dominant undertaking may not be punished if it engages in non-price abusive conducts unless that non-price abusive conduct amounts to intervention in other undertaking's business.

Consumers can rely only on provision of section 25(3) to curb the dominant undertaking's abusive conducts because other clauses aim at exclusionary conducts towards competitors or other business operators. The most difficult part for consumers to deal with abuse of dominance is not in the limitation of the TCA, but the effectiveness of the regulator and the TCC.

⁵⁵¹ TCA section 25(1)

⁵⁵² TCA section 25(2); คณะกรรมการการแข่งขันทางการค้า, แนวปฏิบัติตามมาตรา 25 แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 การใช้อำนาจเหนือตลาดในทางมิชอบ มกราคม พ.ศ. 2552, 8 – 10 <<http://otcc.dit.go.th/wp-content/uploads/2015/07/Guidelines-under-Section-25.pdf>> accessed 30 March 2015 [Trade Competition Commission, Guidelines Under Section 25 of the Trade Competition Act B.E. 2542 on Abuse of Dominance dated January 2009, 8 - 10]

⁵⁵³ TCA section 25(3); Trade Competition Commission, Notification titled Notification of Dominance Criteria (n 544) 11

⁵⁵⁴ TCA section 25(4)

5.3 THE NATIONAL COMPETITION AUTHORITIES OF SINGAPORE AND THAILAND

5.3.1 Organisational Structure

A) Singapore

The CCS is an independent statutory board under the Ministry of Trade and Industry.⁵⁵⁵ The CCS consists of one Chairman and 2-16 members appointed by the Minister of Trade and Industry.⁵⁵⁶ The persons appointed as the Chairman and Commissioners must be chosen for their ability and experience in industry, commerce or administration or for their professional qualifications or for their suitability otherwise.⁵⁵⁷ The Commissioners are in office for a term of not less than 3 years and not more than 5 years as determined by the Minister and they are eligible for re-appointment.⁵⁵⁸

The SCA does not disqualify a Commissioner who has direct or indirect interest in a transaction or project of the Commission provided that he discloses the nature of his interest at the first meeting of the CCS at which he is present after he becomes aware of the relevant facts. The consequence is that the Commissioner who has such an interest must not take part in any deliberations or decisions of the CCS relating to that transaction or project and must be disregarded for the purpose of constituting a quorum of the CCS for deliberation or decision making. This includes transactions or projects by spouses, parents, step-parents, sons, step-sons, daughters, step-daughters, adopted sons,

⁵⁵⁵ AEGC, *Handbook on Competition Policy and Law in ASEAN for Business* (n 499) 52

⁵⁵⁶ Competition Act (Cap 50B, 2006 Rev Ed) s 5

⁵⁵⁷ *ibid* para 1(3), First Schedule under s 5(2)

⁵⁵⁸ *ibid* para 3, First Schedule under s 5(2)

adopted daughters, brothers, sisters, half-brothers, half-sisters, step-brothers, and step-sisters of the Commissioners.⁵⁵⁹

The administration of the CCS is divided into 6 divisions that report directly to the Chief Executive of CCS. The Chief Executive is appointed by the CCS with approval from the Minister, and cannot be removed from office without consent from the Minister.⁵⁶⁰ These divisions are Business and Economics, Corporate Affairs, Legal, Enforcement, Policy and Markets, and Strategic Planning (which has been renamed as International and Strategic Planning⁵⁶¹). Each division undertakes certain duties. Legal, Enforcement, and Business and Economics work closely together to investigate anticompetitive practices.

Although the CCS members are appointed by the Minister, the operational and executive staff members are not government officials. Although one cannot claim that there is no government intervention or influence at this point, the CCS does appear to be better structured than the TCC.

B) Thailand

The TCC is currently structured under the Department of Internal Trade, Ministry of Commerce, and is not an independent body. The Minister is *ex officio* the Chairman of the TCC; the Permanent-Secretary for the Ministry of Commerce is *ex officio* the Vice-Chairman; and the Permanent-Secretary for the Ministry of Finance is *ex officio* a

⁵⁵⁹ *ibid* para 11 (1) - (3), First Schedule under s 5(2)

⁵⁶⁰ *ibid* s 10

⁵⁶¹ CCS, 'Changes to CCS Management and Divisions' <<https://www.ccs.gov.sg/about-ccs/ccs-updates/changes-to-ccs-management-and-divisions>> (updated on 20 April 2016) accessed 25 May 2016

Commissioner. The Minister appoints 8 – 12 Commissioners. The TCC is under complete control of the Minister of Commerce.

The Commissioners that are appointed by the Minister should be, in equal number, chosen from two groups: qualified persons in law, economics, business administration or public administration; and qualified members of the private sectors.⁵⁶² This organisational structure is also prone to the private sectors undue influence over the TCC.⁵⁶³ The Commissioners, other than the Minister and the Permanent-Secretaries, are in office for only 2 years and are eligible for re-appointment for not more than two consecutive terms.⁵⁶⁴ This means that the TCC will be run mainly at the discretion of the Minister of Commerce with the aid of part-time Commissioners.

The structure of the TCC is the major reason the TCA has not been effectively enforced. Two researchers from the Thailand Development Research Institute (TDRI) found very close relationships between some former members of the TCC, businesses against which anticompetitive practices complaints were made, and politicians.⁵⁶⁵ They identified four major cases of conflict of interest as follows⁵⁶⁶

⁵⁶² TCA s 6

⁵⁶³ พูนสิน วงศ์กลฐุต (ed), รายงานที่ตีอาร์ไอ ฉบับที่ 92 มีนาคม 2554 (ฉบับพิเศษ) เรื่อง พระราชบัญญัติว่าด้วยการแข่งขันทางการค้า พ.ศ. 2542: ข้อจำกัดและการปฏิรูป (1st edn, July 2012) 11 [Poonsin Wongkoltoot (ed), *TDRI Report Issue 92 March 2012 (special edition) on Trade Competition Act 1999: Limitation and Reform*]

⁵⁶⁴ TCA s 9

⁵⁶⁵ เดือนเด่น นิคมบริรักษ์ และ สุณีพร ทวรรณกุล, 'การผูกขาดทางธุรกิจกับการเมือง' (การสัมมนาวิชาการประจำปี เรื่อง สู่หนึ่งทศวรรษหลังวิกฤติเศรษฐกิจ: ได้เรียนรู้และปรับปรุงอะไรบ้าง?, ชลบุรี, 9 - 10 ธันวาคม พ.ศ. 2549 (2006)) <<http://tdri.or.th/research/y06c/>> accessed 24 May 2016 [Duenden Nikomborirak and Suneeporn Twankul, 'Monopoly and Politics' (Annual Seminar on A Decade After Economic Crisis: What have we learned and improved?, Chonburi, 9 -10 December 2006)]

⁵⁶⁶ *ibid* 8 - 10

1. Charoen Pokphand Group (CP) by Chiaravanont Family

The CP Group owns extensive businesses.⁵⁶⁷ Complaints were lodged for anticompetitive practices, especially with regards to monopolies in seeds, animal food, eggs, retails, and cable television. Thanin Chiaravanont was advisor to the Minister of Finance. His niece's husband, Wattana Muangsook, was the former deputy Minister of Commerce (2002-2003), the former Minister of Commerce (2004), the former Minister of Industry (March 2005), and the Minister of Social Development and Human Security (August 2005). Lieutenant Suchai Chaowisit was Director General of the Department of Internal Trade and a Member of the Audit Committee and Chairman of Independent Directors of CPAll (a subsidiary of CP) in 2000. He was an *ex officio* Secretary-General of the office of the TCC when the complaint against CP's cable television business was lodged.

2. Suramaharat Group (ThaiBev) by Sirivadhanabhakdi and Techapaiboon Families

ThaiBev has extensive business groups, mostly in beverages and related industries.⁵⁶⁸ Complaints were made with regards to abuse of dominance practices,

⁵⁶⁷ Agro industry and food; crop integration; feed ingredients trading; seeds, fertilizer, plant protection; International trading; pet; pharmaceutical (China); marketing and distribution; telecommunication; property development; automotive and industrial products (China); plastics; finance and banking (China). See Charoen Pokphand Group, 'About Us' <<http://www.cpgroupglobal.com/en/aboutus.php>> accessed 24 May 2016

⁵⁶⁸ Brewery groups (Beer Thai, Beerthip, Cosmos); distillery groups (Sangsom, Sura Bangyikhan, Red Bull); related business groups (including 7 companies such as Thai Beverage Recycle, Thai Beverage Energy, Thai Beverage Logistics, and Thai Molasses); marketing group (4 companies); international business group (International Beverage Holdings Limited is ThaiBev's wholly own subsidiary which has 32 subsidiaries in six countries); sale group (Beer Group, Liquor Marketing Group, Sales Channels Management Group – total 18 companies); non-alcohol beverage business group (Thai Drinks, SPM Foods and Beverage); sale agent group (5 companies); group of listed companies on the stock exchange of Thailand (Oishi Group and Serm suk Group – total 14 companies); trademark group (Thai Beverage Brands, Archa Beer, Beer Chang, Chang Beer International); and others (8 companies such as Re Bull Distillery (1998), Thai Beverage

especially tying and bundling and monopolistic behaviour in government procurement of supply of paper. Its links with politics are made through the Techapaiboon family. Wirun Techapaiboon (managing director) was deputy Minister of the Office of the Prime Minister and deputy Minister of Finance. Sumeth Techapaiboon's son-in-law was the former deputy Minister of Finance, and a major donor of former PM Taksin Shinnawatra's Thai Rak Thai party. Charoen Sirivadhanabhakdi does not have a direct link to politics, but he invested in companies that belonged to the former PM Taksin Shinnawatra.

3. Siam Cement Group (SCG) by the Crown Property Bureau

The SCG owns four companies namely SCG Cement-Building Materials, SCG Chemicals, SCG Packaging, and SCG Investment.⁵⁶⁹ Complaints of abuse of dominance and hard core cartel (price fixing) were made. Although, the research did not find any relationship with politics, SCG's managing director, Bodin Asavanij, was appointed as a Commissioner twice in 2000 and in 2004.

4. State-Owned Enterprises (SOEs) by Ministry of Finance

The SOEs in the research are those public companies listed in the stock exchange of Thailand. They are designated monopolies established under the laws such as MCOT which was used to monopolise radio wave, television and broadcasting in Thailand; Airport of Thailand which monopolises airport business; PTT which monopolises trade in gas and whose shares are held by many politicians either directly, by nominees (financial institutions), or holding companies.

Training). See ThaiBev, 'Business Groups' <<http://www.thaibev.com/en08/home.aspx>> accessed 24 May 2016

⁵⁶⁹ SCG, 'Business Overview' <http://www.scg.co.th/en/02business_overview/03_scg_cement_business.html> accessed 24 May 2016

Other than the relationships mentioned above, the researchers also identified four other conflict of interest cases between the alleged companies engaging in anticompetitive practices and Thai politicians such as AIS Co. Ltd (belonging to former PM Taksin Shinnawatra and his family members) which was accused of engaging in a cartel with another major mobile phone operator, DTAC, on tying and bundling mobile phones with phone services.⁵⁷⁰

Needless to mention the TCC has failed to undertake what it is supposed to do for almost two decades. One disadvantage of this structure is that when there is an absence of government, the TCC cannot function. This happened with the last coup d'état in Thailand. At that time, the TCC was due to expire from office, and it could not hold any meetings to consider complaints or issues. It had to wait until the new government was formed before it could resume its functions.

It is clear that the current TCC was structured under the influence of politics and business. This certainly hinders and impedes judgement and decision making when it comes to prosecuting businesses, especially those big businesses with close ties to politicians. It is the most serious flaw in the enforcement of competition law system in Thailand. Thai competition law may have some drawbacks, but that could have been mended with the more active and efficient commission. Political will is clearly absent. Powerful conglomerates which belong to some elite families causes regulatory capture in the TCA. This problem cannot be solved unless an overhaul of structure and power of the TCA takes place.

⁵⁷⁰ นิคมบริรักษ์ และ ทวรรณกุล, 'การผูกขาดทางธุรกิจกับการเมือง' [Nikomborirak and Twankul, 'Monopoly and Politics'] (n 565) 10 - 11

The Trade Competition Bill proposes an ‘overhaul’ of the structure of the TCC. For example there will be seven Commissioners who are shortlisted by a Selecting Committee.⁵⁷¹ The Selecting Committee will submit the list to the Minister of Commerce, who will present the list to the Cabinet for approval. Once the Cabinet has approved the list, the Prime Minister shall appoint candidates who have been approved as Commissioners.⁵⁷² The Commissioners will take office for a term of six years and are eligible for re-appointment for no more than two consecutive terms.⁵⁷³

The Commissioners must have at least 10 years of experience in law, economics, finance, accounting, industry, business administration, consumer protection or other areas which are beneficial to the tasks of overseeing market competition.⁵⁷⁴ Political officials, members of parliament, senators, and people holding positions in political parties, members and senior officers of local administrations are not eligible to be Commissioners.⁵⁷⁵ The Commissioners must not hold managing position in business organisations; hold more than 5% of shares in any company; be government officials; be general partners in partnerships; be employees or contractors of government agencies, local government; or be directors or advisors of SOEs.⁵⁷⁶

The new proposed Bill tries to solve this problem by excluding politicians and businessmen from being appointed as Commissioners. But the new Trade Competition

⁵⁷¹ The Selecting Committee consists of seven *ex officio* members – Permanent-Secretary of Ministry of Commerce, Permanent-Secretary of Ministry of Finance, Permanent-Secretary of Industry, Permanent-Secretary of Agriculture and Cooperatives, Secretary-General of National Economic and Social Development Board, Chairman of Thai Chamber of Commerce, Chairman of Federation of Thai Industries (Drafted Trade Competition Bill s 11 (as of 15 March 2016))

⁵⁷² Drafted Trade Competition Bill ss 8 and 12 (as of 15 March 2016)

⁵⁷³ *ibid* s 15

⁵⁷⁴ *ibid* s 9

⁵⁷⁵ *ibid* s 10

⁵⁷⁶ *ibid* s 13

Bill does not exclude family members of the politicians and businessmen from being appointed. This can still threaten the independence of the TCC.

The function of the Office of the TCC is to carry out administrative tasks to support the TCC.⁵⁷⁷ It is headed *ex officio* by the Director-General of the Department of Internal Trade who functions as its Secretary-General.⁵⁷⁸ However, the new Bill proposes a restructuring. The new Office of the TCC will be an independent governmental body, not under any Ministry. The new proposed Office of the TCC will be headed by a Secretary-General, who will be publicly recruited through selection and appointment, presumably by the TCC.⁵⁷⁹ In case nobody applies or the TCC does not find a suitable person from the public recruitment, the TCC can select and appoint anyone who is Thai, not over 65 years of age, and who can work full time for the Office of the TCC.⁵⁸⁰ The disqualifications of the Secretary-General are, *inter alia*, being a managing director of businesses, being a government official, being an employee or contractor of government agencies or SOEs, or holding positions in politics.⁵⁸¹ Yet again, this does not prevent spouses and children of politicians and business moguls to apply for the position.

5.3.2 Investigative and Prosecution Power of the CCS and the TCC and Private Enforcement

The CCS and the TCC are vested with powers and duties to enable them to perform the tasks prescribed by respectively the SCA and the TCA. However, in this thesis, only the powers of the CCS and the TCC relating to investigation and prosecution will be examined because these powers are crucial to the functioning of the NCAs. Thus,

⁵⁷⁷ TCA s 18

⁵⁷⁸ *ibid*

⁵⁷⁹ Drafted Trade Competition Bill ss 37 and 40 (as of 15 March 2016)

⁵⁸⁰ *ibid* ss 37 and 38

⁵⁸¹ *ibid* s 38

it is a good example to identify disparities in their investigative and prosecution power and private enforcement which impact the enforcement and hence the effectiveness of the Acts.

A) Singapore

The powers of the CCS are laid out in Section 7⁵⁸² which does not go into great detail, but covers the necessary. The powers relating to investigation and prosecution are in Division 5 Enforcement. In this regard, the CCS has published the CCS Guidelines on the Powers of Investigation and the CCS Guidelines on Enforcement in June 2007 to clarify to the general public and stakeholders how the CCS will conduct its investigations as prescribed by Article 61 of the SCA. The CCS has both investigative and prosecution powers.

Regarding its investigative powers, the CCS has the power to investigate the alleged anticompetitive agreements⁵⁸³ and abuse of dominance.⁵⁸⁴ The CCS can issue a written notice requiring a specific document, information, and explanation of documents, from a person or his present or past officer or employee, which the CCS considers related to its investigations.⁵⁸⁵ The CCS has investigative powers for anticompetitive behaviours if there are reasonable grounds for suspicion. In this regard,

⁵⁸² **Powers of Commission**

7. – (1) Subject to the provisions of this Act, the Commission may carry on such activities as appear to the Commission to be advantageous, necessary or convenient for it to carry on for or in connection with the performance of its functions and the discharge of its duties under this Act or any other written law and, in particular, the Commission may exercise any of the powers specified in the Second Schedule.
- (2) This section shall not be construed as limiting any power of the Commission conferred by or under any other written law.
- (3) The Commission shall furnish the Minister information with respect to its property and activities in such manner and at such times as the Minister may require.

⁵⁸³ SCA s 34

⁵⁸⁴ *ibid* s 47

⁵⁸⁵ *ibid* ss 61A and 63

the CCS may appoint an inspector to conduct the investigations;⁵⁸⁶ enter into premises without warrant;⁵⁸⁷ enter and search premises with warrant;⁵⁸⁸ and issue interim measures.⁵⁸⁹

Upon the completion of the investigation, if the CCS finds that there is an infringement of Section 34 and/or Section 47, the CCS may give directions to bring the infringement to an end⁵⁹⁰ and requires the person concerned to modify the agreement or conduct, or to terminate the agreement, prohibit the anticipated merger from taking effect, or require the merger to be dissolved.⁵⁹¹ The direction may be given to the parent company of a subsidiary which directly violates Section 34 and/or 47 of the Act.⁵⁹² The CCS's directions normally take immediate effect, but the CCS may allow a period of time for the undertaking to comply with the direction.⁵⁹³

The CCS may apply to register the direction with a District Court. Once registered, the direction is effective as if it was issued by the District Court. Non-compliance of the registered direction without reasonable excuse is considered contempt of court.⁵⁹⁴ The undertaking which is subject to the direction can appeal to the Competition Appeal Board (CAB) which is an independent body from the CCS.⁵⁹⁵ The

⁵⁸⁶ *ibid* s 62

⁵⁸⁷ *ibid* s 64

⁵⁸⁸ *ibid* s 65

⁵⁸⁹ *ibid* s 67

⁵⁹⁰ *ibid* s 69

⁵⁹¹ *ibid* s 69(2)

⁵⁹² CCS, 'CCS Guidelines on Enforcement' 3
 <<https://www.ccs.gov.sg/legislation/~media/custom/ccs/files/legislation/ccs%20guidelines/ccsguidelineenforcementjul07final.ashx>> accessed 25 June 2016

⁵⁹³ *ibid* 4

⁵⁹⁴ *ibid*

⁵⁹⁵ *ibid* 5

CAB's decisions are subject to judicial review by the High Court and then the Court of Appeal on point of law arising therefrom.⁵⁹⁶

The SCA allows private enforcement in infringement of anticompetitive agreements and abuse of dominance in civil action against the infringing undertaking.⁵⁹⁷ But the injured person can exercise such a right only after the CCS has made a decision of infringement in respect to the alleged anticompetitive conducts. And if there is an appeal regarding that direction, the injured person can exercise the right only upon the expiry of the appeal period or upon determination of the appeal.⁵⁹⁸ In this case, the court is bound by Section 86(7) to accept as final and conclusive any relevant infringement decisions⁵⁹⁹ by the Commission, the Competition Appeal Board, the High Court, and the Court of Appeal, which establish that the prohibition in question has been infringed. The time limitation in this case is two years after the time that the CCS made the decision or two years from the determination of the appeal, whichever occurs later.⁶⁰⁰

B) Thailand

The TCC does not have the power to conduct investigations. Section 8 of the TCA does not attribute such powers to the TCC. The investigative powers belong to the investigative sub-committees which will be appointed by the TCC and there can be more than one investigative sub-committee to conduct investigations. Moreover, the investigative-subcommittee must consist of no more than 5 members, one of them must be either police or a public prosecutor, and the rest are government officials.⁶⁰¹ It is clear

⁵⁹⁶ *ibid*

⁵⁹⁷ SCA s 86

⁵⁹⁸ *ibid* s 86(2) and (3); CCS, 'CCS Guidelines on Enforcement' (n 592) 5

⁵⁹⁹ SCA s 86(3)

⁶⁰⁰ *ibid* s 86(6); CCS, 'CCS Guidelines on Enforcement' (n 592) 13

⁶⁰¹ TCA s 14

that if the TCC does not appoint an investigative sub-committee, there will be no investigation.

The Council of State has ruled that although the TCC is authorised to act as an inquiry officer under the Criminal Procedure Code,⁶⁰² the TCC cannot conduct the investigation by itself. The TCC is required by Section 14 to appoint the investigative sub-committee to conduct the investigation. Once the investigation is complete, the investigative sub-committee must submit its evidence, its findings, and its opinion to the TCC for further consideration.⁶⁰³ The implication of this interpretation is that the TCC must always appoint an investigative sub-committee to conduct an investigation under this Act. Hence, the assumption that the TCA intends to authorise the investigative sub-committee only to investigate cartels may not be accurate.⁶⁰⁴ Nevertheless, it should be noted that opinions of the Council of State is not binding on the Judiciary.

If the TCC considers that an undertaking has infringed the TCA, the TCC has the power to issue a written administrative order requiring the undertaking to suspend, cease, rectify or vary its acts. It should be noted that the TCC cannot impose a fine on an undertaking upon issuing this administrative order. The TCC is immune from any claims from the undertaking for issuing this written order. In this regard, the

⁶⁰² TCA s 15

⁶⁰³ สำนักงานคณะกรรมการกฤษฎีกา, บันทึกสำนักงานคณะกรรมการกฤษฎีกา เรื่อง อำนาจการสอบสวนตามกฎหมายว่าด้วยการแข่งขันทางการค้า (เรื่องเสร็จที่ ๒๐๙/๒๕๕๒) 5 – 6 [Office of the Council of State, Memorandum of the Office of the Council of State on Investigative Power under the Trade Competition Law (finished matter no. 209/2009) <<http://law.dit.go.th/Upload/Document/%E0%B9%80%E0%B8%A3%E0%B8%B7%E0%B9%88%E0%B8%AD%E0%B8%87%E0%B9%80%E0%B8%AA%E0%B8%A3%E0%B9%87%E0%B8%88%20209-52%20%E0%B8%AD%E0%B8%B3%E0%B8%99%E0%B8%B2%E0%B8%88%E0%B8%AA%E0%B8%AD%E0%B8%9A%E0%B8%AA%E0%B8%A7%E0%B8%99.pdf>> accessed 30 May 2016]

⁶⁰⁴ UNCTAD, *Review of Recent Experiences on the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe* (n 525) 20

undertakings have the statutory right to be heard.⁶⁰⁵ The TCC is required statutorily to specify its reasons for both questions of fact and questions of law and sign this written order.⁶⁰⁶ The order is subject to review by the Appellate Committee, which is final.⁶⁰⁷

However, the TCC cannot sue undertakings violating the TCA on its own. It must refer the case with its opinion to pursue legal action to the public prosecutors. If the public prosecutor rejects the application from the TCC, the Chairman of the TCC (which is the Minister of Commerce) will have to appeal to the Attorney General for a final decision.⁶⁰⁸ If the Attorney General decides in favour of the TCC, the case will be brought to the court. If the Attorney General decides against the TCC, the case is dropped.⁶⁰⁹

Under the proposed Bill, the TCC still has to submit its opinion to the public prosecutor. And if the prosecutor refuses by issuing a non-prosecution order, the TCC has the right under the proposed Bill to appeal such order to the Attorney General. If the Attorney General opines that the case is not complete and needs further investigation, the Chairman of the TCC and the Attorney General shall establish a working group comprised of an equal number of representatives from the TCC and the public prosecutor office to complete the investigation. Once the co-committee finishes the investigation, it shall submit the case to the Attorney General to file the case before the Court.⁶¹⁰

⁶⁰⁵ TCA s 32 para 1

⁶⁰⁶ *ibid* s 32 para 2

⁶⁰⁷ *ibid* ss 31, 42 – 47

⁶⁰⁸ *ibid* s 16

⁶⁰⁹ Criminal Procedure Code B.E. 2477 s 145/1 as amended by the National Council for Peace and Order, Order 115/2557 on Amendments of the Criminal Procedure Code dated 21 July 2014

⁶¹⁰ Drafted Trade Competition Bill s 27 (as of 15 March 2016)

Private litigation is allowed under the current TCA; civil societies are also eligible to sue on behalf of consumers.⁶¹¹ However, the injured persons are not allowed by the TCA to institute a criminal action on their own, they have to lodge a criminal complaint to the TCC for consideration.⁶¹² The time limit for an injured person to bring a claim to the court is within one year from the date the injured person has or ought to have had the knowledge of the grounds for action.⁶¹³ The right of private enforcement remains the same in the proposed Bill.⁶¹⁴

5.4 CASE STUDIES ON ABUSE OF DOMINANCE

The objective of this section is to provide evidence in as much detail as possible, subject to availability of reliable data, on the enforcement by the CCS and the TCC of abuse of dominance provisions to demonstrate the great disparities between these authorities and their approaches in the analysis of the cases as well as their transparency and accountability. The disparities in these areas are evidence as to why it is highly unlikely that a supranational approach to competition law and policy in ASEAN will be possible and hence this cannot enhance ASEAN's competitiveness.

5.4.1 Singapore

Section 47 of the SCA covers abuse of dominance. There are some exemptions provided under the Third Schedule. There has been only one case of abuse of

⁶¹¹ TCA s 40

⁶¹² *ibid* ss 8(13) and 55

⁶¹³ *ibid* s 41

⁶¹⁴ Drafted Trade Competition Bill ss 75 and 76 (as of 15 March 2016)

dominance before the CAB which was final. There are another four cases on abuse of dominance⁶¹⁵ which the CCS has investigated, but the undertakings in question have made voluntary commitments to the CCS to amend their business practices. The CCS conducted the investigation and analysed its first abuse of dominance case very carefully and thoroughly as is shown below.

This thesis argues that as a result of its strong commitment to curb and punish abusive incumbents with hefty fines and the elaborated legal reasoning and economic analysis applied to the first abuse of dominance case, the CCS has received full cooperation from incumbents in later cases to provide voluntary commitments instead of spending their time and resources to fight against the CCS.

A) SISTIC.com Pte Ltd⁶¹⁶ (SISTIC)

On 4 June 2010, the CCS issued an infringement decision against SISTIC for infringing Section 47 of the SCA on the ground of abuse of dominance by concluding a large number of exclusive agreements with venue operators in Singapore which resulted in closure of market entrance and hence the market being distorted. The CCS imposed SGD 989,000 for infringing Section 47 pursuant to Section 69(4) of the SCA, which allows the CCS to impose up to 10% of turnover in Singapore for each year of infringement.

After the case was final, the CCS commissioned Professor Stephen Davies to conduct post-enforcement evaluation of markets.⁶¹⁷ The project was completed and a

⁶¹⁵ Up until February 2016

⁶¹⁶ *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2010] SGCCS 3

⁶¹⁷ CCS, 'Occasional Paper: Post-Enforcement Evaluation Methodologies and Indicative Findings' (26 August 2013) 11 - 12 <<http://www.ccs.gov.sg/content/ccs/en/Media-and-Publications/Publications.html>> accessed 27 April 2016

report was published on 26 August 2013. Although is quite early to assess this, it is still relevant to this thesis.

After enforcement of the decision, the market shares of the smaller competitors of SISTIC's have doubled. And the market had a new entrant from Japan. But SISTIC continues to enjoy the benefit of being the first mover and brand loyalty from the event promoters. Disappointingly, there is no evidence that the CCS's decision has had an impact on SISTIC's booking fee.

B) Coca-Cola Singapore Beverages (CCSB)⁶¹⁸

In March 2012 the CCS received a complaint on CCSB anticompetitive practices that consisted of concluding exclusive agreements and engaging in rebates with local soft drink distributors. Upon investigation, the CCSB provided the CCS with a voluntary agreement to remove the anticompetitive clauses in its agreements with local distributors. The CCS then ceased investigation, but will continue to closely monitor market practices.

C) Cordlife Group Limited (Cordlife)⁶¹⁹

In June 2014, the CCS commenced an investigation on Cordlife regarding its exclusive agreements with baby fair organisers and hospitals which could potentially have the effect of limiting competition under Section 47. Cordlife provided the CCS with voluntary commitments to remove the existing exclusive arrangements that were subject

⁶¹⁸ CCS, 'Media Release: Coca-Cola Singapore Beverages Changes Business Practices in Local Soft Drinks Market following Enquiry by CCS' <<https://www.ccs.gov.sg/media-and-publications/media-releases/cocacola-singapore-beverages-changes-business-practices-in-local-soft-drinks-market-following-enquiry-by-ccs>> accessed 31 May 2016

⁶¹⁹ CCS, 'Media Release: Cordlife removes exclusive arrangements with baby fair organisers and hospitals following investigation by CCS' (last updated 19 June 2015) <<https://www.ccs.gov.sg/media-and-publications/media-releases/cordlife-removes-exclusive-arrangements>> accessed 26 May 2016

to investigation. The CCS was satisfied with the proposed voluntary commitment and ceased its investigation on 17 June 2015.

D) Asia Pacific Breweries (Singapore) Pte. Ltd. (APBS)⁶²⁰

The CCS received complaints regarding APBS for infringing Section 47. APBS concludes outlet-exclusive contracts with retailers prohibiting them from selling draught beer from competing suppliers and restricting the choices of draught beers available to retailers and consumers. The CCS conducted an investigation and commissioned a market survey accordingly. APBS has since provided the CCS with a voluntary commitment to cease its outlet-exclusivity practice and will not impose this condition in its supply of draught beer contracts with retailers which are entered into from 28 December 2015; including renewal contracts. Thus, the CCS ceased its investigation on 28 October 2015.

E) Supply of Lift Spare Parts for Maintenance of Lifts in HDB Estates⁶²¹

The CCS received a complaint regarding a supplier of a specific brand of lift parts (the Company) that supplies lift spare parts for the purposes of service and maintaining lifts located in a Housing Development Board (HDB) estate which would likely infringe Section 47. The CCS investigated and the Company provided the CCS with a voluntary commitment to amend its business practices. The CCS conducted a

⁶²⁰ CCS, 'Media Release: Asia Pacific Breweries (Singapore) Ends Exclusive Business Practices Following CCS Investigation' (last update 7 January 2016) <<https://www.ccs.gov.sg/media-and-publications/media-releases/asia-pacific-breweries-singapore-ends-exclusive-business-practices-following-ccs-investigation>> accessed 26 May 2016

⁶²¹ CCS, 'Media Release: Supply of Lift Spare Parts for Maintenance of Lifts in HDB Estates: CCS Consults on Proposed Voluntary Commitments by Supplier' (last update 22 January 2016) <<https://www.ccs.gov.sg/media-and-publications/media-releases/supply-of-lift-spare-parts-public-consultation-on-proposed-voluntary-commitments-by-supplier>> accessed 26 May 2016

public consultation from 22 January – 5 February 2016 and invited interested parties to provide feedback on the proposed commitment which is a list of amended Terms and Conditions of Supply attached to the Proposed Commitment. The case is pending (as of May 2016).

5.4.2 Thailand

As said, Thailand has a consistently poor record of competition law enforcement due to the structure of the TCC. Regarding abuse of dominance, Section 25 of the current TCA⁶²² prohibits a dominant business operator (undertaking) from engaging in certain anticompetitive practices such as predatory pricing, exclusive dealing, limiting production, and interfering with other undertakings' business practices, which are subject to vague notions such as 'unfairly' and 'without justifiable reason'.⁶²³

Section 3 of the SCA defines 'business operator with market domination' as

one or more business operators in the market of any goods or service who have the **market share** and **sales volume** above that prescribed by the Commission with the approval of the Council of Ministers and published in the Government Gazette, **having regard to the market competition.** (emphasis added)⁶²⁴

⁶²² Abuse of Dominance under the new proposed Bill is in Section 58 which is identical to the current TCA Section 25

⁶²³ **Section 25.** A business operator having market domination shall not act in any of the following manners:

- (1) unfairly fixing or maintaining purchasing or selling prices of goods or fees for services;
- (2) unfairly fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators;
- (3) suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand;
- (4) interfering in the operation of business of other persons without justifiable reasons.

⁶²⁴ The new proposed Bill provides almost the same definition quoted here. However, it imposes a revision requirement on the TCC to revise the definition at least every 5 years from the date of the

It was reported that the original market dominance threshold proposal submitted for the Cabinet's approval in 2000⁶²⁵ was that dominant firms need to hold only 33% of market share with the same amount of turnover.⁶²⁶ However, before the proposal was approved, the TCC decided to shift its approach from one threshold which is applicable to all industries to a sector specific approach.⁶²⁷ The first two industries which came under scrutiny from the TCC were the retail and wholesale industry and the motorcycle industry.⁶²⁸

The reason for such selective considerations was ambiguous as reported in anonymous interviews conducted with representatives of the Thai retail and motorcycle industries on 30 October 2003 by Williams. The interviewees revealed that the abrupt shift in policy was caused by lobbying from domestic undertakings, and ironically by concern over the growth of FDI in these domestic markets.⁶²⁹ The proposed threshold for retail and wholesale sector was for a dominant incumbent to hold at least 20% market share and have a turnover of 27 billion Baht or more in the relevant market.⁶³⁰

However, that proposal received negative criticism from academics, business sectors and civil societies for reasons of discrimination.⁶³¹ It was reported that a year later, Mr Wattana Muangsook, the then Minister of Commerce and the *ex officio*

publication of the Notification in the Royal Gazette. (Section 4 of the Drafted Trade Competition Bill)

⁶²⁵ Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (n 520) 481

⁶²⁶ Thanitkul, 'Competition Law in Thailand: A Preliminary Analysis' (n 525) 175

⁶²⁷ Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (n 520) 481; 'Motorcycle Industry Scrutinized by Trade Competition Law' (2003) 5 SGA Bulletin, 3 <<http://www.chaninatandleeds.com/Thailand%20Law%20News%20Jan03.html#hl6>> accessed 5 June 2014

⁶²⁸ Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (n 520) 482

⁶²⁹ *ibid*

⁶³⁰ *ibid* 481

⁶³¹ Deunden Nikomborirak, 'The Political Economy of Competition Law: The Case of Thailand' (2006) 26 *Northwestern Journal of International Law & Business* 597, 604

Chairman of the TCC, withdrew this proposal. Nikomborirak opined that the decision to withdraw the threshold was due to its inappropriateness, and reckoned that the strategy to withdraw the proposed threshold was ‘merely a tactic to further delay the establishment of the definition of dominance and, hence, the enforcement of the law.’⁶³² But this thesis argues that Wattana Muangsook, former Minister of Commerce, withdrew this proposal because it could potentially affect his wife’s family business, because if the threshold was in effect, Tesco Lotus and Makro could potentially fall within the category of dominant undertaking⁶³³.

After several proposals, the TCC finally obtained Cabinet’s approval to issue a fundamental definition. On 8th February 2007, the Notifications of the TCC on the Criteria for Business Operator with Market Domination⁶³⁴ took effect. A World Bank expert was cited that the criteria were set too high in the context of Thailand, and that there were approximately only a 100 firms that could be considered as holding a dominant position⁶³⁵ (as it requires the firm to hold over 50% market share in the previous year and at least a yearly turnover of one billion Baht (approximately £20,000,000.00)).⁶³⁶ As evident, the definition of dominance under the TCA and the

⁶³² *ibid*

⁶³³ See his conflict of interest link to a powerful business group at CP Group at **Charoen Pokphand Group (CP) by Chiaravanont Family** on p. 217 and note 689 below

⁶³⁴ ประกาศคณะกรรมการการแข่งขันทางการค้า เรื่อง หลักเกณฑ์การเป็นผู้ประกอบธุรกิจซึ่งมีอำนาจเหนือตลาด, ราชกิจจานุเบกษาฉบับประกาศและงานทั่วไปเล่ม ๑๒๔ ตอนพิเศษ ๑๕ง ลงวันที่ 7 กุมภาพันธ์ พ.ศ. 2550 (Hereinafter referred to as Notification of Dominance Criteria) [The Trade Competition Commission Notification titled Notification of Dominance Criteria, Royal Gazette issue 124 special edition 15ngor dated 7 February 2007]

⁶³⁵ ศักดา ธนิตกุล, คำอธิบายและกรณีศึกษา พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 (2nd ed, วิญญูชน พ.ศ. 2553) 94 [Sakda Thanitkul, *Explanation and Case Studies Trade Competition Act B.E. 2542* (2nd, Winyuchon 2010)]

⁶³⁶ ‘1. Business operator, in any goods or services, with market share in the previous year over 50% **and** at least 1,000 million baht turnover; or

2. The top three business operators, in any goods or services, with combined market share in the previous year over 75% and at least 1,000 million baht turnover

The exception is for a business operator with the market share less than 10% **or** turnover less than 1,000 million baht in the previous year.’ (tentative translation by Office of the TCC)

SCA differs greatly. According to Both, different meanings given to ‘dominance’ can complicate cooperation on the regional level.⁶³⁷

The TCC published the Guidelines on Section 25 dated January 2009,⁶³⁸ which stated explicitly that acquiring dominance is not prohibited under the TCA, but that the abuse of such dominance is.⁶³⁹ This Guideline was reviewed for potential updates by a specialised sub-commission.⁶⁴⁰

The Guidelines use the term ‘relevant market’ and mention product and geographical market. Regarding geographical market, it takes into account substitution, cost of transportation, and product deterioration as determinants for the geographical market, but not the SSNIP test. Example given of cost of transportation is confusing. It states:

‘(1) Cost of delivery is high when compared with product value. For example, the delivery of the products from Central Thailand to the North costs a lot of money hence products sold in the North are more expensive than products sold in the Centre. Consequently, the products which are delivered to the North cannot compete with the products sold in the Centre. It follows that the Central and the North areas are

⁶³⁷ Both, ‘Drivers of International Cooperation in Competition Law Enforcement’ (n 505) 310

⁶³⁸ คณะกรรมการการแข่งขันทางการค้า, แนวปฏิบัติตามมาตรา 25 แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 การใช้อำนาจเหนือตลาดในทางมิชอบ มกราคม พ.ศ. 2552 <<http://otcc.dit.go.th/wp-content/uploads/2015/07/Guidelines-under-Section-25.pdf>> accessed 30 March 2015 [Trade Competition Commission, Guidelines Under Section 25 of the Trade Competition Act B.E. 2542 on Abuse of Dominance dated January 2009]

⁶³⁹ *ibid* 1

⁶⁴⁰ Sakda Thanitkul and Duenden Nikomborirak were among the six appointees to review Guidelines on Section 25, Section 27, and Section 29. The specialised sub-committee was appointed on 7 January 2015 and expected to finish the reviews of the three Guidelines within 3 months. However, the report of this specialised sub-committee is not publicly available on the TCC website. See ประกาศคณะกรรมการการแข่งขันทางการค้า เรื่อง การแต่งตั้งคณะกรรมการเชี่ยวชาญเฉพาะเรื่อง การจัดทำแนวปฏิบัติทางการค้าที่เป็นธรรม ลงวันที่ 7 มกราคม พ.ศ. 2558 <<http://law.dit.go.th/Upload/Document/9337e47a-27f8-44d7-8bbb-9c1b8cceb10b.pdf>> accessed 28 May 2016 [Trade Competition Commission Notification Appointment of specialized sub-committee on Preparation of the Guideline on Fair Trade Practices date 7 January 2015]

not in the same geographical market.’⁶⁴¹ (Tentative translation by the author)

The example given of product deterioration is even more confusing. It states:

‘(2) Products which are prone to deteriorate or have limited shelf life such as fresh fruits and vegetables may not be suitable for long distance transportation and to be sold in remote area, and are not substitutable. Hence, they are in different geographical markets.’⁶⁴² (Tentative translation by the author)

These examples given are confusing as they do not appear relevant. Determining a geographical market by asking whether costs of transportation are higher, or products will deteriorate quicker without examining whether consumers are willing to switch to sellers in neighbouring areas if the price is increased by 10%, the mobility of buyers, as well as the ability of other competitors from neighbouring areas to respond to buyers’ demand in a prompt and cost effective manner, is a questionable practice. According to this definition, mangoes sold in Bangkok are not in the same geographical market as mangoes sold in Chiangmai without regard to the ability of the supplier to deliver these mangoes efficiently at low cost and in a short time.

It is true that high transportation costs can result in a smaller geographic market, as explained by the Guidelines on Section 47 Prohibition of Singapore,⁶⁴³ but the CCS takes other factors into consideration too. Besides, the definition of geographical market as provided in the TCC Guidelines does not suit the geography of the market for services.

⁶⁴¹ คณะกรรมการการแข่งขันทางการค้า, แนวปฏิบัติตามมาตรา 25 แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 การใช้อำนาจเหนือตลาดในทางมิชอบ (น 638) 3 [Trade Competition Commission, Guidelines Under Section 25 of the Trade Competition Act B.E. 2542 on Abuse of Dominance]

⁶⁴² *ibid*

⁶⁴³ CCS, ‘CCS Guidelines on Market Definition’ (CCS 2007) para 4.8 <http://www.ccs.gov.sg/legislation/~/_media/custom/ccs/files/legislation/ccs%20guidelines/mktdefinitionjul07final.ashx> accessed 16 August 2012

Regarding the product market, the TCA takes into consideration 7 factors ,listed here from the most influential to the least important: demand-substitution and cross elasticity of demand (using SSNIP test), supply-substitution and cross elasticity of supply and switching costs, final usage of products by consumers (aims of product consumption) and switching costs incurred by buyers, buyers' recognition and perception of products/services, distribution channels (through distributor or direct sale), price and quality, and physical appearance of products/services.⁶⁴⁴

The Guidelines explicitly mention that the TCC may obtain data relating to the buyers' recognition and perception of products/services by conducting market surveys, questionnaires, or by making use of previous researches.⁶⁴⁵ This is a very different approach to the CCS because the CCS explicitly states that determination of the relevant market should not rely on an earlier definition as market competition may have changed.⁶⁴⁶

One can conjecture that the enforcement of abuse of dominance in Thailand is challenging as neither the TCA, nor the Notification of Dominance Criteria, nor the Guidelines on Section 25 provide clear and useful examples for defining the market and assessing dominance. There is no mention of market power and it does not mention judgements in abuse of dominance cases in Japan, Germany, Korea, and Taiwan as useful references even though the TCA was modelled after the competition laws of these countries. The reality in enforcing Section 25 supports the thesis that the structure of the

⁶⁴⁴ คณะกรรมการการแข่งขันทางการค้า, แนวปฏิบัติตามมาตรา 25 แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 การใช้อำนาจเหนือตลาดในทางมิชอบ (n 638) 3 – 4 [Trade Competition Commission, Guidelines Under Section 25 of the Trade Competition Act B.E. 2542 on Abuse of Dominance]

⁶⁴⁵ *ibid* 4

⁶⁴⁶ CCS, 'CCS Guidelines on Market Definition' (n 643) paras 5.8 - 5.9

TCC and the Office of the TCC as well as the TCA are not promoting competition and competitiveness.

There is a clear lack of transparency and accountability on the part of the TCC in advocacy of competition law and policy in Thailand. There are a total of 95 complaints lodged with the TCC between October 1999 and March 2015; 53 of which concern unfair trade practices; 24 of which concern anticompetitive agreements; and 18 of which concern abuse of dominance.⁶⁴⁷ According to Nikomborirak, there is no information on how these decisions were made by the TCC and what information the TCC took into consideration.⁶⁴⁸ When a party to the complaint requested a copy of a non-confidential version of its decisions, the TCC made it difficult for the interested party to obtain such information.⁶⁴⁹

⁶⁴⁷ สภาปฏิรูปแห่งชาติ, วาระปฏิรูปที่ ๑๒: การผูกขาดและการแข่งขันที่เป็นธรรม: การปฏิรูปกฎหมายแข่งขันทางการค้า (n 213) 13 - 14 [National Reform Council of Thailand *Reform Agenda No. 12: Monopoly and Fair Competition: Trade Competition Law Reform*]

⁶⁴⁸ นิคมบริรักษ์, การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย (n 520) 13 – 15 [Nikomborirak, *A Reform to Alleviate Monopoly and Promote Competition in Thai Economy*]

⁶⁴⁹ คำวินิจฉัยคณะกรรมการวินิจฉัยการเปิดเผยข้อมูลข่าวสารสาขาเศรษฐกิจและการคลังของประเทศ ที่ ศค ๖/๒๕๔๕ เรื่อง อุทธรณ์คำสั่งไม่ให้เปิดเผยข้อมูลข่าวสารเกี่ยวกับการพิจารณาและคำวินิจฉัยของคณะกรรมการการแข่งขันทางการค้า กรณีที่มีการร้องเรียนว่ามีการขายพ่วงอันเป็นการฝ่าฝืนพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. ๒๕๔๒ dated 5 November B.E. 2545 (2002) <<http://www.oic.go.th/FILEROOM-PDF/CABOICFORM05/DRAWER01/GENERAL/DATA0002/00002559.tif.pdf>> accessed 23 February 2016. [Decision of the Information Disclosure Tribunal of Economics and National's Finance Division number Sor Kor 6/2545 on Appeal of the Decision not to disclose information relating to proceedings and decision of the Trade Competition Commission on a complaint of an alleged tying and bundling which violates the Trade Competition Act 1999 dated 5 November 2002] In this case, Boonrod Brewery Co. Ltd (Boonrod), complainant of the abuse of dominance by ThaiBev, file a request with the TCC for a copy of the TCC's decision on its complaint, particularly on the TCC's legal reasoning in questions of law and questions of fact as well as individual Commissioner's opinions and dissenting opinions on 4 October 2000, but the TCC refused citing these information could not be disclosed according to Section 53 of the TCA, and that the disclosure of such information would prevent the Commissioners from giving their opinions freely without being under pressure. Then Boonrod appealed to the Office of the Official Information Commission (OIC) on 8 November 2000. The OIC found that Boonrod's request was not clear and ordered it to re-submit its request to the TCC. Boonrod resubmitted its request accordingly on 19 February 2001 to the TCC. But the TCC denied disclosing this information claiming the same reason on 19 March 2002. Boonrod appealed to the OIC again on 18 June 2002. The OIC ordered the TCC to disclose the information to Boonrod on 5 November 2002.

The only official and publicly available information about cases decided by the TCC that contain ‘legal reasoning’, is in the bulletin published by the Department of Internal Trade (DIT).⁶⁵⁰ However, this bulletin does not contain all cases on abuse of dominance hence academics’ criticism of and references to the cases are used to complete the findings.

It should be noted that since the enforcement of the TCA in 1999, no case was filed to the Court. And the Cabinet has never appointed an Appellate Committee pursuant to Section 42.⁶⁵¹ Case studies on abuse of dominance in Thailand are narratively examined below. It should be noted that most cases are dated. The last case on TrueVisions is the most recent case which did not receive any attention from the TCC.

A) Whiskey and Beer Tying

Tying whiskey with beers is not a new trade practice in Thailand. It already made the headlines in 1997.⁶⁵² In early 2000, Boonrod Brewery, producer of Singha Beer, filed a complaint to the Prime Minister alleging that the Suramaharat violated Section 25(2) (unfairly tying and bundling) and 29 (unfair trade practices)⁶⁵³ of the TCA. The Office of the Prime Minister forwarded the complaint to the Minister of Commerce as *ex officio*

⁶⁵⁰ กรมการค้าภายใน, ‘รู้รอบงานแข่งขันทางการค้า: ครบรอบ 72 ปี วันสถาปนากรมการค้าภายใน’ [Department of Internal Trade, ‘Understanding Trade Competition Work: 72nd Anniversary of the Establishment of the Department of Internal Trade’]

⁶⁵¹ Under the new proposed Bill, there will be no Appellate Committee because the TCC is authorised to consider the appeals of its own decisions. The decisions on the appeals are final. There is no provision on judiciary review. (Sections 77 and 79 paragraph 3 of the Drafted Trade Competition Bill as of 15 March 2016)

⁶⁵² นิคมบริรักษ์ และ ทวรรณกุล, ‘การผูกขาดทางธุรกิจกับการเมือง’ [Nikomborirak and Twankul, ‘Monopoly and Politics’] (n 565) 27; See background of beer market in Thailand in Williams, ‘Competition Law in Thailand: Seeds of Success or Fated to Fail?’ (n 520) 478

⁶⁵³ TCC section 29 A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.

Chairman of the TCC. The TCC then appointed a sub-committee to conduct a study on the market and the complaint.⁶⁵⁴

In June 2000, the sub-committee on whiskey and beers tying found that: 1. Suramaharat owns ThaiBev, the producer of Chang Beer. Suramaharat has a statutory monopoly on Thai whiskey. There are cross ownerships among the distributors, producer groups, and sub-distributors of ThaiBev and Suramaharat. Both corporations share the same board of directors. Suramaharat's distributors and sub-distributors are located at the same address as Chang Beer.⁶⁵⁵ Although the Bulletin of the DIT does not explicitly state that the sub-committee applied the SEE test, the explanation seems to point to that conclusion.

The sub-committee found that there was tying of Thai whiskey produced by the Suramaharat with Chang beer at many levels of distribution. The conditions of tying and bundling varied. Sometimes the distributors were allowed to not buy the tied Chang beer, but the tying Thai whiskey would be more expensive when bought alone, and sometimes ratios between Thai whiskey and Chang beers were imposed etc.⁶⁵⁶

The sub-committee found that Suramaharat unfairly tied Chang beer with its Thai whiskey. But in 2002, the criteria on market share and turnover of a dominant undertaking were not yet enforced. Thus, there were not enough facts to determine whether Suramaharat was a dominant undertaking pursuant to Section 3.⁶⁵⁷

⁶⁵⁴ ธนิตกุล, คำอธิบายและกรณีศึกษา พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 (n 635) 380 – 381 [Thanitkul, *Explanation and Case Studies Trade Competition Act B.E. 2542*]

⁶⁵⁵ กรมการค้าภายใน, 'รู้รอบงานแข่งขันทางการค้า: ครบรอบ 72 ปี วันสถาปนากรมการค้าภายใน' (n 650) 48 – 49 [Department of Internal Trade, 'Understanding Trade Competition Work: 72nd Anniversary of the Establishment of the Department of Internal Trade']

⁶⁵⁶ *ibid* 49

⁶⁵⁷ *ibid* 50

However, the sub-committee also considered Section 27(3) (10) (anticompetitive agreements)⁶⁵⁸ and Section 29 (unfair trade practices)⁶⁵⁹ and concluded that tying and bundling was provided for specifically in Section 25. Therefore, Section 25 should be applied. Besides, violations of Section 27(3) (10) consist of agreements between competitors (horizontal agreements), not vertical agreements. And market survey also found that whiskey and beer were not in the same market. The majority of the sub-committee found that there was not enough evidence of an agreement with a view to have market dominance or market control.⁶⁶⁰

Regarding the infringement of Section 29, some members of the sub-committee opined that this section is an umbrella clause and that hence the whiskey and beer tying in question should be subject to this. However, the majority of the sub-committee found that tying and bundling was normal business practice to maximise profits and could not be considered as destroying, impairing, obstructing, impeding, or restricting business operations of other undertakings or preventing other undertakings from carrying out business or causing cessation of their businesses.⁶⁶¹ The interpretation of the majority of the sub-committee is worrying, because it focused on type of conduct rather than the effects of such conduct. This is contrary to the provision of Section 29 (see note 6530)

Finally, the TCC agreed with the sub-committee and ruled that the alleged tying practices did not violate Section 25, 27, and 29. However, the TCC notified the sub-distributors that the tie-in of Chang beer was an inappropriate practice and hence should

⁶⁵⁸ TCC section 27

⁶⁵⁹ See note 653

⁶⁶⁰ กรมการค้าภายใน, รัฐบาลแข่งขันทางการค้า: ครบรอบ 72 ปี วันสถาปนากรมการค้าภายใน' (n 650) 50 [Department of Internal Trade 'Understanding Trade Competition Work: 72nd Anniversary of the Establishment of the Department of Internal Trade']

⁶⁶¹ *ibid* 50 - 51

be terminated.⁶⁶² The TCC also directed the DIT to occasionally monitor marketing practices of the distributors and producers in the beer and whiskey industry and report findings to the TCC.⁶⁶³

B) Cable Television v Consumers⁶⁶⁴

In early 2000, the TCC received complaints from consumer groups relating to abuse of dominance of a monopoly cable television company which increased its member packages fee and limited choices for its members.

Prior to 1998 there used to be two cable television companies namely International Broadcasting Corporation Plc., and UTV Cable Network Plc. These companies were granted concessions from the MCOT⁶⁶⁵ in form of a joint-venture agreement between them and the MCOT. Due to the financial crisis during 1997-1998, the two competitors restructured their shareholder structure and acquired cross ownership with approval from the MCOT. They remain different legal entities, but use the same trademark “UBC”. The acquisition did not affect the joint-venture agreement that they have with the MCOT.

⁶⁶² *ibid*; See also Williams, ‘Competition Law in Thailand: Seeds of Success or Fated to Fail?’ (n 520) 478-479; UNCTAD, *Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe* (n 525) 23 - 24; Nikomborirak, ‘The Political Economy of Competition Law: The Case of Thailand’ (n 631) 603; นิคอมบรีรักษ์ และ ทวรรณกุล, ‘การผูกขาดทางธุรกิจกับการเมือง’ [Nikomborirak and Twankul, ‘Monopoly and Politics’] (n 565) 27; Kohpaiboon, Chantasakda, and Tanasritunyakul, ‘Competition Policy in Thailand’ (n 520) 19; นิคอมบรีรักษ์, *การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย* (n 520) 20 [Nikomborirak, *A Reform to Alleviate Monopoly and Promote Competition in Thai Economy*]

⁶⁶³ There are another two Notifications of the TCC on Appointment of the Investigative Sub-Committee in Relation to Whiskey and Beer tying dated 24 February 2554 (2011) and 20 June 2556 (2013). However, the reports of these Investigative Sub-Committees are not publicly available.

⁶⁶⁴ กรมการค้าภายใน รื้ออบงานแข่งขันทางการค้า: ครบรอบ 72 ปี วันสถาปนากรมการค้าภายใน (n 650) 52 - 55 [Department of Internal Trade ‘Understanding Trade Competition Work: 72nd Anniversary of the Establishment of the Department of Internal Trade’]

⁶⁶⁵ The Mass Communication Organization of Thailand is an SOE which operates its own television channel and is authorised by law to grant concessions to other undertakings.

As part of the approval plan, the MCOT required that UBC must continue to offer its basic monthly plan (silver package) to lower-income customers. But after the acquisition, UBC proposed to MCOT to modify its monthly packages, such as substantially increasing installation fees for new members and increasing the Gold Package monthly membership from 890 Baht to 1,060 Baht. Besides, UBC sought MCOT's approval to remove the requirement to continue to offer the silver package by providing a new standard substitute package. The MCOT approved all proposals.⁶⁶⁶

However, consumers complained to the TCC that the fees for the new standard substitute package were unreasonably high and that UBC did not make new customers aware of this by intentionally concealing its existence from the consumers.⁶⁶⁷

The TCC appointed an investigative sub-committee. The investigative sub-committee analysed the market structure on the following issues: service market, geographical market, and barrier to entry. The following analysis is drawn from the bulletin of the DIT.

Regarding the service market, the sub-committee considered supply substitutions relating to fees, customer base, quality and characteristics of service, and convenience in servicing. The conclusion was that cable television with membership subscriptions was a different market from free televisions, satellite dishes, video rentals, and cinemas.

Regarding the geographical market, the sub-committee considered broadcasting technology and the government's monitoring and supervision criteria. The conclusion was that the geographical market was Thailand. The sub-committee also concluded that

⁶⁶⁶ Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (n 520) 477

⁶⁶⁷ *ibid*

small undertakings could not enter the market due to limitations in broadcasting technology and high investment hence UBC was a monopoly with a 100% market share.

Regarding barriers to entry, the sub-committee found the following reasons prevented new entrants: 1. High sunk costs; 2. uncertainty in license application as there was no governmental body regulating the Telecommunications industry which rendered new entrants unable to lease or invest in the fibre optic network; 3. Government's investment policy limited foreign investment, and 4. The market size was small.

The Office of Attorney General also examined the concession contract between UBC and MCOT and came to the following conclusions: 1. The joint-venture is UBC's venture because the UBC is entirely invested in the venture, the UBC unilaterally pays the operation costs, and is solely responsible for the members without any account made to the MCOT part; and 2. UBC is not an SOE hence it is not exempted under Section 4(2) of the Trade Competition Act.

Regarding the SEE test, the World Bank representative, two economics academics, and one law academic mutually agreed that UBC, despite consisting of two separate companies, having the same board of directors who act on behalf of the two companies meant that they are a single unit, and thus constitute a dominant undertaking under Section 25.

The sub-committee also examined the practices of UBC and concluded that UBC abused its dominance by bundling and forcing all members to sign up for the Gold package which was the most expensive package. The sub-committee also determined the extent of abuse of dominance and found that customers had to pay higher fees and the cost of changing from the MMDS system to satellite and cable. In terms of efficiency,

after the merger, the sub-committee found that cost of operation per member was higher than before the merger. But the quality of services did not seem to have increased.

The sub-committee submitted its findings and opinions to the TCC. The TCC ruled that although there was cross ownership and the two companies remain different legal entities, they share the same board of directors who act on behalf of the UBC. Hence, it was not under Section 27(1)⁶⁶⁸ prohibition on anticompetitive agreement between two undertakings. The TCC also found that UBC had a 100% market share and was a monopoly, but its practice in increasing monthly membership fees did not infringe Section 25(1) on unfair price fixing⁶⁶⁹ because there was a justifiable reason for such an increase in the fee. The TCC opined that the change in monthly package was under supervision and approval from the MCOT since UBC had notified the MCOT who ensured that the monthly fee was fair and that the increase in monthly packages represented additional choices for consumers.

However, according to Williams, things were handled slightly differently from the document provided by the DIT. From his findings, the investigative sub-committee ‘took a very literalist view of Section 25’ and concluded that there were still two separate entities and that they did not qualify as a single economic entity. Thus, UBC could not violate Section 25 on abuse of dominance. The sub-committee found that this was an infringement of Section 27 on anticompetitive agreement between undertakings. It surmised that the sub-committee arrived to this conclusion to avoid the application of Section 25 because at that time the TCC had not published its criteria for dominance yet. This means Section 25 was inoperable. To avoid the same mistake as in whiskey and

⁶⁶⁸ See note 658

⁶⁶⁹ See note 623

beer tying, the sub-committee tried to apply Section 27 instead. According to Williams, when the sub-committee submitted its opinion to the TCC, the TCC disagreed and concluded that UBC should be treated as one single unit that violated Section 25(3) (refusal to supply).⁶⁷⁰

Although the information on analysis of the case provided by the DIT and Williams are slightly different, their conclusion is the same. No infringement decision was issued, and no sanctions were applied to UBC. The TCC decided to refer the case to the MCOT instead.⁶⁷¹ At the end, the MCOT affirmed the TCC findings that the increased monthly fee was not unfair price fixing due to UBC's operating loss. The MCOT did not impose any sanction on UBC or order a reduction of monthly fees. This was because the MCOT is entitled to 6.5% from UBC's turnover. However, UBC began to offer a less expensive monthly package to its customers to meet the original requirements imposed by the MCOT. But the cheaper package did not really offer any real choices to consumers. Nevertheless, there is evidence that in March 2005, UBC eventually offered real choices to its customers and potential customers as a result of facing competition from new entrants in the market.⁶⁷²

⁶⁷⁰ Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (n 520) 477 - 478

⁶⁷¹ See also UNCTAD, *Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe* (n 525) 22 - 23; Nikomborirak, 'The Political Economy of Competition Law: The Case of Thailand' (n 628) 602 - 603; นิคมบริรักษ์ และ ทวรรณกุล, 'การผูกขาดทางธุรกิจกับการเมือง' [Nikomborirak and Twankul, 'Monopoly and Politics'] (n 565) 26 - 27; Kohpaiboon, Chantasakda, and Tanasritunyakul, 'Competition Policy in Thailand' (n 520) 19; นิคมบริรักษ์, *การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย* [Nikomborirak, *A Reform to Alleviate Monopoly and Promote Competition in Thai Economy*] (n 520) 19 - 20

⁶⁷² Nikomborirak, 'The Political Economy of Competition Law: The Case of Thailand' (n 628) 603

C) Battle of the Japanese Motorcycle Manufacturers

This case is a saga which ends with a tragic death of the knight. It is the only case which was handed to the public prosecutor for prosecution of the alleged incumbent. And of course, it did not end well.

On 7 November 2001, the TCC received a complaint from motorcycle manufacturers namely Yamaha, Suzuki, and Kawasaki who alleged that A.P. Honda, a dominant motorcycle manufacturer, abused its dominance. However, there are many versions of what Honda allegedly did to abuse its dominance.

Some researchers reported that Honda abused its dominance by concluding distribution agreements containing a quota and queue clause. Honda Wave was the most popular model in the market hence it was in very high demand. Motorcycle distributors were given quota and queue to receive a certain amount of Honda Wave motorcycles in disproportion to the amount of other brands of motorcycles that distributors are selling. The more other brands of motorcycle it sells, the less number of Honda Waves it would receive. As a result, more and more distributors abandoned other brands.⁶⁷³

According to the DIT bulletin, the abusive practice in question was the offer of special conditions to dealers who sell other brands to become a sole dealer of Honda motorcycles. Another practice was that in case Honda failed to influence the dealers and distributors to switch to Honda; it would appoint a new dealer or distributor to sell Honda motorcycles in competition with the existing dealers.⁶⁷⁴

⁶⁷³ Kohpaiboon, Chantasakda, and Tanasritunyakul, 'Competition Policy in Thailand' (n 520) 19

⁶⁷⁴ กรมการค้าภายใน รัฐบาลงานแข่งขันทางการค้า: ครบรอบ 72 ปี วันสถาปนากรมการค้าภายใน' (n 650) 56
[Department of Internal Trade 'Understanding Trade Competition Work: 72nd Anniversary of the Establishment of the Department of Internal Trade']

Nikomborirak reported that Honda's abusive practice was to prohibit dealers from exhibiting and selling competing brands in the same store.⁶⁷⁵ Williams reported that Honda's abusive practices were the conclusion of exclusive dealing agreements, having competitors advertising hoardings removed, and persuading dealers to switch to Honda only.⁶⁷⁶

The TCC appointed a specialised sub-committee which took 2 years to finish its investigation. The specialised sub-committee concluded that Honda engaged in unfair trade practices under Section 29⁶⁷⁷ (act carried out which is not free and fair and has the effect of restricting business operation of other business). The sub-committee chose to avoid applying Section 25 (abuse of dominance) even though Honda had a 70% market share as this section was inoperable at the time of the case.

Williams reported that on 30 April 2003, the TCC published the Guidelines for Unfair Trade Practices under Section 29 which appears to have been used retrospectively in this case because on the same day, the TCC announced submission of this case to the public prosecutor.⁶⁷⁸ The Guidelines clearly stated that Section 29 is only applicable for unfair trade practices in business to business dealings.⁶⁷⁹

No details emerged as to why and how the sub-committee came to the conclusion provided in the bulletin from the DIT, let alone that there was any publicly available record of a similar nature. Williams reported that during the course of

⁶⁷⁵ Nikomborirak, 'The Political Economy of Competition Law: The Case of Thailand' (n 628) 605

⁶⁷⁶ Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (n 520) 485

⁶⁷⁷ See note 650

⁶⁷⁸ Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (n 520) 483 and 485

⁶⁷⁹ สำนักส่งเสริมการแข่งขันทางการค้า, แนวปฏิบัติพหุติกรรมทางการค้าที่ไม่เป็นธรรมตามมาตรา ๒๙ แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. ๒๕๔๒, 1 <<http://otcc.dit.go.th/wp-content/uploads/2015/07/Guidelines-under-Section-26.pdf>> accessed 31 May 2016 [Office of Trade Competition Promotion, Guidelines on Unfair Trade Practices Under Section 29 of the Trade Competition Act B.E. 2542]

investigation, Honda was not given the opportunity to present its case to the sub-committee and that the allegation did not contain a clear accusation as to what it did wrong and that there was no supporting evidence for the conclusion. It was reported that the Japanese Ambassador to Thailand personally accompanied the President of Honda to lobby the Minister of Commerce to reverse the TCC decision.⁶⁸⁰

On 30 April 2003, the TCC agreed with the findings of the specialised sub-committee to prosecute Honda pursuant to Section 29 and ordered the Secretary-General of the Office of the TCC to investigate, collect evidence and proceed under the TCA. The Office of the TCC submitted the case to the Office of the Attorney General (OAG) for proceedings on 1 August 2003. But the OAG refused to file the case to the court on the grounds of insufficient evidence and requested that the TCC investigated further.⁶⁸¹

The TCC conducted further investigation and collected more evidence as instructed by the OAG. But on 15 November 2006, the OAG issued a non-prosecution order and returned the files to the TCC on the ground of invalid investigation. The OAG claimed that the TCC did not appoint the investigative sub-committee to investigate the case pursuant to Section 14. Hence, the investigation was invalid. The Chairman of the TCC disagreed and issued a dissenting opinion and appeal of that order to the Attorney General.⁶⁸²

On 22 May 2007, the Attorney General ordered the TCC to appoint the investigative sub-committee to conduct the investigation for this case. On 1 August

⁶⁸⁰ Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (n 520) 485 - 486

⁶⁸¹ กรมการค้าภายใน รัฐบาลแข่งขันทางการค้า: ครบรอบ 72 ปี วันสถาปนากรมการค้าภายใน' (n 650) 58
[Department of Internal Trade 'Understanding Trade Competition Work: 72nd Anniversary of the Establishment of the Department of Internal Trade']

⁶⁸² *ibid*

2007, the TCC appointed the investigative sub-committee accordingly. Meanwhile the TCC wrote an urgent letter to the Council of State asking for advice on whether it was bound by Section 14 to appoint an investigative sub-committee to conduct investigations. The Council of State replied in a memorandum dated April 2009 that the TCC was indeed bound to appoint the investigative sub-committee.

On 30 November 2009 the investigative sub-committee finished the investigation and submitted its findings to the TCC to prosecute Honda for infringing Section 29. The TCC, on 31 March 2010, agreed with the investigative sub-committee and submitted the case to the OAG for a prosecution order accordingly.⁶⁸³ Unsurprisingly, to the public's disappointment, there was no detail on how the sub-committee interpreted Section 29 in this case.

On 23 August 2010, the OAG issued a non-prosecution order, which was appealed by the TCC on 11 April 2011. On 29 March 2012, the OAG sent a memorandum to the Chairman of the TCC to order the investigative sub-committee to conduct further investigation and to remind the TCC that the limitation statute would expire in April 2013.⁶⁸⁴

On 27 June 2012, the TCC appointed another investigative sub-committee. The investigative sub-committee investigated on the issues suggested by the OAG and submitted its findings to the TCC. The TCC approved the case and submitted to the OAG on 10 January 2013.⁶⁸⁵

⁶⁸³ *ibid* 58

⁶⁸⁴ *ibid* 59

⁶⁸⁵ *ibid*

On 28 March 2013, the Attorney General issued a non-prosecution order on the grounds of insufficient evidence⁶⁸⁶ without giving any legal reasoning and analysis. The case was dropped.

The new proposed Bill changed the way the Attorney General can intervene with the TCC's decisions as already mentioned in section B on investigative powers in Thailand.

For stakeholders in Thailand (except Honda), this case is a great disappointment. It is the first case that the TCC finally agreed with the investigative sub-committee that there was an infringement even though this alleged infringement was against Section 29 (unfair trade practices to destroy other business operators) rather than against Section 25 (abuse of dominance). The TCA authorises the TCC to issue an administrative order under Section 31 and 32 as described in 5.3.2 Investigative and Prosecution Power on page 225. And the TCC is immune from claims and liability under Section 31. The TCC could have issued such an order requiring Honda to cease its abuse of dominance.

It is not known to the public why the TCC decided to pursue this case the way it did even though it has all the power it needs to protect the functioning of the market. To conjecture that the TCC was intimidated by the thought of issuing a written order with reasons for such an order both for the questions of fact and for the questions of law and to sign the order is beyond comprehensible. There is no reason to be afraid of issuing such an order when the law completely protect the TCC from all liability.

On hindsight, one could surmise that the administrative order under Section 31 does not contain any fines. It only authorises the TCC to require the undertaking to stop

⁶⁸⁶ *ibid*

the infringement. However, had the TCC issued that order, Section 33 provides that the undertaking must comply with this order. And Section 52 provides that the undertaking which fails to comply with the administrative order issued under Section 31 will be imprisoned for a term of 1 - 3 years or fined of 2 – 6 million Baht,⁶⁸⁷ and daily fined an amount not exceeding 50,000 Baht⁶⁸⁸ throughout the period of failure to comply.

In fact, had the TCC decided to issue such an order and had Honda decided to appeal, Honda would have had no chance of winning, because the TCA provides that the rules and procedure for the appeal shall be as prescribed and published in the Royal Gazette by the Appellate Committee; and thus far, no such rules are published and there has never been an Appellate Committee. Maybe the TCC was concerned that Honda might not have the opportunity to fully defend itself since there was no procedure for appeal, and so the TCC decided it was best that the public prosecutor should file the case before the court.

Had this case happened in Singapore, one can surmise that the CCS would have issued an infringement order with elaborate legal reasoning as it did in *SISTIC*, or Honda might have fully cooperated with the CCS and provided a voluntary commitment.

D) Retail Super Store v Local Groceries

This case involves large hypermarket stores such as Central Group, Tesco Lotus, Carrefour, Big C, and Makro.⁶⁸⁹ These companies were accused of unfairly applying

⁶⁸⁷ Roughly equal to £40,000 – 60,000

⁶⁸⁸ Roughly equal to £1,000

⁶⁸⁹ At the time of the allegation, Big C was operated by Casino Group; Tesco Lotus was partnered between English Tesco and Thai CP Group; Carrefour was operated by French company and Makro was operated by SHV Holding, a Dutch company. However, at present, SHV Holding withdrew from the market and sold its shares to CP All; and Carrefour sold its business operation in Thailand to Big C. Only Central Group is owned and operated by Thai company. CP's acquisition of Makro's shares from the Dutch company made CP Group own the largest

various aggressive business strategies towards local suppliers. For example, it was reported that the Central Group's retail arm, Central Retail, and its subsidiaries allowed their member suppliers to deliver the goods to their premises from 8pm to 8am, but for non-member suppliers the delivery time was limited from 2am to 4am.⁶⁹⁰

Others were condemned of charging fees such as entrance fees, advertising fees, removal of goods fees, and product displaying fees. Moreover, they also demanded promotional and marketing discounts from suppliers as well as promotional discounts for holding special marketing events. They also charged their suppliers for electronic commerce transactions, and indirectly forced their suppliers to produce goods for their own house brand to compete with the suppliers' products.⁶⁹¹ These strategies enabled them to be in a much better position than the local groceries shops in terms of lower operational costs as they passed on most of these costs to their suppliers. It resulted in cheaper prices than those charged by the local groceries shops.

The strategies largely affected two interested groups – the local, traditional groceries shops and the local suppliers. Nine out of ten local groceries shops were reported to be affected by the intense competition with major competitors.⁶⁹² The research results of TDRI were cited to support that such competition benefited the consumers in terms of lower prices and that the local retailers should adjust themselves to the competition.⁶⁹³ The retailers, through provincial chambers of commerce, urged

wholesale store, Makro, and dominant retailer Tesco. See CP's tie with Minister of Commerce and the TCC in B) Thailand page 195

⁶⁹⁰ Thikhamporn Srichan, 'TRADE PRACTICES: Big Chains May Face Legal Action', *The Nation* (Bangkok, 24 September 2002) <<http://www.nationmultimedia.com/business/TRADE-PRACTICES-Big-chains-may-face-legal-action-66287.html>> accessed 3 August 2016

⁶⁹¹ *ibid*

⁶⁹² 'Hypermarket Dominance: Retailers Demand Actions', *The Nation* <<http://www.nationmultimedia.com/home/HYPERMARKET-DOMINANCE-Retailers-demand-action-63673.html>> accessed 10 June 2014

⁶⁹³ *ibid*

the Thai Government to protect them from foreign competitors by repealing the Alien Business Act.⁶⁹⁴

Former Prime Minister Thaksin Shinawatra, was reported to have met with former Tesco Global CEO, Terry Leahy and confirmed to Leahy that “Thailand places a high worth on foreign investment.”⁶⁹⁵ On the other hand, his Ministers showed concerns on the matter. They even considered freezing the expansion of foreign hypermarkets as the election was approaching.⁶⁹⁶ The end result was that the former Deputy Minister of Commerce, Newin Chidchob, announced his plans to list retail business as controlled businesses, designate their zoning, and to investigate the potential breach of the TCA.⁶⁹⁷

According to Sakda Thanitkul, former member of the specialised sub-committee on Retail Business, the control of the business did not receive much support from the public and the draft bill was finally withdrawn. The zoning regulation does not have much impact on the foreign retailers as by the time of the enforcement of the regulation, the foreign retailers already expanded to more than 117 branches throughout the country.⁶⁹⁸ Nevertheless, the investigation by the specialised sub-committee established by Mr Chidchob concluded that the aggressive business strategies adopted by the major retailers were in breach of Section 29. The specialised sub-committee proposed to the TCC to file a criminal charge against the foreign retailers.⁶⁹⁹

⁶⁹⁴ Williams, ‘Competition Law in Thailand: Seeds of Success or Fated to Fail?’ (n 520) 483

⁶⁹⁵ Just-Food.com Editorial Team, ‘Thailand/UK: Tesco on Course for Expansion in Thailand’, *just-food* (13 May 2002) <http://www.just-food.com/news/tesco-on-course-for-expansion-in-thailand_id71954.aspx> accessed date 10 June 2014

⁶⁹⁶ ‘Threat to Tesco Thai’s Expansion’, *BBC* (15 September 2006) <<http://news.bbc.co.uk/1/hi/business/5348666.stm>> accessed date 10 June 2014

⁶⁹⁷ Sakda Thanitkul, ‘SMEs and Competition Law: A Case Study on Suppliers of Goods to Large Retail Stores’ (2008) 15 *Journal of International Cooperation Studies* 31, 43 - 44 <http://www.research.kobe-u.ac.jp/gsics-publication/jics/thanitkul_15-3.pdf> accessed date 10 June 2014

⁶⁹⁸ *ibid*

⁶⁹⁹ Williams, ‘Competition Law in Thailand: Seeds of Success or Fated to Fail?’ (n 520) 483

However, Mr Chidchob was transferred to another position before the TCC made any formal allegations against the major retailers. Subsequently, the specialised sub-committee was replaced under the new Minister of Commerce. Finally, no criminal charges were pressed. Instead, in October 2006, the TCC published the Guidelines for Unfair Trade Practices in the Wholesale/Retail Business pursuant to the provision of Section 29 (Guidelines on Retails), which is modelled after the Japanese Fair Trade Commission's approach (JFTC),⁷⁰⁰ and considered this as 'the most appropriate approach' for Thailand to solve the issues.⁷⁰¹

According to Thanitkul, this approach aimed at preventing the four major retailers from engaging in anticompetitive conducts. It was not to hinder their efficiency, 'but to give the clear signal to large retailers that they have to be careful about their conducts because of their huge bargaining power. . .'.⁷⁰² This optimistic and positive idea of warning them to be more careful, while in fact, these multinational corporations are well aware and familiar with anticompetitive conducts under the competition laws in their home countries that they should refrain from engaging in, and they have now been given a second chance to be careful.

Thanitkul believes that:

If there is a complaint lodged by weak SMEs suppliers alleging that a large retailer grossly violating these Guidelines, the staff at the office of the Competition Commission will step in by informing them that there are complaints against their business behaviour. As business operators, management of large retailers do not want to spend their time on defending themselves by showing evidences like vendor agreements that they entered into with weak SMEs suppliers. It is argued that

⁷⁰⁰ Thanitkul, 'SMEs and Competition Law: A Case Study on Suppliers of Goods to Large Retail Stores' (n 697) 44

⁷⁰¹ *ibid* 46

⁷⁰² *ibid* 45

top management of large retailers would rather refrain from such alleged conduct by instructing their purchasing departments to watch out about their particular conduct.⁷⁰³

Thanitkul argued further that the definition of ‘unfair low price’⁷⁰⁴ (predatory pricing) provided in the Guidelines on Section 29 was the key to solve the problem as it may prevent the large retailers from ‘driving out Mom & Pop stores with so-so efficiency.’⁷⁰⁵ He also asserted that avoiding a criminal lawsuit against the large retailers by simply publishing the Guidelines on Section 29 and not prosecuting them -- despite clear evidence of Section 29 violation -- was ‘far better’ than pursuing criminal charges or not taking any action at all.⁷⁰⁶ Given the poor record of enforcement of the TCC and its very politically dependent structure, this thesis argues that the decision not to prosecute sent the wrong signal to the incumbents. It signalled that the TCC does not take its duties seriously. Besides, studies show that illicit gains from cartel are significantly larger than fines imposed on firms. And firms from advanced economies have more potential to engage in international cartels (See 2.1.2 Competitiveness of a Firm). Hence, such a view toward big multinational corporations can be seen as either extremely optimistic or naïve.

The Guidelines merely described the acts considered as unfair in the retail and wholesale business. Therefore, it has very little impact on the major retailers.⁷⁰⁷ It was

⁷⁰³ *ibid*

⁷⁰⁴ **Unfair low price sales** where sales are made at a price lower than those stated in invoices unless such a sale is reasonably necessary in the business; for example, the product is about to be expired, or the product is seasonally used and outdated.

⁷⁰⁵ Thanitkul, ‘SMEs and Competition Law: A Case Study on Suppliers of Goods to Large Retail Stores’ (n 697) 45

⁷⁰⁶ *ibid*

⁷⁰⁷ Nikomborirak, ‘The Political Economy of Competition Law: The Case of Thailand’ (n 628) 604

criticised as ‘unsatisfactory and appears to be a sop to appeal to nationalistic sentiment.’⁷⁰⁸

In addition to publishing this ‘middle ground solution’⁷⁰⁹, to the disappointment of many local groceries shops, Thaksin’s administration decided not to restrict the zoning of the major retailers. The local small retailers were distressed. In order to appease them, the former Prime Minister employed his usual strategy to ‘help’ local groceries shops affected by these major retailers’ business strategies by instructing the State Owned Bank, Krung Thai Bank, to provide ‘generous credit’ to help them save their businesses.⁷¹⁰

E) Abbott’s AIDS Medication

Between November 2006 and January 2007, the Ministry of Health granted many compulsory licenses for the government to use generic versions of AIDS medications in its National Health Insurance scheme so that these would be accessible to the poor. The Government pays royalty fees to the patent holders, which is in accordance with the World Trade Organisation’s Agreement on Trade Related to Aspects of Intellectual Property Rights and Thai law.⁷¹¹ The use of the compulsory licensed AIDS medication is

⁷⁰⁸ Williams, ‘Competition Law in Thailand: Seeds of Success or Fated to Fail?’ (n 520) 4784

⁷⁰⁹ Thanitkul, ‘SMEs and Competition Law: A Case Study on Suppliers of Goods to Large Retail Stores’ (n 697) 44

⁷¹⁰ Montira Narkvichien, ‘Small Retailers Close to PM’s Heart’ *The Nation* (Bangkok, 20 November 2002) <<http://www.nationmultimedia.com/headlines/Small-retailers-close-to-PMs-heart-69513.html>> accessed date 11 June 2014

⁷¹¹ Sean Flynn, ‘Appeal of Thailand Commission Order on Abbott’s Refusal to Sell AIDS Medications in Thailand’ American University, Program on Information Justice and Intellectual Property (17 January 2008) 1 <https://www.wcl.american.edu/pijip/thai_comp_licenses.cfm> accessed 7 May 2014

made available only to those who cannot afford it. Patients using private health services will continue to pay the full market price.⁷¹²

Abbott announced that it would not register its AIDS medication sold under tradename 'Kaletra' and its new version which does not require refrigeration, which is especially important in Thailand's climate, to avoid compulsory licensing. On 26 April 2007, the Thai Network of People Living with HIV/AIDS (TNP+), the AIDS ACCESS Foundation, and their supporters filed a complaint against Abbott alleging it violated Section 25(3) on abuse of dominance for its refusal to supply.⁷¹³

It should be reiterated that by the time the complaint was lodged, the TCC had already published its criteria of dominance which entered into force on 8 February 2007. The TCC released a one-page decision on the complaint to the Chair of Foundation for Consumers. The TCC decided that Abbott's withdrawal of its registration of Kaletra did not violate Section 25(3) of the TCA.⁷¹⁴

The TCC took about 8 months to reply to the Foundation for Consumers' complaint. The TCC considered Section 25(3) by referring to its criteria for market dominance and emphasised that the market shares of previous year should be over 50% and that there should be at least 1 billion Baht turnover. The TCC simply concluded that Abbott had a smaller turnover than that in 2005 (which was not the previous year in this case) without specifying how they calculated the turnover and where the data came from

⁷¹² Letter from Dr Mongkol Na Songkhla Minister of Public Health to the Ambassador and Head of the Delegation of the European Commission to Thailand, No. 0100.3/ (July B.E. 2550 (2007)) <http://www.actupparis.org/IMG/pdf/Answer_Thai.pdf> accessed 31 May 2016

⁷¹³ Sean Flynn, 'Thailand's Lawful Compulsory Licensing and Abbott's Anticompetitive Response' American University, Program on Information Justice and Intellectual Property (26 April 2007) 1 <https://www.wcl.american.edu/pijip/documents/Thailandreport426.2_001.pdf> accessed 31 May 2016

⁷¹⁴ Letter of the TCC decision on the Foundation for Consumers' letter of Complaint (27 December 2007) (Tentative translation) <https://www.wcl.american.edu/pijip/thai_comp_licenses.cfm> - accessed 30 May 2016

and without considering Abbott's market share. The most unconventional aspect in the definition of dominance was that TCC did not even start with defining the relevant market. The TCC jumped right to the turnover. Not starting with defining the relevant market is gross negligence on the part of a national competition authority.

On hindsight, the TCC might have considered that defining the relevant market was irrelevant because Abbot's turnover was not over one billion Baht. This saved the TCC a lot of thinking and analysis.

Regarding Section 25(3), the TCC further explained that other than its low turnover, Abbott had not yet obtained the required Certificate of Product Registration hence Kaletra was not yet available in Thailand. Since there was no Kaletra, it was not possible that Abbott has restricted, reduced, or suspended its distribution.

Then the TCC explained in the letter that Abbott did not withdraw its registration of Kaletra with the intent to cause a person residing in Thailand and intending to purchase Kaletra for his personal consumption to have restricted opportunities to purchase it directly from an undertaking outside Thailand. Therefore, Abbott did not breach Section 28.⁷¹⁵ The reasoning being as follows:

This is due to the fact that drug registration is subject to certain regulations required by the Food and Drug Administration on drug safety. In addition, there has never been a reported case of direct order from the consumer to the company's head office in the United States. This is because in Thailand these drugs are normally available at hospitals and by

⁷¹⁵ **Section 28.** A business operator who has business relation with business operators outside the Kingdom, whether it is on a contractual basis or through policies, partnership, shareholding or any other similar form, shall not carry out any act in order that a person residing in the Kingdom and intending to purchase goods or services for personal consumption will have restricted opportunities to purchase goods or services directly from business operators outside the Kingdom.

medical prescriptions only, especially for second-line drugs which must be prescribed by a specialist doctor.⁷¹⁶

It is clear that in previous cases, the TCC did not have the tools to properly enforce abuse of dominance. But when it does, it does not do it in the right way. A one-page reply seems as if the TCC could not be bothered. What was at stake was the lives of millions of poor people in Thailand and their chance to access medications that can save their lives at an affordable price. The TCC can argue that this consideration is not within the scope of its duties.

There are more complaints on abuse of dominance lodged to the TCC, but none of them received much consideration from the TCC and there was no useful examination which is worth reading as the legal and economic analysis is clearly lacking.⁷¹⁷

F) TrueVisions Withdraws HBO from Its Pay-TV Service

TrueVisions is a subsidiary of CP Group. CP Group hold 60.1% shares in True Corporation. And True Corporation holds 100% shares in TrueVisions. TrueVisions is the biggest pay-TV service provider. It is formerly known as UBC. The MCOT did not discipline UBC when it merged as demonstrate above. Now the National Broadcasting and Telecommunications Commission (NBTC) is in charge of the television industry.⁷¹⁸ In December 2016, TrueVisions announced its plan to withdraw HBO channels from 1 January 2017. It failed to give 30-day prior notice to its subscribers.⁷¹⁹ Even if this practice violates the law, the NBTC decided not to fine TrueVisions but required it to

⁷¹⁶ Letter of the TCC Decision on the Foundation for Consumers' letter of Complaint (n 714)

⁷¹⁷ See OECD, 'Contribution from Thailand' (n 522) 5; UNCTAD, *Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe* (n 525) 25 - 31

⁷¹⁸ NBTC, 'NBTC's History' <<http://www.nbtc.go.th/About/history3.aspx>> accessed 16 April 2017

⁷¹⁹ The Nation, 'True Visions to stop HBO channel' (26 December 2016) <<http://www.nationmultimedia.com/news/breakingnews/30302866>> accessed 16 April 2017

compensate affected subscribers and issued an administrative warning instead.⁷²⁰ The company agreed to pay marginal compensation to its customers.⁷²¹ According to TrueVisions, only 700 – 1,000 customers are affected.⁷²²

TrueVisions has 3,930,000 customer base in 2016 and revenue from subscription alone of almost 8 billion Baht.⁷²³ The TCC did not make any comment as to whether there was a case for consumers or not. In fact, this case could fall into section 25(3), but TrueVisions can easily eliminate the claims with the excuse that its decision was “reasonable”. According to the company, it could not renew the contract with HBO.

However, considering the past experience of how the TCC handled the complaints. It is highly likely that it will refer the case to the NBTC as it did to the merger case almost 20 years ago.

5.5 CONCLUSION

This chapter demonstrated the disparities in general competition law enforcement by using case studies on abuse of dominance in Singapore and Thailand.

⁷²⁰ Bangkokbiznews, ‘ทริวิชั่นคืนเงินลูกค้ากรณียกเลิกช่อง HBO’ (4 April 2017) [TrueVisions refunds customers for HBO channels withdrawal] <<http://www.bangkokbiznews.com/news/detail/741524>> accessed 4 April 2017

⁷²¹ Usanee Mongkolporn, ‘TrueVisions to increase payout after pulling HBO channels’ (21 February 2017) <<http://www.nationmultimedia.com/news/business/corporate/30306784>> accessed 16 April 2017

⁷²² Bangkokbiznews, ‘TrueVisions refunds customers for HBO channels withdrawal’ (n 720)

⁷²³ True, ‘True Corporation Public Company Limited’ <<http://true.listedcompany.com/misc/PRESN/20170327-true-glance-4q2016.pdf>> accessed 4 April 2017

Despite being the first country in ASEAN to have enacted competition law without international pressure, Thailand has not succeeded in its enforcement and advocacy.

Capacity building programmes supported by international organisations or from other NCAs as part of trade agreements do not seem to have a positive impact on the capacity and performance of the TCC. This is because the real problem is not in capacity, but authority, independence of the NCAs. What will impact the efficiency of competition law enforcement the most is the NCA itself. Without an independent and competent NCA, competition law enforcement will be hindered.

The current structure of the TCC and the Office of the TCC are under control of the Government, politics, and big conglomerates. Conflict of interest is evident. The TCC is run by the part time Commissioners who can only meet to discuss any complaints if the Minister of Commerce convenes the meeting.

The officers of the Office of the TCC are government officers under the DIT who work full time, but who are subject to transfer to other offices within the DIT at the disposal of the Secretary-General of the DIT. Hence, it is hard for them to obtain expertise acquired over years of experience.

The new proposed Trade Competition Bill addresses these problems. However, it opens the door for Government interference in the new TCC by leaving the selection of the new TCC to the Selecting Committee which is comprised of government officials such as the Permanent-Secretary for the Ministry of Commerce and the Ministry of Finance. The Prime Minister or the Ministers can signal to the Selecting Committee who they prefer. It is up to the integrity of these highest ranking government officials whether they will satisfy the Prime Minister or the Ministers requests

The new Trade Competition Bill also prohibits businessmen from being selected as Commissioners, but it does not preclude their spouses and children. However, what aggravates the inefficiency of the dysfunctional structure of the TCC is not the TCA, but the Commissioners' attitudes. They are the people who are supposed to advocate competition law and policy in Thailand. Yet they fear to make publicly available the legal reasoning and application of economic theories in their decisions in detail. They fear that they could be held accountable and sued. This attitude is toxic to competition advocacy. How can the public learn anything from the TCC if they do not show the public how they came to their conclusions? The TCC holds that if their opinions were made publically available, the TCC would be restricted to give their opinions freely. This thesis argues that no capacity building programme can cure this attitude.

As for Singapore, although the Minister of Trade and Industry appoints the CCS, the independence of the Commissioners is not questionable. The SCA only limits the Commissioners who may have a conflict of interest in the transaction to refrain from taking part in any deliberation or decision of the CCS relating to that transaction and that they must be disregarded for the purpose of constituting a quorum of the CCS for such deliberation or decision. This includes an interest in transactions or projects by the spouses, parents, step-parents, sons, step-sons, daughters, step-daughters, adopted sons, adopted daughters, brothers, sisters, half-brothers, half-sisters, step-brothers, and step-sisters of the Commissioners.

If the TCA had a provision such as this, the TCC might have been able to deliver more infringement decisions. However, this statement may not be true as the Attorney General can drop a case by issuing a non-prosecution order on the ground of insufficient evidence as happened in the tragic case of the Japanese motorcycle manufacturers.

Regarding investigative and prosecution powers, the evidence is clear that the TCC cannot conduct its own investigation. Because the Attorney General and the Council of State agree that the TCC must appoint an investigative sub-committee to conduct the investigations. However, the opinion of the Council of State is not binding. It is the Court who decides, but this issue has never been submitted to the Court due to the veto from the Attorney General. The new Trade Competition Bill proposes an amendment in this matter. Under the new law, the Attorney General cannot drop the case like it did. A co-committee between the public prosecutor and the TCC must be appointed to consider the different opinions. If the TCC insists, the Attorney General must file the case to the Court.

However, private enforcement in Thailand is unlikely to have a positive impact on the enforcement of the TCA, because private parties are allowed to claim damages only within one year after the date the injured person has or ought to have known the ground for action. Private parties have limited access to documents or evidence which are in possession of their opponents. Moreover, the costs of hiring a team of competent lawyers and economists to be able to prove to the court of the wrong doing can be high. To make the matter worse, under the law in Thailand, injured persons are only entitled to claim actual damages. There are no triple damages or punitive damages under the TCA, which can potentially render pursuing the case privately unworthy of the time and expenses. Private parties who are likely to be able to afford such expense and risk would be business entities rather than consumers.

On the contrary, private litigation in Singapore under the SCA is more likely to have a positive impact on effective enforcement, because the court is bound to accept any relevant infringement decisions of the CCS, and the CAB, which establish that there

is an infringement. This encourages and facilitates private parties to claim damages owed to them with confidence. This practice requires an utmost accountability, competency, and transparency from the CCS to deliver its decisions. It is a great responsibility to be in charge of making decisions which are binding upon the courts.

The administration of the CCS is divided into the Legal, Enforcement, and Business and Economics divisions. These divisions work closely to investigate the anticompetitive practices to create coherence to the approach and reasoning. On the contrary, each investigative sub-committee appointed by the TCC is in office for up to only two years. And each sub-committee investigates only one complaint. Therefore, there is no guarantee that the other investigative sub-committees will apply and interpret the TCA and take into account economic theories in a consistent manner. Moreover, it is possible under the TCA that one complaint may be investigated by more than one investigative sub-committee.

In terms of abuse of dominance, Singapore and Thailand have different definitions as to what constitutes a dominant undertaking. The current TCA takes turnover into account to determine dominance. This produces disappointing results, especially in the Abbott's AIDS Medication case which stopped the chance of millions of AIDS patients from having access to an affordable drug. The new Trade Competition Bill discards turnover from the definition of a dominant undertaking. But the Notification of the TCC on thresholds of market share must be issued for the provision on abuse of dominance to be operable. The question is when will that Notification be issued?

The enforcement of abuse of dominance by the CCS deserves admiration. Due to the vigorous and extensive analysis of the law in SISTIC case, the CCS has received

full cooperation from dominant undertakings to provide voluntary commitments. Singaporean consumers surely have more choices whether they want them or not. As the SISTIC post-enforcement evaluation reveals there is a new entrant and consumers have more choices. Other incumbents dismissed the exclusivity clause in their agreements. One can at least surmise that market foreclosure is lessened.

All evidence provided and examined in this chapter should suffice to demonstrate the difficulties if not impossibility of harmonising and converging all-sector competition law and policy in Thailand and Singapore. As rightly asserted by Both, ‘the absence of a workable competition law regime in one member state would prevent effective enforcement of competition policy at the regional level.’⁷²⁴ Although Thailand has a competition law regime, it is hardly qualified as ‘workable’. This is a potential obstacle to strategic measures to develop a regional strategy on competition policy and law convergence as set in the AEC Blueprint 2025. How can one harmonise and converge the different fundamental competition ideologies in these countries? Singapore aims at efficiency and a competitive market. Thailand aims at fair and free competition. Singapore takes a purist regime. Thailand takes a mixed regime. The CCS is entrusted with power to issue infringement decisions which are binding upon the courts, the transparency and accountability is evident. The TCC is reluctant to even publish its decisions for the public to review due to the fear of being unable to be open and direct in making decisions. It seems as if between Thailand and Singapore alone already, the five driving forces of effective cooperation in competition law and policy as suggested by Both are lacking, let alone if all ten AMSs were taken into account.

⁷²⁴ Both, ‘Regionalisation of Competition Policy: What Lessons Can Be Drawn for ASEAN from Other Region’s Experience?’ (n 302) 20

Moreover, giving up, judicial sovereignty, even slightly, is highly unlikely to be well perceived by the Thais. This should be considered very seriously.

Thailand's competitiveness is much lower than Singapore's for many reasons. Having an inefficient competition law and policy is one of these reasons. Of course, if Thailand can improve its competition law enforcement, its overall GCI should improve too. And if all AMSs have efficient competition law and policy concurrently, it is highly likely that the competitiveness of ASEAN should increase. However, it is not necessarily solved by using a supranational approach if this does not suit the ASEAN way.

CHAPTER 6

CONCLUSION

Does ASEAN need a supranational approach to its competition law and policy to create a highly competitive AEC?

No, it does not. There are three main reasons.

1. Competition law and policy is not the sole determinant factor of competitiveness.

Professor Krugman is right to have said that competitiveness is a dangerous obsession. Leaders, law makers, and economists tend to overuse the concept for their own ends by emphasising its importance. This thesis agrees that the concept of competitiveness is indeed important, but should be used with caution.

According to Professor Porter, if firms are competitive, a country is likely to be competitive too. A competitive nation is one that provides a high standard of living for its citizens, and has a high productivity. A country's competitiveness is measured by 12 pillars. Goods market efficiency is one of them. It is measured by 16 indicators, and some of these relate to competition law and policy, namely the effectiveness of antimonopoly policy, the intensity of local competition, and the extent of market dominance. Clearly, an effective competition law and policy alone cannot improve the overall competitiveness of a country if that country falls below average in all other indicators.

This thesis found that despite having an effective antimonopoly policy, goods market efficiency, a smaller extent of market dominance, and a highly intense local

competition, the competitiveness of an AMS may not be as high as it should be. This is due to poor development. An AMS will reap the benefits of competition law and policy more fully if it is at least at the transition from Factor-Driven to Efficiency-Driven stage of development and if it is effectively enforcing its competition law and policy such as is the case in Singapore and Malaysia. If these factors are lacking a country will not yield the benefits of competition law and policy as much as it should such as is the case in Indonesia, Thailand, and Viet Nam.

This does not mean that competition law and policy does not contribute to competitiveness or that it does not matter – it does, but only to a certain extent as explained above. ASEAN needs to improve the AMSs' economic development along with effectively enforcing national competition laws. Thailand is at the Efficiency-Driven stage of development, but its lax competition law enforcement compromises the country's chance of becoming more competitive.

The role of the government is crucial to a country's competitiveness as it influences all facets of the diamond. Efficient enforcement of competition law enhances rivalry, which puts pressure on firms to be more competitive and efficient. Effective competition law enforcement by NCAs signals to firms not to collude and to refrain from anticompetitive practices. NCAs represent the government's role on keeping rivalry in the markets. Government is the key to firms' competitiveness as it can hinder or enhance any of the diamond elements. Therefore, the NCAs are the key to competitiveness.

Regulatory capture occurs when big conglomerates have power to influence policy makers to enact laws or unenforced the laws in their favour. It is the case of AMSs, especially Thailand. Experience from Taiwan and South Korea shows that

although countries might have been under authoritarian government such as military government which lack legitimacy of administration, competition law can be efficiently enforced provided there is political will to do so. The government and the NCA have direct impact on how competition law is applied and enforced. Therefore, in countries in factor-driven or in transition from factor-driven to efficiency-driven could have effective competition law system if their government and politicians aim to do so. As a consequence, chances of these countries to become more competitive increase.

Professor Porter also suggests that it is better to increase competitiveness in each industry separately and improve them individually because it is not possible for a country to attain a high competitiveness in all sectors. This is true for a region as well. For ASEAN, it is more feasible to focus on the industry level, across the region, rather than attempting to increase the competitiveness of each member state in all sectors at the same time. Developing a regime of competition law in this manner will help ASEAN focus on the industries which are stated in the AEC Blueprints as the key industries to the competitive, innovative, and dynamic AEC.

Experience from electricity regulation in six countries show that sectoral regulation and competition agency can collaborate and optimise the competitiveness and protection of competition process in a given market.

2. A supranational approach is not compatible with the ASEAN way and the ASEAN Charter.

There are two approaches to international cooperation in competition law: hard law and soft law. It is evident that the only region that successfully applies hard law approach is the EU. The establishment and history of the EU contribute to such success.

This is a unique characteristic of the existence of the EU which cannot be transplant anywhere. Each regional economic cooperation must find its own way.

In order to facilitate the development of regional competition law and policy, scholars often argue for harmonisation, convergence, or even unification of competition law and policy. Many leading international organisations promote the idea of international competition law which yields varied levels of achievement. These attempts range from capacities building activities, cooperation, and information exchange to recommendation of best practices and model laws to regional competition law such as the EU model.

Among the international organisations which promote harmonisation and convergence or unification of competition law, the ICN's soft law approach appears to be more welcome than others. Its informal approach which is based on consensus and consultation and sharing of best practices and the publication of recommendations is compatible with the way ASEAN operates.

The attempt to promote competition law and policy in bilateral and multilateral trade agreements is evident. The majority of the trade agreements studied in this thesis contain provisions or a chapter on competition. But the majority of these are not subject to the dispute settlement mechanism of said agreements. This inclusion is considered as symbolic to demonstrate the value of competition and functions as a best endeavour to guarantee to foreign investors and citizens and domestic businesses the protection of their investments. When disputes arise they seek settlement through international trade arbitration tribunals such as ICSID and the WTO Dispute Resolution Body Panel.

A supranational approach to competition law and policy has been applied in some trading blocs. This thesis examined the attempt of MERCOSUR and found that the experience of MERCOSUR in attempting to create a regional competition law with hard law approach, which is enforceable on its members without applying supremacy and direct effect doctrines, and enforced by intergovernmental bodies that have decision making powers but not investigative powers, has not yet succeeded.

The suggestion of using the EU model is often made without regard for ASEAN's history, the AMSs' history, and the ASEAN way. The EU model only works for the EU, because it has been ingrained and rooted in the EU since the very beginning. The history of the EU is also unique. It is not transplantable. The financial costs of running such an organisation to oversee the effective enforcement of the regional competition law are high. The EU centralised the Commission power of enforcing the EU competition law, especially granting exemption under Article 101(3). It was effective and enabled the Commission to obtain expertise and ensured that the EU competition law is enforced uniformly across the region. Council Regulation 1/2003 decentralised the Commission's power to apply EU competition law and the ECN is established to be a platform for the European NCAs to exchange their views and best practices. This is a reasonable approach for the EU given its characteristics.

But this experience is useful to ASEAN only to a certain extent. ASEAN did not experience these great wars among members that require countries to come together and to stop fighting to ensure that Europe can prosper again. The reason for the establishment of ASEAN is mainly to maintain the stability of the region after the major powers withdrew following the end of WWII. It was not necessary for ASEAN to establish a supranational body to ensure that rules were obeyed as there were no rules

established between the AMSs in the Bangkok Declaration. The five founding fathers of ASEAN are all Foreign Ministers. It is not difficult to understand why the ASEAN way have taken over. The ASEAN way is a diplomatic way. It is not the law that is the supremacy in ASEAN as none was established. It is relationships, mutual recognition as equal partners, and respect for one another that is the core of ASEAN.

Since the very beginning, AMSs embrace non-interference in internal affairs. Internal affairs are matters which each AMS will solve by itself. Other AMSs can only offer consultation. Any decision must be reached through consensus. All AMSs are treated equally regardless of size or GDP. The ASEAN way has been practiced all throughout its history. Now the ASEAN way has been formalised in the ASEAN Charter.

The ASEAN Charter requires each AMS to contribute equally to the operational budget of the ASEAN Secretariat. The financial burden which may be incurred by the AMSs should be taken into consideration. A supranational body is highly unlikely to occur in ASEAN both because it is not in ASEAN's nature, and because it is financially challenging.

What if ASEAN takes a decentralised approach to regional competition law and policy as in the case of the EU post Council Regulation 1/2003 and uses the AEGC as a platform similar to the ECN? This is unlikely, because before the Council Regulation 1/2003, the Commission and the EU Courts have ensured that there is a uniform enforcement of EU competition law. There exists a body of knowledge and jurisprudence and expertise in the application and interpretation of the regional competition law before the decentralisation took place.

If ASEAN had a regional competition law (which it does not), it is highly unlikely that relying on the NCAs to enforce such a law would have produced unification in the interpretation and application of the law. This is because there is no body of knowledge and expertise for the NCAs to refer to; the competencies of the NCAs are questionable, this is evident in the case of the TCC. Establishment of a supranational appellate body is required; and granting judicial power to this appellate body may not be welcomed by the AMSs. ASEAN has already agreed to the Vientiane Protocol to solve disputes arising out of its economic agreements through a panel of Senior Economic Officials. Why not make the most of that agreement? The Vientiane Protocol can be the ASEAN way of solving disputes instead of establishing an ASEAN Court of Justice.

3. ASEAN has already begun its own sectoral approach to competitiveness across the region the ASEAN way.

Since the Asian Financial Crisis in 1997, the AMSs realised the importance of deeper economic cooperation. The idea of having a single market is agreed upon. The necessity in cooperation in competition law and policy is evident. Although the ASEAN Charter does not provide the possibility of creating a supranational body within ASEAN, the AMSs have adjusted themselves in adhering to a rule-based regime in economic cooperation. This shows the willingness of the AMSs to cooperate and strengthen, and deepen their commitments where and when necessary.

In this regard, ASEAN has already created a single market in the aviation industry. Within ASEAN, the AMSs' airlines can compete freely and fairly. The Aviation Agreements specify rules on abuse of dominance, state aids, and subsidy. The AMSs recognise the importance of an efficient and competitive aviation market. This is in

accordance with Professor Porter's suggestion that it is more feasible to focus on competitiveness in a specific industry.

Even if the effectiveness of the competition provisions in the Aviation Agreements is not formally analysed yet, it is evident that there are new entrants in the aviation industry intra ASEAN. There are definitely more low cost airlines hence consumers have more choices. New rivals are entering the market, so there is a good chance of more competitive ASEAN aviation industry. One can surmise that if more and more industries become competitive regionally, ASEAN's competitiveness is likely to follow, provided that each AMS improves its economic development to be able to reap the benefit of efficient competition law and policy enforcement.

What is evident at present are the difficulties and obstacles which will likely arise if ASEAN decides to harmonise and converge their national competition laws instead of taking a sectoral approach. Examples of abuse of dominance in Thailand and Singapore are examined in this thesis. Their disparities in enforcement, capacities, substantive, and procedural law render it almost impossible to converge these laws. Other than that, the TCC has issues with lack of accountability and transparency. An NCA cannot advocate competition law to stakeholders if it is not willing to disclose how it has come to the conclusion and decisions in a case. It is not difficult to learn from other NCA's such as the CCS how to be accountable and transparent. The CCS website publishes and discloses useful information for the public which is easily accessed and obtained. Concealing non-confidential information of a case as well as the legal reasoning prevents stakeholders from criticising the TCC.

Moreover, the TCC appears to lack the wit to find a solution to stop an incumbent from abusing its dominance even when the law provides the sword and the

shield. A knight who has a sword and shield, but does not know how to use them, is hardly a knight. The result of this was examined in chapter 5.

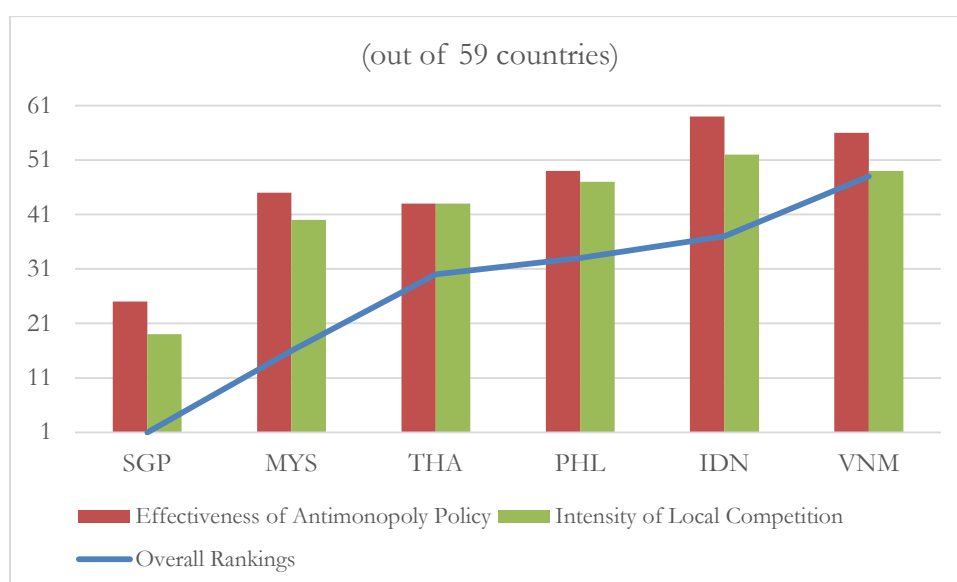
Hence, it is much more logical and plausible to improve competitiveness through a sectoral approach than through a holistic approach. ASEAN has already started with its own way of approaching regional sectoral competition rules and policy. This incurs little financial burden on the AMSs compared to establishing a supranational organisation. It is worth a try. ASEAN has until 2025 to prove whether this sectoral approach can increase its competitiveness. If the AMSs also take the same approach to other industries, ASEAN's competitiveness should be enhanced.

Further studies on the development of competition rules for other industries through the negotiation of economic agreements among the AMSs as well as on the effectiveness of the Vientiane Protocol should complement the ASEAN way of a sectoral approach to competition law and policy.

ANNEX 1: TABLES 1 – 16: COMPETITIVENESS OF AMSs FROM 1999 – 2016

Country names in red have enacted competition laws and countries' abbreviations are based on the United Nations definitions.⁷²⁵

Table 1: 1999 – 2000⁷²⁶

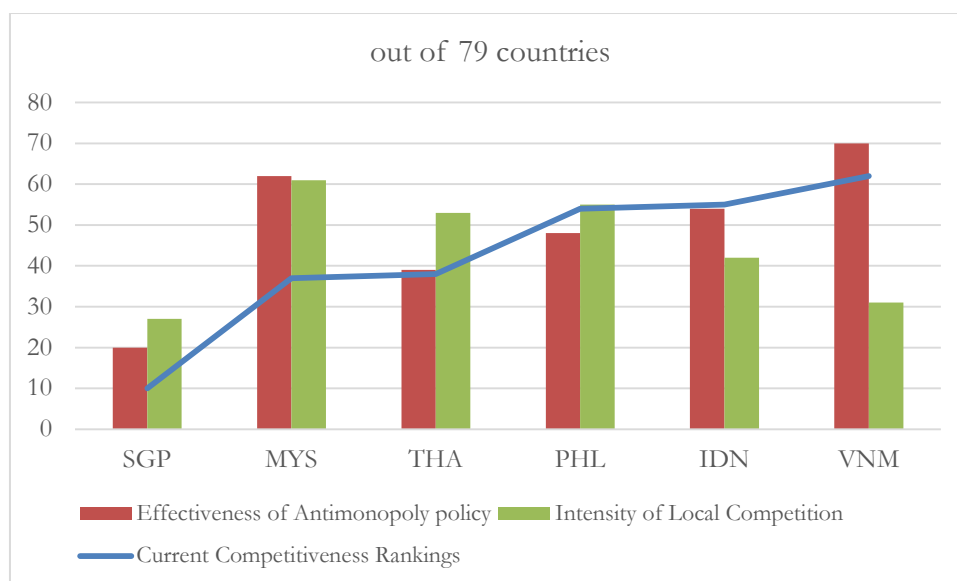


Effectiveness of Antimonopoly Policy was measured by Executive Opinion Survey question: “Antitrust or anti-monopoly policy effectively promotes competition” (1 = strongly disagree, 7 = strongly agree)

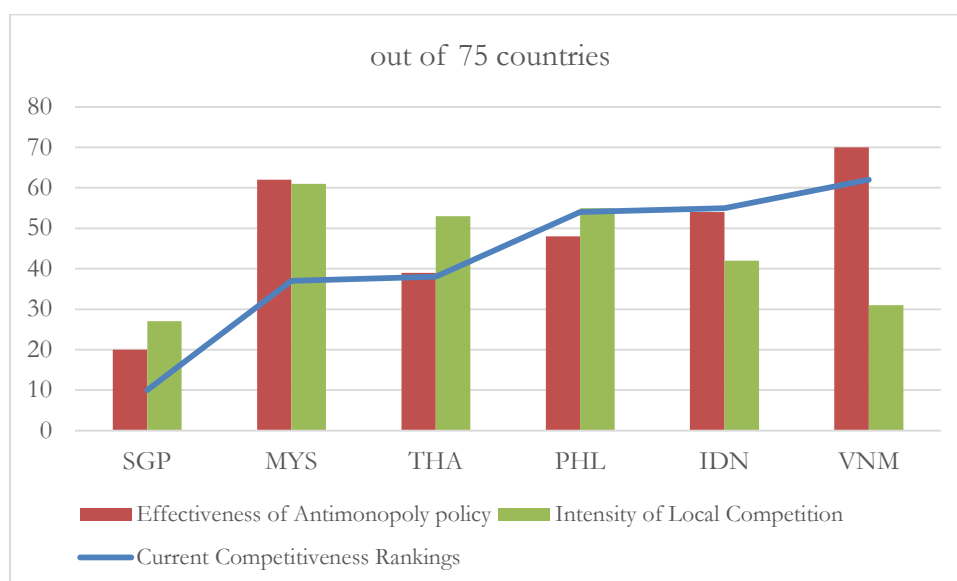
Intensity of Local Competition was measured by Executive Opinion Survey: “Competition in the local market is intense and market shares fluctuate constantly” (1 = strongly disagree, 7 = strongly agree)

⁷²⁵ United Nations Statistic Division, ‘Countries or Areas, Codes and Abbreviations’ (6 November 2013) <<http://unstats.un.org/unsd/methods/m49/m49alpha.htm>> accessed 6 April 2016

⁷²⁶ Klaus Schwab et al (eds), *The Global Competitiveness Report 1999* (OUP 2000) 328, 332, and 336

Table 2: 2000 – 2001⁷²⁷

Current Competitiveness Rankings demonstrate microeconomic competitiveness of firms in the countries⁷²⁸

Table 3: 2001 – 2002⁷²⁹

⁷²⁷ Michael E Porter et al (eds), *The Global Competitiveness Report 2000* (OUP 2000) 11,306, and 312

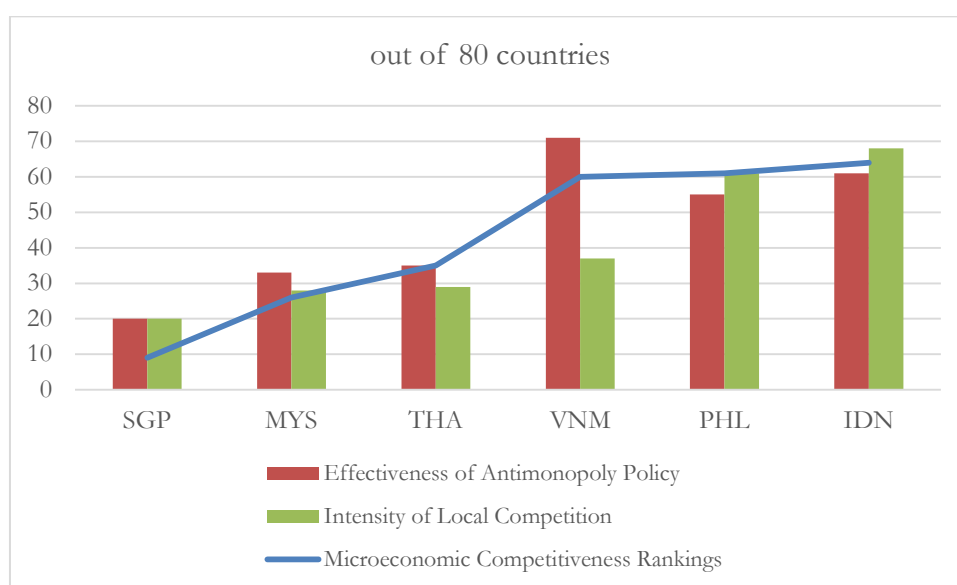
⁷²⁸ This was taken from the Global Competitiveness Report 2000 – 2001, 11

⁷²⁹ Michael E Porter et al (eds), *The Global Competitiveness Report 2001 – 2002* (OUP 2002) 15,410, 411, and 413

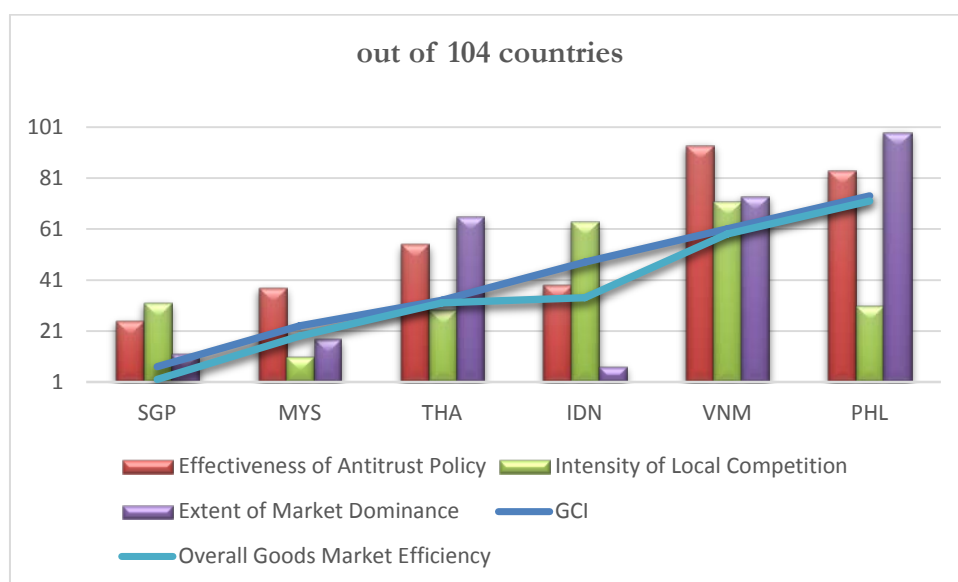
Effectiveness of Antimonopoly policy was measured by Executive Opinion Survey: “Anti-monopoly policy in your country” (1 = lax and not effective at promoting competition, 7 = effectively promotes competition)

Intensity of Local Competition was measured by Executive Opinion Survey: “In most industries, competition in the local market is” (1 = limited and price-cutting is rare, 7 = intense and market leadership changes over time)

Table 4: 2002 – 2003⁷³⁰



⁷³⁰ Peter K Cornelius (ed), *The Global Competitiveness Report 2002 – 2003* (OUP 2003) xv, 623, and 625

Table 5: 2004 – 2005 ⁷³¹

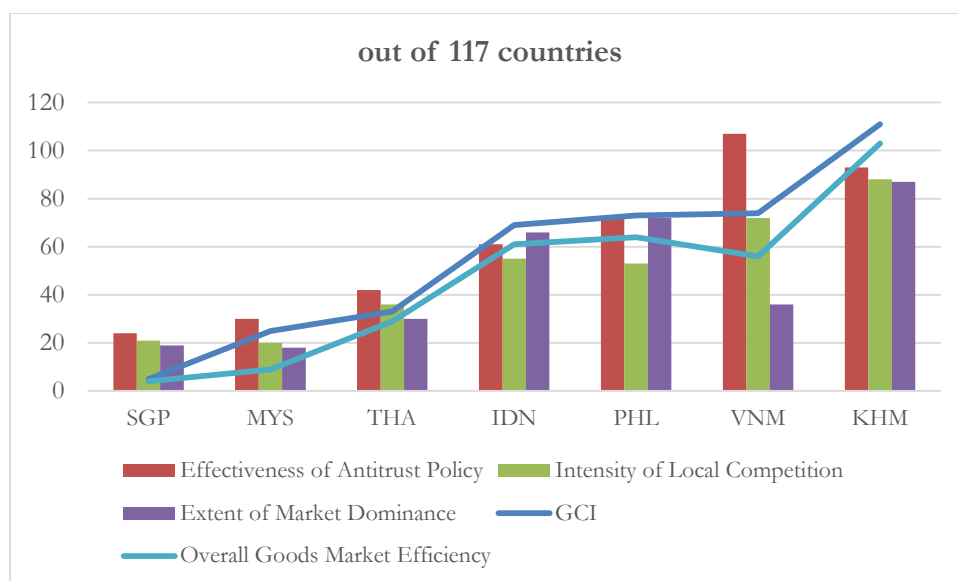
5 stages of development

Stage 1: Factor-Driven Indonesia, Viet Nam, Philippines	Transition from 1 to 2 Thailand	Stage 2: Efficiency- Driven Malaysia	Transition from 2 to 3	Stage 3: Innovation- Driven Singapore
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Extent of Market Dominance was measured by Executive Opinion Survey:

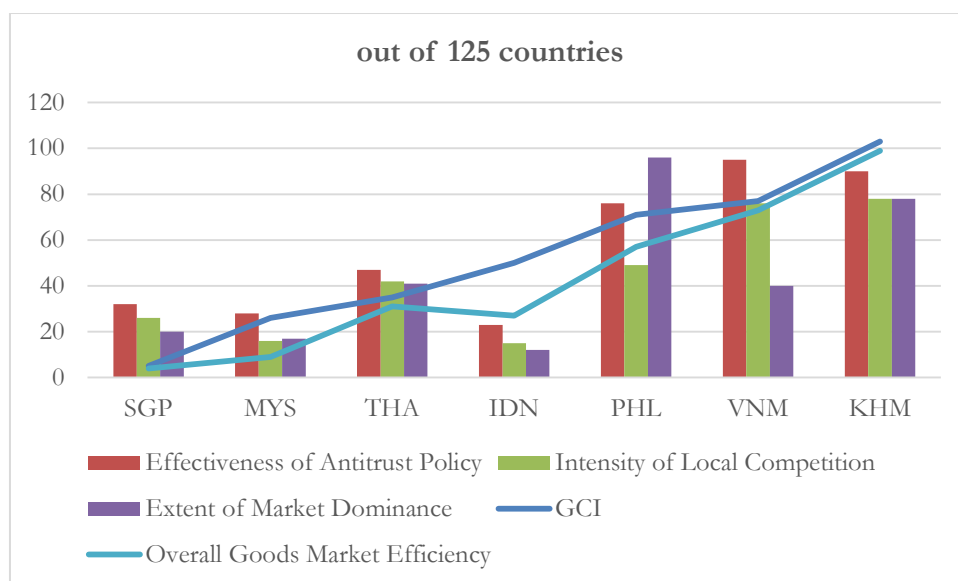
“Market dominance by a few enterprises is (1 = common in key industries, 7 = rare)

⁷³¹ Augusto Lopez-Claros (ed), *The Global Competitiveness Report 2004 – 2005* (Palgrave Macmillan 2004) 59, 68 – 69, 558, 560, and 563

Table 6: 2005 – 2006⁷³²**5 stages of development**

Stage 1: Factor-Driven Indonesia, Philippines, Viet Nam, Cambodia	Transition from 1 to 2 Thailand	Stage 2: Efficiency-Driven Malaysia	Transition from 2 to 3	Stage 3: Innovation-Driven Singapore
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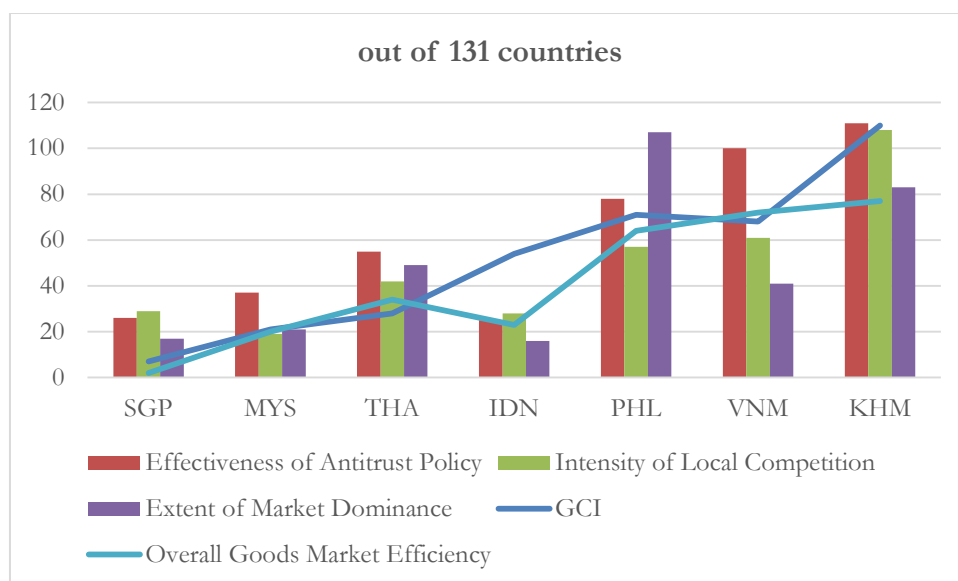
⁷³² Augusto Lopez-Claros (ed), *The Global Competitiveness Report 2005 – 2006* (Palgrave Macmillan 2005) 26, 28 – 29, 32 – 33, 578, 579, and 580

Table 7: 2006 – 2007⁷³³

5 stages of development

Stage 1: Factor-Driven Indonesia, Philippines, Viet Nam, Cambodia	Transition from 1 to 2 Thailand	Stage 2: Efficiency-Driven Malaysia	Transition from 2 to 3	Stage 3: Innovation- Driven Singapore
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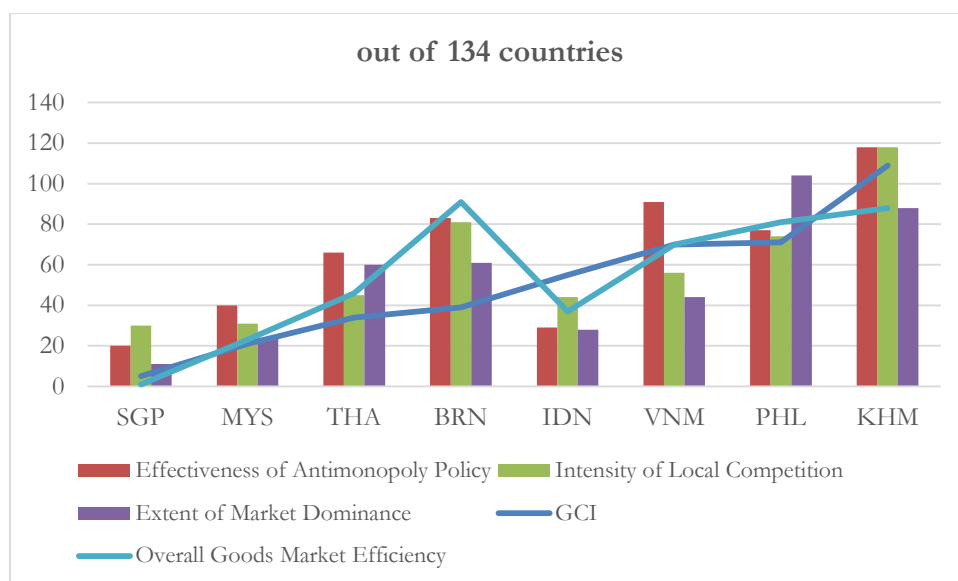
⁷³³ Augusto Lopez-Claros et al (eds), *The Global Competitiveness Report 2006 – 2007* (Palgrave Macmillan 2006) xxv, 13, 20 – 21, 479, 480, and 500

Table 8: 2007 – 2008⁷³⁴

5 stages of development

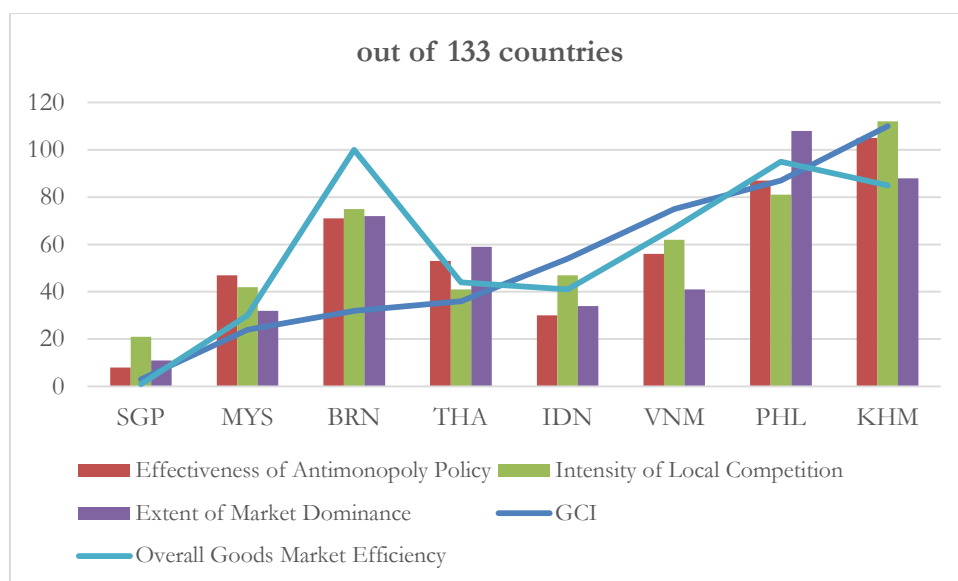
Stage 1: Factor-Driven Indonesia, Philippines, Viet Nam, Cambodia	Transition from 1 to 2 Thailand	Stage 2: Efficiency-Driven Malaysia	Transition from 2 to 3	Stage 3: Innovation- Driven Singapore
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⁷³⁴ Michael E Porter, Xavier Sala-i-Martin, and Klaus Schwab (eds), *The Global Competitiveness Report 2007 – 2008* (algrave Macmillan 2007), 9 - 10, 18 – 19, and 436 - 438

Table 9: 2008 – 2009⁷³⁵**5 stages of development**

Stage 1: Factor-Driven Indonesia, Philippines, Viet Nam, Cambodia	Transition from 1 to 2 Brunei	Stage 2: Efficiency-Driven Malaysia, Thailand	Transition from 2 to 3	Stage 3: Innovation- Driven Singapore
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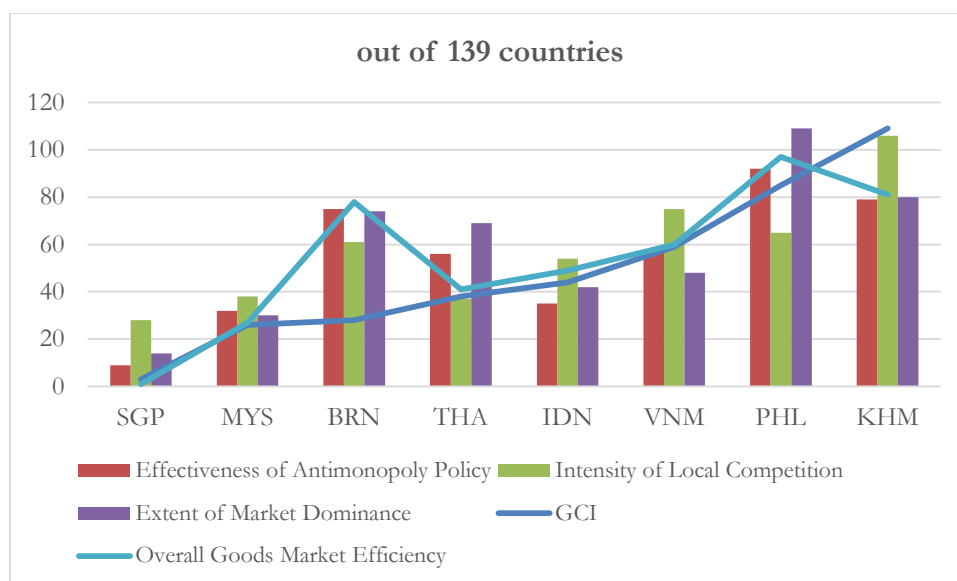
⁷³⁵ Michael E. Porter and Klaus Schwab (eds), *The Global Competitiveness Report 2008 - 2009* (World Economic Forum 2008) 9 - 10, 16 - 17, 424, 470, and 471

Table 10: 2009 – 2010⁷³⁶

5 stages of development

Stage 1: Factor-Driven Viet Nam, Philippines, Cambodia	Transition from 1 to 2 Brunei, Indonesia	Stage 2: Efficiency-Driven Malaysia, Thailand	Transition from 2 to 3	Stage 3: Innovation-Driven Singapore
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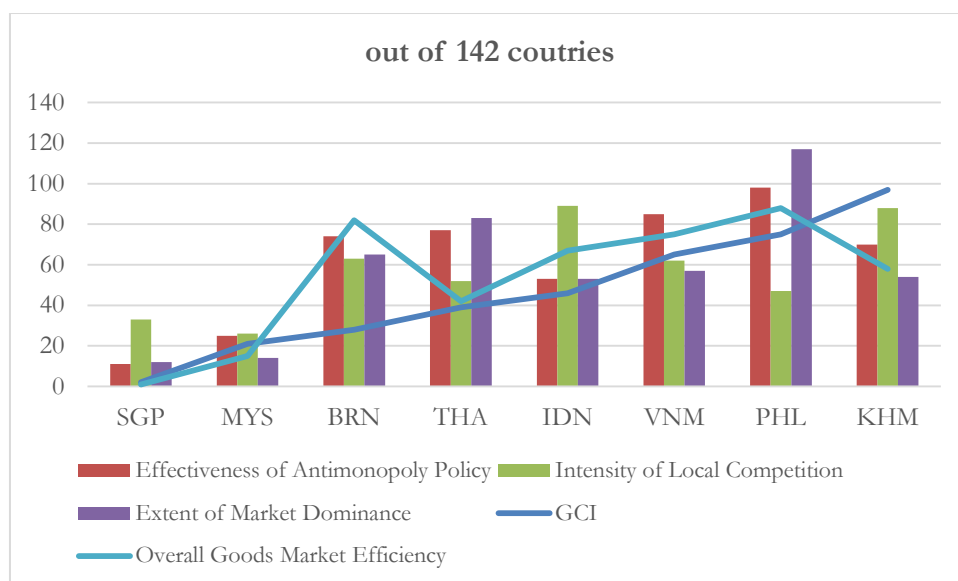
⁷³⁶ Klaus Schwab (ed), *The Global Competitiveness Report 2009 – 2010* (n 229) 12 – 13, 18 – 19, 404 - 406

Table 11: 2010 – 2011⁷³⁷

5 stages of development

Stage 1: Factor-Driven Viet Nam, Philippines, Cambodia	Transition from 1 to 2 Brunei, Indonesia	Stage 2: Efficiency-Driven Malaysia, Thailand	Transition from 2 to 3	Stage 3: Innovation-Driven Singapore
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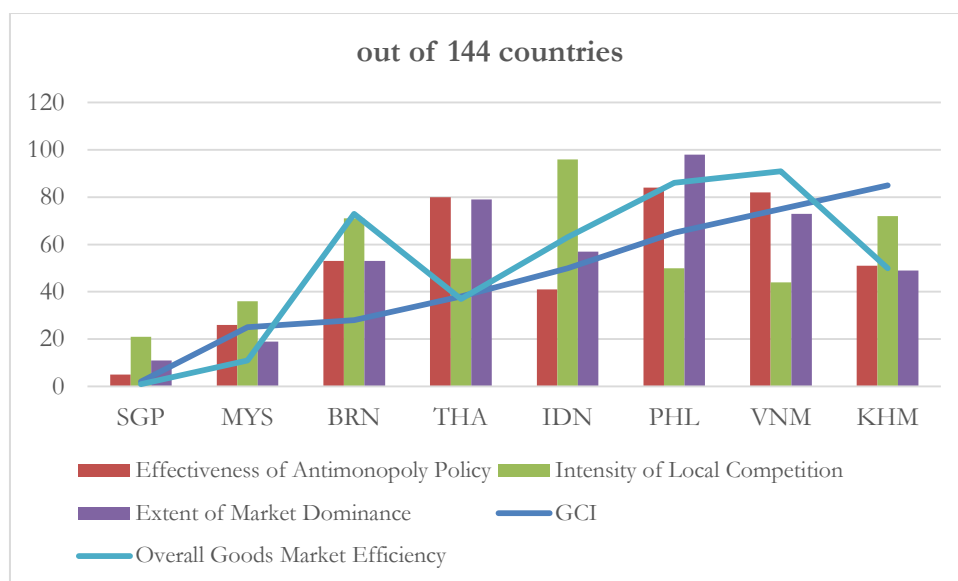
⁷³⁷ Klaus Schwab (ed), *The Global Competitiveness Report 2010 – 2011* (World Economic Forum 2010) 11, 20 – 21, and 428 - 430

Table 12: 2011 – 2012⁷³⁸

5 stages of development

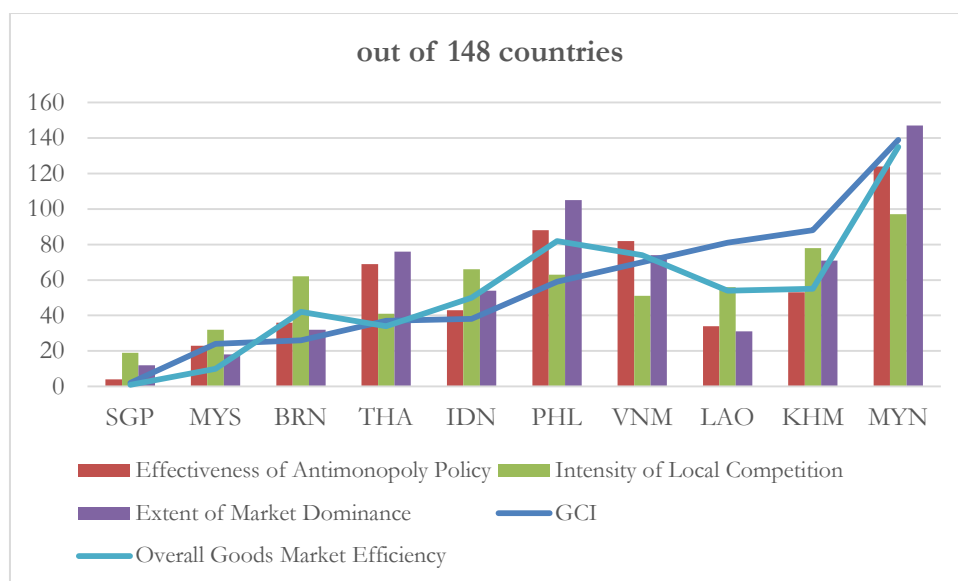
Stage 1: Factor-Driven Viet Nam, Cambodia	Transition from 1 to 2 Brunei, Philippines	Stage 2: Efficiency-Driven Malaysia, Thailand, Indonesia	Transition from 2 to 3	Stage 3: Innovation-Driven Singapore
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⁷³⁸ Klaus Schwab (ed), *The Global Competitiveness Report 2011 – 2012* (World Economic Forum 2011) 11, 15, 20 – 21, and 452 - 454

Table 13: 2012 – 2013⁷³⁹**5 stages of development**

Stage 1: Factor-Driven Viet Nam, Cambodia	Transition from 1 to 2 Brunei, Philippines	Stage 2: Efficiency-Driven Thailand, Indonesia	Transition from 2 to 3 Malaysia,	Stage 3: Innovation-Driven Singapore
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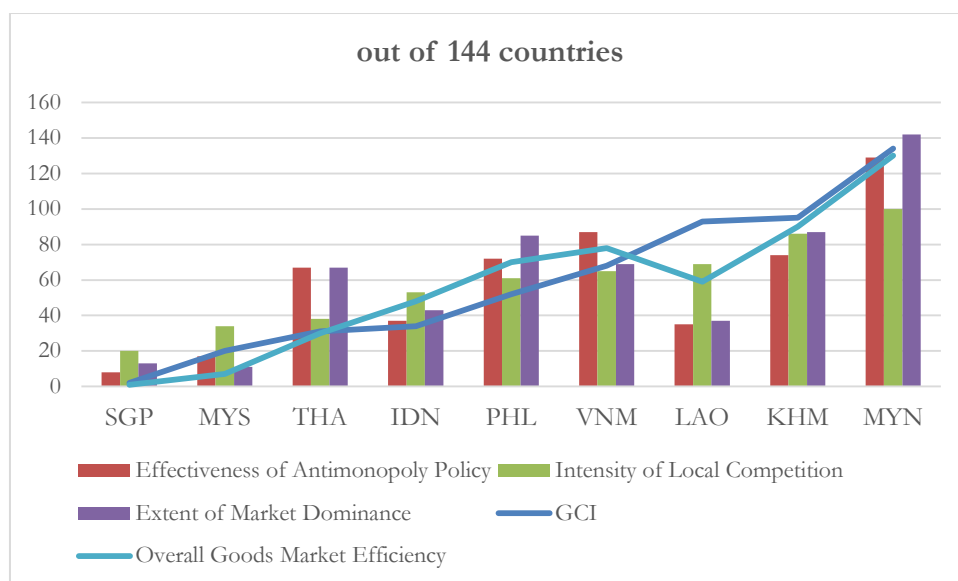
⁷³⁹ Klaus Schwab (ed), *The Global Competitiveness Report 2012 – 2013: Full Data Edition* (n 110) 10, 13 18 – 19, and 450 - 452

Table 14: 2013 – 2014⁷⁴⁰

5 stages of development

Stage 1: Factor-Driven Viet Nam, Laos Cambodia, Myanmar	Transition from 1 to 2 Brunei, Philippines	Stage 2: Efficiency-Driven Thailand, Indonesia	Transition from 2 to 3 Malaysia,	Stage 3: Innovation-Driven Singapore
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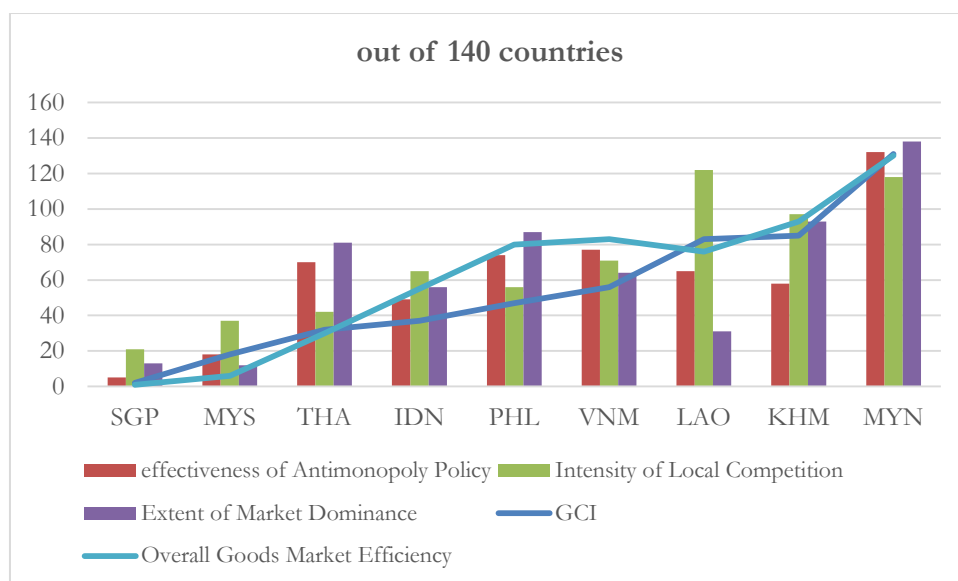
⁷⁴⁰ Klaus Schwab (ed), *The Global Competitiveness Report 2013 – 2014: Full Data Edition* (n 111) 11, 15, 20 – 21, and 470 - 472

Table 15: 2014 – 2015⁷⁴¹

5 stages of development

Stage 1: Factor-Driven Viet Nam, Laos Cambodia, Myanmar	Transition from 1 to 2 Philippines	Stage 2: Efficiency-Driven Thailand, Indonesia	Transition from 2 to 3 Malaysia,	Stage 3: Innovation-Driven Singapore
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⁷⁴¹ Klaus Schwab (ed), *The Global Competitiveness Report 2014 – 2015: Full Data Edition* (World Economic Forum 2014) 11, 13, 18 – 19, and 466 - 468

Table 16: 2015 – 2016⁷⁴²**5 stages of development**

Stage 1: Factor-Driven Laos, Cambodia, Myanmar	Transition from 1 to 2 Philippines, Viet Nam	Stage 2: Efficiency-Driven Thailand, Indonesia	Transition from 2 to 3 Malaysia,	Stage 3: Innovation-Driven Singapore
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⁷⁴² Klaus Schwab (ed), *The Global Competitiveness Report 2015 – 2016* (n 86) 12, 13, 129, 203, 229, 249, 271, 297, 321, 345, and 367

ANNEX 2: GCI INDICATORS AND THRESHOLDS FOR STAGES OF DEVELOPMENT⁷⁴³

Table 1: Basic Requirements

	Stage of Development				
	Stage 1: Factor- driven <2,000 US\$	Transition from Stage 1 to Stage 2 2,000-2,999 US\$	Stage 2: Efficiency- driven 3,000-8,999 US\$	Transition from Stage 2 to Stage 3 9,000-17,000 US\$	Stage 3: Innovation- driven >17,000 US\$
Weight for basic requirements	60%	40-60%	40%	20-40%	20%

Pillar 1: Institutions	Pillar 2: Infrastructure	Pillar 3: Macroeconomic Environment	Pillar 4: Health and Primary Education
A. Public Institutions	A. Transport Infrastructure	Government budget balance	A. Health
1. Property Rights	Quality of overall infrastructure	Gross national savings	Business impact of malaria
Property rights IP* protection	Quality of road infrastructure	Inflation	Malaria incidence
2. Ethics and corruption	Quality of railroad infrastructure	Government debt	Business impact of tuberculosis
Diversion of public funds	Quality of port infrastructure	Country credit rating	Tuberculosis incidence
Public trust in politicians	Quality of air transport infrastructure		Business impact of HIV/AIDS
Irregular payments and bribes	Available airlines seat kilometres		HIV prevalence
3. Undue Influence	B. Electricity and Telephony Infrastructure		Infant mortality
Judicial independence	Quality of electricity supply		Life expectancy
Favouritism in decisions of government officials	Mobile telephone subscriptions		B. Primary Education
4. Public-Sector Performance	Fixed telephone lines		Quality of primary education
Wastefulness of government spending			Primary education enrolment rate
Burden of government regulation			

⁷⁴³ Based on *The Global Competitiveness Report 2015 – 2016* (n 86) 38 - 40

Efficiency of legal framework in settling disputes Efficiency of legal framework in challenging regulations Transparency of government policymaking			
5. Security			
Business costs of terrorism Business costs of crime and violence Organised crime Reliability of police services			
B. Private Institutions			
1. Corporate Ethics			
Ethical behaviour of firms			
2. Accountability			
Strength of auditing and reporting standards Efficacy of corporate boards Protection of minority shareholders' interests Strength of investor protection			

Table 2: Efficiency Enhancers

	Stage of Development				
	Stage 1: Factor-driven <2,000 US\$	Transition from Stage 1 to Stage 2 2,000-2,999 US\$	Stage 2: Efficiency-driven 3,000-8,999 US\$	Transition from Stage 2 to Stage 3 9,000-17,000 US\$	Stage 3: Innovation-driven >17,000 US\$
Weight for Efficiency Enhancers	35%	35-50%	50%	50%	50%

Pillar 5: Higher Education and Training	Pillar 6: Goods Market Efficiency	Pillar 7: Labour Market Efficiency	Pillar 8: Financial Market Development	Pillar 9: Technological Readiness	Pillar 10: Market Size
A. Quantity of Education	A. Competition	A. Flexibility	A. Efficiency	A. Technological Adoption	A. Domestic Market Size
Secondary education enrolment rate	1. Domestic Competition	Cooperation in labour-employer relations	Availability of financial services	Availability of latest technologies	Domestic market size index
Tertiary education enrolment rate	Intensity of local competition	Flexibility of wage determination	Affordability of financial services	Firm-level technology absorption	B. Foreign Market Size
C. Quality of Education	Extent of market dominance	Hiring and firing practices	Financing through local equity market	FDI and technology transfer	Foreign market size index
Quality of the educational system	Effectiveness of anti-monopoly policy	Redundancy costs	Ease of access to loans	B. ICT Use	
Quality of math and science education	Effect of taxation on incentives to invest	Effect of taxation on incentives to work	B. Trustworthiness and Confidence	Internet users	
Quality of management schools	Total tax rate	B. Efficient Use of Talent	Soundness of banks	Broadband internet subscriptions	
Internet access in schools	Number of procedures required to start a business	Pay and productivity	Regulation of securities exchanges	Internet bandwidth	
C. On-the-Job Training	Time required to start a business	Reliance on professional management	Legal rights index	Mobile broadband subscriptions	

Local availability of specialised research and training services	Agricultural policy costs	Country capacity to retain talent		Mobile telephone subscriptions	
Extent of staff training	2. Foreign Competition Variable	Country capacity to attract talent		Fixed telephone lines	
	Prevalence of trade barriers	Female participation in labour force			
	Trade tariffs Prevalence of foreign ownership Business impact of rules on FDI Imports as a percentage of GDP				
	A. Quality of Demand Conditions				
	Degree of customer orientation Buyer sophistication				

Table 3: Innovation and Sophistication Factors

	Stage of Development				
	Stage 1: Factor-driven <2,000 US\$	Transition from Stage 1 to Stage 2 2,000-2,999 US\$	Stage 2: Efficiency- driven 3,000-8,999 US\$	Transition from Stage 2 to Stage 3 9,000- 17,000 US\$	Stage 3: Innovation- driven >17,000 US\$
Weight for Innovation and Sophistication Factors	5%	5-10%	10%	10-30%	30%

Pillar 11: Business Sophistication	Pillar 12: R&D Innovation
Local supplier quantity	Capacity for innovation
Local supplier quality	Quality of scientific research institutions
State of cluster development	Company spending on R&D
Nature of competitive advantage	University-industry collaboration in R&D
Value chain breadth	Government procurement of advanced technology products
Control of international distribution	Availability of scientists and engineers
Production process sophistication	PCT patent applications
Extent of marketing	Intellectual property protection
Willingness to delegate authority	
Reliance on professional management	

ANNEX 3: CURRENT LEGAL FRAMEWORK OF COMPETITION LAWS OF THE AMSs

COUNTRY	CURRENT COMPETITION LAW	CURRENT DEVELOPMENT ON COMPETITION LAW	PROVISIONS ON ABUSE OF A DOMINANT POSITION/UNILATERAL CONDUCTS
BRUNEI ⁷⁴⁴	Competition Order, 2015	It is set to enter into force in phases. The country is in the process of recruiting and forming the Competition Commission. At the time of writing, the Competition Order is not yet enforced.	<p>Definition of a Dominant Position Section 2 Interpretation “dominant position” means a situation in which one or more undertakings possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors within Brunei Darussalam or elsewhere”</p> <p>“Chapter 3: Abuse of dominant position Abuse of dominant position 21. (1) Subject to section 22, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Brunei Darussalam is prohibited. (2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse of it consists in –</p> <ul style="list-style-type: none"> (a) predatory behaviour towards competitors; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.” <p>Enforcement of decision of Commission. Section 42 [4] No financial penalty fixed by the Commission under this section may exceed 10 per cent or such other percentage of such turnover of the business of the</p>

⁷⁴⁴ ASEAN Secretariat, <<http://www.asean-competition.org/select?country=Brunei>> accessed 17 March 2017

			undertaking in Brunei Darussalam for each year of infringement for such period, up to a maximum of 3 years, as the Minister may, by order published in the Gazette, prescribe.
Cambodia ⁷⁴⁵	Cambodia is still in the process of drafting the competition law.	Cambodia endeavour to adopt the competition law as one of her commitments to ASEAN and WTO. The process involves working groups established by the Ministry of Commerce. The working groups cooperate with international experts from Australia Competition and Consumer Commission (ACCC). The draft law is expected to be submitted to the Council of Minister of Cambodia at the end of 2016 and to the National Assembly by the beginning of 2017.	<p>The draft provisions on Abuse of dominance as of 7 March 2016.</p> <p>Article 4: Definitions “dominant position means a situation in which a person, either individually or together with other persons, is in a position in a market to act without effective constraint from competitors or potential competitors.”</p> <p>Article 7: Unlawful Activities by Persons in a Dominant Position “It is unlawful for any person or group of persons with a dominant position to abuse their dominant position, including by:</p> <ul style="list-style-type: none"> A. Requiring or inducing a supplier or customer to not deal with a competitor or potential competitor of the person in a Dominant Position; B. Refusing to supply goods or services to a competitor or potential competitor; C. Selling goods or services on condition that the purchaser purchases separate goods or services unrelated to the object of a contract, or forcing a purchaser to accept a condition unrelated to the object of a contract; D. Selling goods or services below the cost of production; E. Refusing to give a competitor or potential competitor access to an essential facility <p>This Article 7 does not prohibit a person or persons with a dominant position from taking any step which has a reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.”</p> <p>Article 38: Penalties for Chapter II Conduct “In a Final Order under Article 33 of this Law, the Commission may impose an administrative fine for each violation of Articles 5, 6, 7,8 or 10 of this Law:</p> <ul style="list-style-type: none"> A. For natural persons, an amount of up to 10 (ten) percent of their total earnings during the years that the violation took place; and

⁷⁴⁵ ASEAN Secretariat, <<http://www.asean-competition.org/select?country=Cambodia>> accessed 17 March 2017

			<p>B. For legal persons, an amount of up to 10 (ten) percent of the total revenues (obtained by that legal person and its related entities) from doing business in Cambodia during the years that the violation took place.</p> <p>The Order must specify the date by which the fine is to be paid.”</p>
Indonesia ⁷⁴⁶	Law Number 5 Year 1999	<p>Several amendments to the Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition are taking place, especially on institutional status of Komisi Pengawas Persaingan Usaha (KPPU) Secretariat. The preparation of Presidential Regulation concerning Second Amendment of Presidential Decree Number 75 Year 1999 on KPPU, in order to strengthen KPPU’s status to support its functions and duties.⁷⁴⁷</p>	<p>Article 1(4) “Dominant position is a situation where an entrepreneur does not have any significant competitor in the relevant market with regard to the market share being controlled, or the entrepreneur is in the highest position among its competitors in the relevant market with regard to its financial capability, ability to have access to the suppliers or sales, and ability to adapt to the supply and demand of certain goods or services.”</p> <p>“Article 25 (1) Entrepreneurs are prohibited from taking advantage of their dominant position, either directly or indirectly, in order to:</p> <ul style="list-style-type: none"> a. impose trade terms with the intention to prevent and/or hamper the consumers to acquire competitive goods and/or services, both in prices or quality; or b. restrict the market and technology development; or c. hamper other entrepreneurs having the potential to become their competitors to enter the relevant market. <p>(2) Entrepreneurs are in the dominant position as referred to under Paragraph (1) of this article if:</p> <ul style="list-style-type: none"> a. one entrepreneur or a group of entrepreneurs controls 50% (fifty percent) or more of the market share on one type of goods or service; or b. two or three entrepreneurs or groups of entrepreneurs control 75% (seventy five percent) or more of the market share on one type of certain goods or services” <p>Administrative Sanctions Article 47</p> <p>“(1) The Commission is authorized to impose administrative sanctions to the entrepreneurs who have violated the provisions in this law.</p> <p>(2) Administrative sanctions as referred to under Paragraph (1) of this article shall be:</p> <ul style="list-style-type: none"> a. to revoke contracts as referred to in Articles 4 through 13, Article 15; and/or b. to order the entrepreneurs to end vertical integration as referred to under Article

⁷⁴⁶ ASEAN Secretariat, <<http://www.asean-competition.org/read-legislation-kppu-plays-important-role-in-indonesian-national-development-plan-for-2015-2019>> accessed 17 March 2017

⁷⁴⁷ ibid

			<p>14; and/or</p> <p>c. to order the entrepreneurs to stop activities proven to have caused monopolistic practices and/or unfair business competition and/or damages to the public; and/or</p> <p>d. to order the entrepreneurs to end the abuse of their dominant position; and/or</p> <p>e. to revoke the merger of the companies and acquisition of shares as referred to under Article 28; and/or</p> <p>f. to impose compensation for damages; and/or g. to impose a fine at the lowest in the amount of Rp. 1,000,000,000 (one billion rupiah) and at the highest in the amount of Rp. 25,000,000,000 (twenty five billion rupiah).”</p> <p>Criminal Punishment Article 48</p> <p>“(1) Violations to the provisions in Article 4, Articles 9 through 14, Articles 16 through 19, Article 25, Article 27 and Article 28 of this law is subject a criminal fine in the amount of at least Rp. 25,000,000,000 (twenty five billion rupiah) and in the amount of Rp. 100,000,000,000 (one hundred billion rupiah) at the most, or imprisonment at a maximum period of 6 (six) months.</p> <p>(2) Violations to the provisions under Article 5 through 8,m Article 15, Articles 20 through 24, and Article 26 of this law is subject to a criminal fine in the amount of at least Rp. 5,000,000,000 (five billion rupiah) and in the amount of Rp. 25,000,000,000 (twenty five billion) rupiah at the most, or imprisonment at a maximum period of 5 (five) months.</p> <p>(3) Violations to the provisions under Article 41 of this law is subject to a criminal fine in the amount of at least Rp. 1,000,000,000 (one billion rupiah) and at in the amount of Rp. 5,000,000,000 (five billion rupiah) at the most, or imprisonment at a maximum period of (three) months.”</p>
Laos	Law on Business Competition 2015		<p>Section 30 Market Dominance and Monopoly</p> <p>Market dominance is when one or two undertakings or a group of undertakings which engage in business activities having market shares more than the specified percentage prescribed by the Business Competition Commission.</p> <p>Monopoly is when there is only one undertaking or a group of undertakings operate in business activities to provide products or services in the relevant market.</p> <p>Section 31 Abusive conducts</p> <p>1. Unfairly price of products or services</p>

			<ol style="list-style-type: none"> 2. Selling products or services below cost and selling poor quality products or services 3. Refusal to deal 4. Impose monopolistic conditions on provision of goods or services 5. Imposing dissimilar conditions or price on the same goods or services 6. Other conducts as specified in the law or relevant order⁷⁴⁸
Malaysia	Malaysia Competition Act 2010		<p>Interpretation</p> <p>2. “dominant position” means a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors”</p> <p>Abuse of dominant position is prohibited</p> <p>10. (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.</p> <p>(2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include—</p> <ol style="list-style-type: none"> (a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer; (b) limiting or controlling— <ol style="list-style-type: none"> (i) production; (ii) market outlets or market access; <p>Laws of Malaysia¹⁶ ACT 712</p> <ol style="list-style-type: none"> (iii) technical or technological development; or (iv) investment, <p>to the prejudice of consumers;</p> <ol style="list-style-type: none"> (c) refusing to supply to a particular enterprise or group or category of enterprises; (d) applying different conditions to equivalent transactions with other trading parties to an extent that may— <ol style="list-style-type: none"> (i) discourage new market entry or expansion or investment by an existing

⁷⁴⁸ These provisions are the author’s own translation from the original Laotian text. Section 32-36 prescribe the explanation of each abusive behaviours as set out in Section 31. An expert casts doubt on whether this could hinder an effective competition as there is no umbrella clause. See David Fruitman, ‘Lao PDR Lays Foundation for Competition Regime’ (DFDL, 18 February 2016) <<https://www.dfdl.com/resources/legal-and-tax-updates/lao-pdr-lays-foundation-for-its-competition-regime/>> accessed 6 April 2017

			<p>competitor;</p> <p>(ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or</p> <p>(iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;</p> <p>(e) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract;</p> <p>(f) any predatory behaviour towards competitors; or</p> <p>(g) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.</p> <p>(3) This section does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.</p> <p>(4) The fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in that market.</p> <p>Finding of an infringement</p> <p>40. (1) If the Commission determines that there is an infringement of a prohibition under Part II, it—</p> <p>(a) shall require that the infringement to be ceased immediately;</p> <p>(b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end;</p> <p>Competition 33</p> <p>(c) may impose a financial penalty; or</p> <p>(d) may give any other direction as it deems appropriate.</p> <p>(2) The Commission shall, within fourteen days of its making a decision under this Part, notify any person affected by the decision.</p> <p>(3) The Commission shall prepare and publish reasons for each decision it makes under this section.</p> <p>(4) A financial penalty shall not exceed ten percent of the worldwide turnover of an</p>
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			<p>enterprise over the period during which an infringement occurred.</p> <p>General penalty</p> <p>61. Any person who commits an offence under this Act for which no penalty is expressly provided shall, on conviction, be liable—</p> <p>(a) if such person is a body corporate, to a fine not exceeding five million ringgit, and for a second or subsequent offence, to a fine not exceeding ten million ringgit; or</p> <p>(b) if such person is not a body corporate, to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding five years or to both, and for a second or subsequent offence, to a fine not exceeding two million ringgit or to imprisonment for a term not exceeding five years or to both.</p>
Myanmar	Competition Law 2015		<p>Section 27</p> <p>“27. No businessman shall, by abusing influence in the market, carry out any of the following acts;</p> <p>(a) selling the goods or providing services at price lesser than production cost or cost, insurance and freight (CIF) in order to cause competitors to leave the market;</p> <p>(b) causing to the detriment of consumers by sale or purchase the goods or services at unreasonable price to market price or by fixing sale price for retailers;</p> <p>(c) controlling the production, distribution of goods and providing services; restraining the market; obstructing the development of science and technology; and causing the detriment of consumers;</p> <p>(d) laying down non-uniform commercial terms and conditions within the same market in order to cause unfair competition;</p> <p>(e) laying down unfair terms and conditions upon other businesses in concluding contracts regarding goods and services or coercing to accept obligations which are not related directly to such contracts;</p> <p>(f) preventing entering of new competitors into market by unfair means;</p> <p>(g) refusing or allowing discriminately the use of main infrastructures or rare resources owned or utilized by oneself in order to prevent entry of new competitors into the market.”</p> <p>41. Any person who violates the prohibitions contained in section 15, section 19, section 22, section 26, section 27, section 31 or section 32 shall, on conviction, be punished with imprisonment for a term not exceeding two years or with fine not exceeding Kyat one hundred lakhs or with both.</p>

Philippines	Competition Act 2014		<p>Section 4 Definition of Terms. – As used in this Act:</p> <p>“(f) Control refers to the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency or otherwise;</p> <p>(g) Dominant position refers to a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any of a combination of the following: competitors, customers, suppliers, or consumers”</p> <p>Section 15 Abuse of Dominant Position</p> <p>“It shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition:</p> <p>(a) Selling goods or services below cost with the object of driving competition out of the relevant market: <i>Provided</i>, That in the Commission’s evaluation of the fact, it shall consider whether the entity or entities have no such object and the price established was in good faith to meet or compete with the lower price of a competitor in the same market selling the same or comparable product or service of like quality;</p> <p>(b) Imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner except those that develop in the market as a result of or arising from a superior product or process, business acumen, or legal rights or laws;</p> <p>(c) Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;</p> <p>(d) Setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially; <i>Provided</i>, That the following shall be considered permissible price differentials:</p> <p>(1) Socialized pricing for the less fortunate sector of the economy;</p> <p>(2) Price differential which reasonably or approximately reflect differences in the cost of manufacture, sale, or delivery resulting from differing methods, technical conditions, or quantities in which the goods or services are sold or delivered to the buyers or sellers;</p> <p>(3) Price differential or terms of sale offered in response to the competitive price</p>
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			<p>of payments, services or changes in the facilities furnished by a competitor; and</p> <p>(4) Price changes in response to changing market conditions, marketability of goods or services, or volume;</p> <p>(e) Imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded, such as fixing prices, giving preferential discounts or rebate upon entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially: <i>Provided</i>, That nothing contained in this Act shall prohibit or render unlawful:</p> <p>(1) Permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; or</p> <p>(2) Agreements protecting intellectual property rights, confidential information, or trade secrets;</p> <p>(f) Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or services to be supplied;</p> <p>(g) Directly or indirectly imposing unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers, fisherfolk, micro-, small-, medium-scale enterprises, and other marginalized service providers and producers;</p> <p>(h) Directly or indirectly imposing unfair purchase or selling price on their competitors, customers, suppliers or consumers, provided that prices that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws shall not be considered unfair prices; and</p> <p>(i) Limiting production, markets or technical development to the prejudice of consumers, provided that limitations that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws shall not be a violation of this Act:</p> <p><i>Provided</i>, That nothing in this Act shall be construed or interpreted as a prohibition on having a dominant position in a relevant market or on acquiring, maintaining and increasing market share through legitimate means that do not substantially prevent, restrict or lessen competition:</p> <p><i>Provided, further</i>, That any conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit may</p>
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			<p>not necessarily be considered and abuse of dominant position: <i>Provided, finally,</i> That the foregoing shall not constrain the Commission or the relevant regulator from pursuing measures that would promote fair competition or more competition as provided in this Act.”</p> <p>Section 29 Administrative Penalties. –</p> <p>“(a) Administrative Fines. – In any investigation under Chapter III, Sections 14 and 15, and Chapter IV, Sections 17 and 20 of this Act, after due notice and hearing, the Commission may impose the following schedule of administrative fines on any entity found to have violated the said sections:</p> <p>First offense: Fine of up to one hundred million pesos (P100,000,000.00); Second offense: Fine of not less than one hundred million pesos (P100,000,000.00) but not more than two hundred fifty million pesos (P250,000,000.00).</p> <p>In fixing the amount of the fine, the Commission shall have regard to both the gravity and the duration of the violation.</p> <p>(b) Failure to Comply With an Order of the Commission. – An entity which fails or refuses to comply with the ruling, order or decision issued by the Commission shall pay a penalty of not less than fifty thousand pesos (P50,000.00) up to two million pesos (P2,000,000.00) for each violation and a similar amount of penalty for each day thereafter until the said entity fully complies. Provided that these fines shall only accrue daily beginning forty-five (45) days from the time that the said decision, order or ruling was received.</p> <p>(c) Supply of Incorrect or Misleading Information. – The Commission may likewise impose upon any entity fines of up to one million pesos (P1,000,000.00) where, intentionally or negligently, they supply incorrect or misleading information in any document, application or other paper file with or submitted to the Commission or supply incorrect or misleading information in an application for a binding ruling, a proposal for a consent judgment, proceedings relating to a show cause, order, or application for modification of the Commission’s ruling, order or approval, as the case may be.</p> <p>(d) Any other violations not specifically penalized under the relevant provisions of the Act shall be penalized by a fine of not less than fifty thousand pesos (P50,000.00) up to two million pesos (P2,000,000.00).</p> <p>Provided that the schedule of fines indicated in this section shall be increased by the Commission every five (5) years to maintain their real value from the time it was set.”</p>
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Singapore	Competition Act 2005		<p>Abuse of dominant position</p> <p>47.</p> <p>“—(1) Subject to section 48, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.</p> <p>(2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in —</p> <p>(a) predatory behaviour towards competitors;</p> <p>(b) limiting production, markets or technical development to the prejudice of consumers;</p> <p>(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or</p> <p>(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.</p> <p>(3) In this section, “dominant position” means a dominant position within Singapore or elsewhere.”</p> <p>Enforcement of decision of Commission</p> <p>69.</p> <p>“—(1) Where the Commission has made a decision that —</p> <p>(a) any agreement has infringed the section 34 prohibition;</p> <p>(b) any conduct has infringed the section 47 prohibition;</p> <p>(c) any anticipated merger, if carried into effect, will infringe the section 54 prohibition; or</p> <p>(d) any merger has infringed the section 54 prohibition,</p> <p>the Commission may give to such person as it thinks appropriate such directions as it considers appropriate to bring the infringement or the circumstances referred to in paragraph (c) to an end and, where necessary, requiring that person to take such action as is specified in the direction to remedy, mitigate or eliminate any adverse effects of such infringement or circumstances and to prevent the recurrence of such infringement or circumstances.</p> <p>(2) A direction referred to in subsection (1) may, in particular, include provisions —</p> <p>(a) where the decision is that any agreement has infringed the section 34</p>

			<p>prohibition, requiring parties to the agreement to modify or terminate the agreement;</p> <p>(b) where the decision is that any conduct has infringed the section 47 prohibition, requiring the person concerned to modify or cease the conduct;</p> <p>(ba) where the decision is that any anticipated merger, if carried into effect, will infringe the section 54 prohibition —</p> <p>(i) prohibiting the anticipated merger from being carried into effect;</p> <p>(ii) requiring any parties to any agreement that is directly related and necessary to the implementation of the merger (which would result from the anticipated merger being carried into effect) to modify or terminate the agreement, notwithstanding the agreement is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 45 or 46, as the case may be, that the agreement is unlikely to infringe, or has not infringed, the section 34 prohibition; and</p> <p>(iii) requiring any person concerned with any conduct that is directly related and necessary to the implementation of the merger (which would result from the anticipated merger being carried into effect) to modify or cease that conduct, notwithstanding the conduct is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 52 or 53, as the case may be, that the conduct is unlikely to infringe, or has not infringed, the section 47 prohibition;</p> <p>(c) where the decision is that any merger has infringed the section 54 prohibition —</p> <p>(i) requiring the merger to be dissolved or modified in such manner as the Commission may direct;</p> <p>(ii) requiring any parties to any agreement that is directly related and necessary to the implementation of the merger to modify or terminate the agreement, notwithstanding that the agreement is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 45 or 46, as the case may be, that the agreement is unlikely to infringe, or has not infringed, the section 34 prohibition; and</p> <p>(iii) requiring any person concerned with any conduct that is directly related and necessary to the implementation of the merger to modify or cease that conduct, notwithstanding that the conduct is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 52 or 53, as the case may be, that the conduct is unlikely to infringe, or has not infringed, the section 47 prohibition;</p>
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			<p>(d) where the decision is that any agreement has infringed the section 34 prohibition, any conduct has infringed the section 47 prohibition or any merger has infringed the section 54 prohibition, to pay to the Commission such financial penalty in respect of the infringement as the Commission may determine; and</p> <p>(e) in any case, requiring any party to an agreement that has infringed the section 34 prohibition, any person whose conduct has infringed the section 47 prohibition, any party to an anticipated merger which, if carried into effect, will infringe the section 54 prohibition or any party involved in a merger that has infringed the section 54 prohibition —</p> <p>(i) to enter such legally enforceable agreements as may be specified by the Commission and designed to prevent or lessen the anti-competitive effects which have arisen;</p> <p>(ii) to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the Commission; and</p> <p>(iii) to provide a performance bond, guarantee or other form of security on such terms and conditions as the Commission may determine.</p> <p>(3) For the purpose of subsection (2)(d), the Commission may impose a financial penalty only if it is satisfied that the infringement has been committed intentionally or negligently.</p> <p>(4) No financial penalty fixed by the Commission under this section may exceed 10% or such other percentage of such turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of 3 years, as the Minister may, by order published in the <i>Gazette</i>, prescribe.</p> <p>(5) The Commission shall, in any direction requiring the payment of a financial penalty, specify the date before which the financial penalty is to be paid, being a date not earlier than the end of the period within which an appeal against the direction may be brought under section 71.</p> <p>(6) The Minister may, by order published in the <i>Gazette</i>, prescribe the interest payable on the outstanding amount of any financial penalty imposed under subsection (2)(d) and for payment by instalment (as may be directed by the Commission in its discretion) of any financial penalty imposed under subsection (2)(d).”</p>
Thailand	Trade Competition Act 1999	Thailand is currently in the process of amending the Act. The National Assembly is	<p>Section 3. In this Act:</p> <p>“"business operator with market domination" means one or more business operators in the market of any goods or service who have the market share and sales volume above</p>

		<p>expect to pass the amended Act within the end of 2017.</p>	<p>that prescribed by the Commission with the approval of the Council of Ministers and published in the Government Gazette, having regard to the market competition;”⁷⁴⁹</p> <p>Section 25. “A business operator having market domination shall not act in any of the following manners: (1) unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services; (2) unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators; (3) suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand; (4) intervening in the operation of business of other persons without justifiable reasons.”</p> <p>Section 51. “Any person who violates section 25, section 26, section 27, section 28 or section 29 or fails to comply with section 39 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six million Baht or to both, and, in the case of the repeated commission of the offence, shall be liable to the double penalty.”</p>
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⁷⁴⁹ The Trade Competition Commission, upon an approval from the Cabinet, on 18 January 2007, has published criteria for business operator having market dominance. A business operator is considered dominant in a relevant market when it has market share at least 50% and total turnover of at least one billion Baht (THB1,000,000,000.00). A group of top three business operators is considered collective dominant when the group has totally 75% of market share and total turnover of at least one billion Baht (THB1,000,000,000.00). There is a safe harbour rule for a business operator which has market share less than 10% or total turnover less than one billion Baht (THB1,000,000,000.00).

Viet Nam	Law on Competition 2004		<p>Abuse of Dominant Market Position and Monopoly Position</p> <p>Article 11 Enterprises and groups of enterprises in dominant market position</p> <p>“1. An enterprise shall be deemed to be in a dominant market position if such enterprise has a market share of thirty (30) per cent or more in the relevant market or is capable of substantially restraining competition.</p> <p>2. A group of enterprises shall be deemed to be in a dominant market position if they act together in order to restrain competition and fall into one of the following categories:</p> <p>(a) Two enterprises have a market share of fifty (50) per cent or more in the relevant market;</p> <p>(b) Three enterprises have a market share of sixty-five (65) per cent or more in the relevant market;</p> <p>(c) Four enterprises have a market share of seventy-five (75) per cent or more in the relevant market.”</p> <p>Article 13 Practices constituting abuse of dominant market position which are prohibited</p> <p>“Any enterprise or group of enterprises in a dominant market position shall be prohibited from carrying out the following practices:</p> <p>1. Selling goods or providing services below total prime cost of the goods aimed at excluding competitors;</p> <p>2. Fixing an unreasonable selling or purchasing price or fixing a minimum re-selling price goods or services, thereby causing loss to customers;</p> <p>3. Restraining production or distribution of goods or services, limiting the market, or impeding technical or technological development, thereby causing loss to customers;</p> <p>4. Applying different commercial conditions to the same transactions aimed at creating inequality in competition;</p> <p>5. Imposing conditions on other enterprises signing contracts for the purchase and sale of goods and services or forcing other enterprises to agree to obligations which are not related in a direct way to the subject matter of the contract;</p> <p>6. Preventing market participation by new competitors.”</p>
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			<p>Article 117 Forms of penalties to be imposed for breaches of laws on competition and measures for remedying consequences</p> <p>1. For each practice in breach of the laws on competition, the individual or organization in breach must be subject to one of the following main forms of penalty:</p> <ul style="list-style-type: none"> (a) A warning; (b) A fine. <p>2. Depending on the nature and seriousness of the breach, one or more of the following additional forms of penalty may also be applied to an individual or organization in breach of the laws on competition:</p> <ul style="list-style-type: none"> (a) Withdrawal of business registration certificate; revocation of the right to use a licence or practising certificate; (b) Confiscation of exhibits and facilities used to commit the breach of the laws on competition. <p>3. In addition to the forms of penalty stipulated in clauses 1 and 2 of this article, one or more of the following measures for remedying consequences may also be applied to an individual or organization in breach of the laws on competition:</p> <ul style="list-style-type: none"> (a) Restructure of an enterprise which abuses its dominant market position; (b) Division or separation of enterprises which merged or consolidated; compulsory re-sale of that part of an enterprise which was acquired; (c) Public rectification; (d) Removal of illegal terms and conditions from a contract or business transaction; <p>4. Where a practice in breach causes loss to the interests of the State or to the lawful rights and interests of other individuals or organizations, compensation must be paid for such loss in accordance with law.”</p> <p>Article 118 Level of fines for breach of laws on competition</p> <p>“1. A body authorized to impose penalties may impose a fine up to no more than ten (10) per cent of the total turnover of the organization or individual in breach in the financial year preceding the year in which the prohibited practice took place where the breach involves an agreement in restraint of competition, an abuse of dominant market position or monopoly position, or an economic concentration.</p> <p>2. The body authorized to impose penalties shall deal with unfair competitive</p>
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			<p>practices and other conduct in breach of this Law outside the cases stipulated in clause 1 of this article in accordance with the laws on dealing with administrative offences or in accordance with relevant laws.</p> <p>3. The Government shall provide detailed regulations on the level of fines applicable to practices in breach of this Law.”</p>
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ANNEX 4: ASEAN AVIATION MARKET TREND

Table 1: Total number of passengers carried

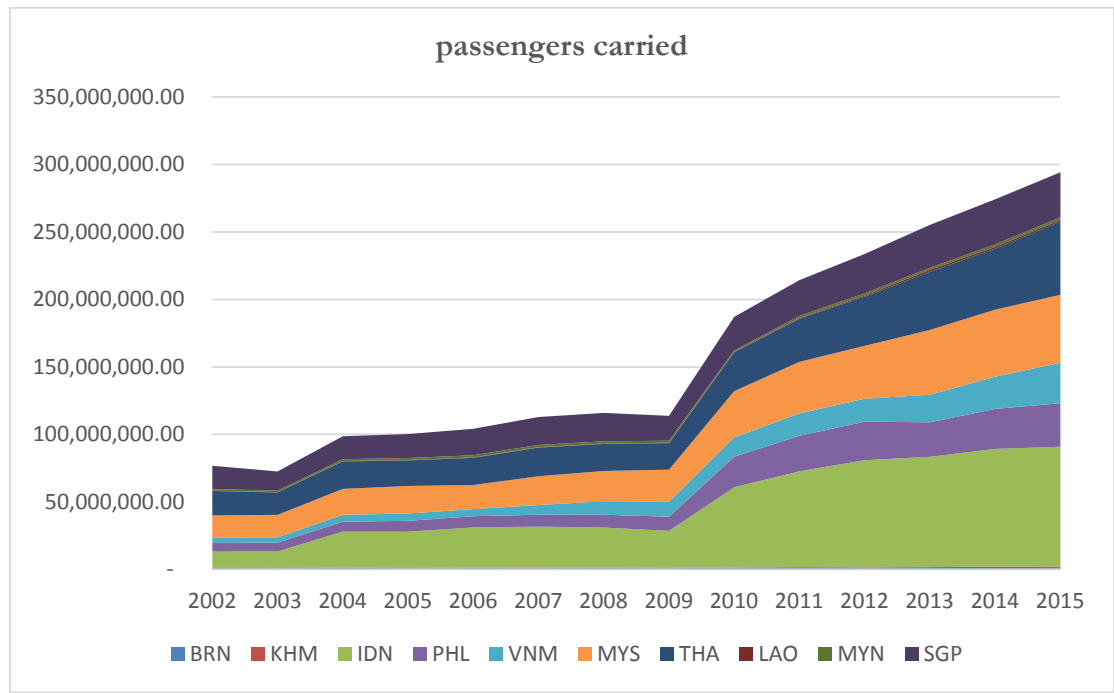


Table 2: Registered Carrier Departure Worldwide

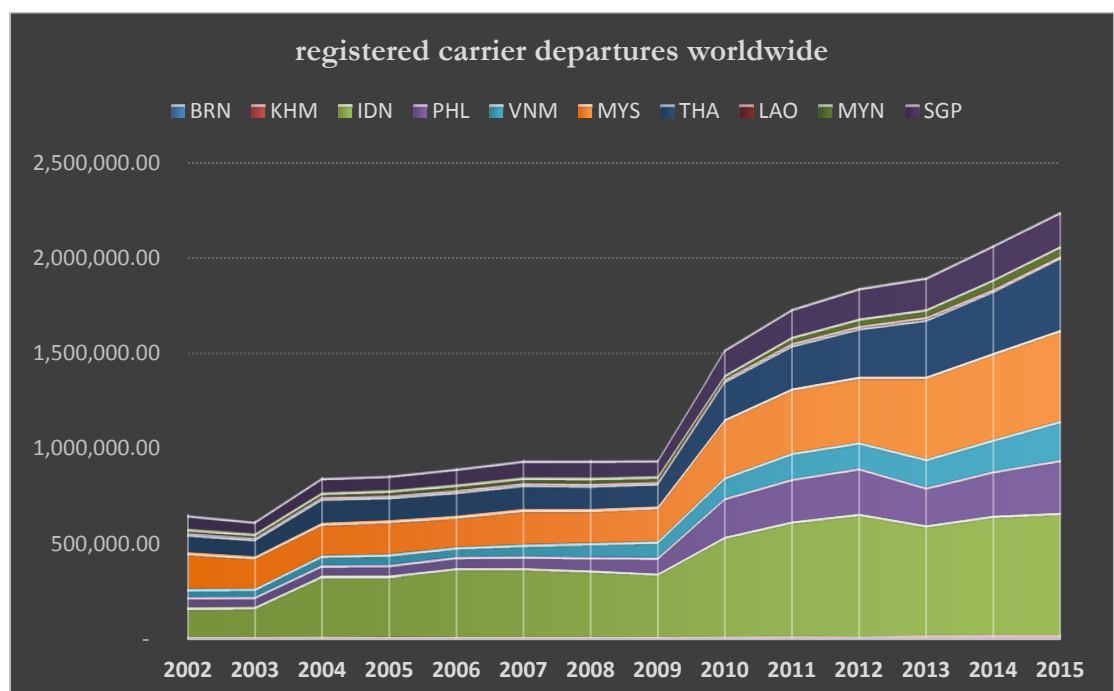
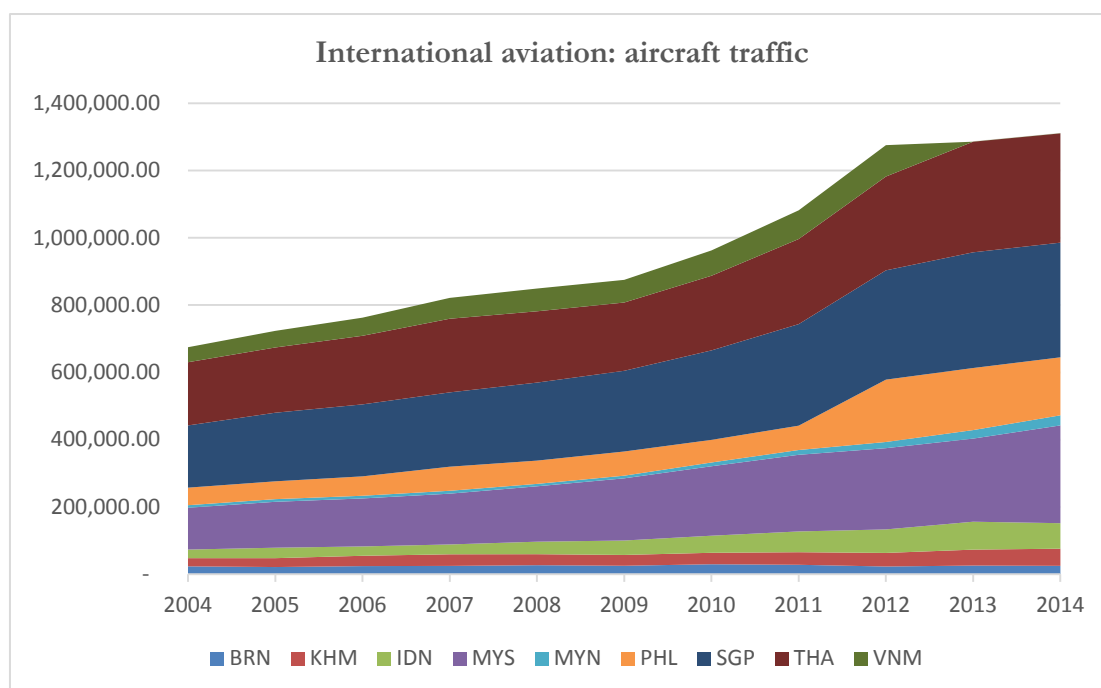


Table 3: International Aviation: Aircraft Traffic⁷⁵⁰



⁷⁵⁰ Data used in this table extracted from ASEAN Secretariat, ASEAN Statistical Yearbook 2015 (ASEAN Secretariat Jakarta 2016) 187 <http://www.aseanstats.org/wp-content/uploads/2016/10/ASEAN-Statistical-Yearbook-2015_small_size.pdf> accessed 15 April 2017

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