Competition Laws and Economic Integration in ASEAN*

Lawan Thanadsillapakul*

ASEAN is an economic group comprised of the countries of Southeast Asia. ASEAN and Asia Pacific has been the most dynamic and fastest growing region in the world. But the 1997 Asian crisis sent the 'Asian Tigers' into turmoil. The rise and fall of Asia clearly reflects the interdependence of East Asian countries and the world economy, and also reflects the impact of the changing global legal and economic environment of these countries. ASEAN countries have gone through a volatile period and thus have embarked on deeper integration to strengthen regional economic self–reliance while committing to an open market orientation. A new direction for ASEAN, "Open Regionalism," will balance regional integration and global liberalization.

---

*School of Law, Sukhothai Thammathirat Open University

** The new approach of ASEAN economic integration based on the "Open Regionalism" balancing intra and extra regional liberalisation of trade and investment aiming at the creation of a natural *de facto* integrated regional market has been launched by ASEAN in the new integration schemes: AIA, AFAS, and (new) AFTA. This model (new paradigm) is legally based on the *"Negative regional economic integration theory,"* unlike the conservative pattern of the European Union, which is not necessary to be followed by other regions, and in fact the EU is only a model implemented by the European countries resulting from the various strands of historical, political, social and economic background. ASEAN is fundamentally different from the EU, and ASEAN has its own development. See Pinder, John (1972) "Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC," in Hodges, Michael (Ed.) *European Integration.* Middlesex: Penguin Books Inc. Also see Garnaut, Ross (1996) *Open Regionalism and Trade Liberalisation: An Asia Pacific Contribution to the World Trade System.* Singapore: Institute of Southeast Asian Studies and Sydney: Allen and Unwin, also see Eliassen, Kjell A. and Monsen, Catherine Borve (1997) "Institutions and Networks: A Comparison of European and South East Asian Integration" Paper presented in Panel F1.3 "Regional Institutions and Globalisation" at a Conference on "Non-State Actors and Authority in the Global System," University of Warwick, 31st October- 1st November 1997, and see Garnaut, Ross; Drysdale, Peter & Kunkel, John (Eds.) (1994) *Asia Pacific Regionalism: Reading in International Economic Relations.* Australia: HarperEducational Publishers.

The necessity of eliminating barriers to entry of trade and investment creates a need to provide, at a regional level, an effective protection against unfair competition. As more liberal trade and investment regimes are established in ASEAN countries, there is an increasing requirement for competition rules to regulate fair competition among business players, as well as to supervise their behaviour. There would be very little point in eliminating various barriers and national boundaries imposed by ASEAN countries if these governmental restraints were replaced by concentrations and other restrictive business practices as well as concerted practices among private firms. Therefore, agreements restricting competition as well as the abuse of dominant positions of market power should be controlled under competition laws. This is the rationale for regional competition law for strengthening economic integration in ASEAN.

1. Introduction

The rise and fall of the East Asian countries have shown that in the face of the dynamic global economy and economic crises encountered by ASEAN, these countries need to develop their sustainable regional market. To create and strengthen an ASEAN market replacing the current separate national ASEAN markets, regionalisation of ASEAN laws and regulations, especially those relating to trade and investment is required in order to facilitate the free flow of goods, capital, services, and labour for achieving such an aim. A more liberalised trade and investment regime in ASEAN will better enhance their free economies and create a more favourable trade and investment climate in the region.

Consequently, ASEAN countries need to develop the effective legal systems for encouraging and overseeing increasingly competitive business activities in the region. The necessity of eliminating barriers to entry of trade and investment creates a need to provide, at a regional

level, an effective protection against unfair competition[1] to govern the economic activities and transactions of those TNCs located in the ASEAN region. As more liberal trade and investment regimes are established in ASEAN countries, there is an increasing requirement for competition rules to regulate fair competition among business players, as well as to supervise their behaviour.[2] There would be very little point in eliminating various barriers and national boundaries imposed by ASEAN countries if these governmental restraints were replaced by concentrations and other restrictive business practices as well as concerted practices among private firms.[3] Therefore, agreements restricting competition as well as the abuse of dominant positions of market power should be controlled[4] under competition laws. This is the rationale for regional competition law for strengthening economic integration in ASEAN.

This article will analyse the scope and basis for a comprehensive competition law in ASEAN for enhancing the implementation of economic integration in the region. Section 2 focuses on competition law and policy as the reinforcement function of ASEAN investment regime and regulations. Since ASEAN will develop its integrated regional

---

[1]As stated by UNCTAD the main objective of competition laws is "to preserve and promote competition as a means to ensure the efficient allocation of resources in an economy, resulting in the best possible choice of quality, the lowest prices and adequate supplies for consumers." UNCTAD (1996e) "Competition Policy and Legislation: Information Note 21." Note by the UNCTAD Secretariat to the Intergovernmental Group of Experts on Competition Law and Policy, UNCTAD document TD/B/RBP/INF.37, mimeo.

[2]The liberalisation of FDI policies can lead to an increase in competition in national or regional market. See UNCTAD (1997) *World Investment Report 1997:Transnational Corporations, Market Structure and Competition Policy.* New York and Geneva: United Nations Publication.

[3]Korah, Valentine (1997a) *An Introductory Guide to EC Competition Law and Practice.* Sixth Edition. Oxford: Hart Publishing, p. 1.

[4] To control here means to check, to verify, and to vet; in substantive rules of the competition laws. It means to exercise restraint or direction on the free action of another, to command those to comply with the rules in order to keep the market open and refrain from the abuse of dominant market power.

market, it requires a regulatory regime that can facilitate free movement of trade and investment intra-ASEAN. Competition law is compatible with "open regionalism"[5] because it is basically neutral and non-discriminatory. Moreover, the development of a regional competition law and policy that enhances fair competition among firms doing business in the region might also provide a basis for evaluating the economic benefit to ASEAN of entry by a foreign investor on competition grounds, rather than the discriminatory criteria used in screening procedures. Therefore, ASEAN regional competition laws and policies play a multifunctional role, i.e. to encourage the free flow of trade and investment, to monitor the behaviour of firms, and to evaluate the economic role or potential dominance of extra-ASEAN TNCs in the region. A single ASEAN competition law, rather than separate competition laws in each ASEAN country, would ensure that competition is evaluated on a regional basis, thus maintaining the principle of open regionalism in ASEAN. I will discuss this topic below.

Unlike the assumptions of neo-liberalism,[6] competition law and policy accepts the important role of states and good governance institutions in regulating firms' behaviour. This perspective is also more compatible with the new approach of positive integration ideology.[7] More-

---

[5] Thanadsillapakul, Lawan (2000) Open Regionalism and Deeper Integration: The Implementation of AFTA, AIA, and AFAS, the article is posted at http://www.worldbank.org.eapsocial, and also posted in the CEPMLP Internat Journal at http://www.cepmlp.org/journal/ Dundee University.

[6] Neo-liberalism regards regulation as an unnecessary burden; as Picciotto stated, the perspective of neo-liberal ideologues toward economic integration is that "...international integration means the creation of open markets, which requires only strong provision for the protection of property rights, the maintenance of public order, and not much else." See Picciotto, Sol (1998) "Linkages in International Investment Regulations: The Antinomies of the Draft Multilateral Agreement on Investment," in *Journal of International Economic Law*. University of Pennsylvania. Vol. 19, No. 3. Fall. p. 731-768, (at page 738).

[7] Picciotto argues that the current phase of restructuring of the global political economy needs the creation of positive linkages across regulatory regimes, to facilitate a shift from negative to positive integration. This can also be applicable to economic integration at a regional level. See Picciotto, 1998, p. 739, footnote 5.

over, competition law generally takes a pro-consumer policy perspective that takes into account the public good and social welfare. This ensures that the advantages of liberalisation within ASEAN resulting from economic integration would directly contribute to the general public wealth through consumers.

Section 3 surveys existing ASEAN laws relating to unfair competition and considers how they function and whether they are effectively enforced. Section 4 focuses on the rationale for a regional ASEAN competition law. The rationale for implementing regional competition law and policies is that the removal of internal barriers should not be allowed to result in companies creating territorial exclusivity through cartels or the abuse of dominant position. Control of restrictive business practices in the process of liberalisation is a key element in the new approach to positive integration.[8] This approach is unlike neo-liberalism, which tends to assure that the free market needs no control, regulation or restriction, either by government or public bodies.

2. Competition Law as a Reinforcement Function of ASEAN Investment Regime and Regulations

2.1 Why does ASEAN require Competition Law?

Firstly, since ASEAN aims to strengthen economic integration in the region, it needs laws and institutions to support the implementation and elaboration of trade and investment liberalisation within the ASEAN market. The interaction between government, consumers, and producers results in the concern that a rules-based system needs to be strengthened. How the competitive process actually works and to what extent the government should regulate the relationships between

---

[8] Picciotto, Sol (1998) "Linkages in International Investment Regulations: The Antinomies of the Draft Multilateral Agreement on Investment", in *Journal of International Economic Law*. University of Pennsylvania. Vol. 19, No. 3, Fall, p. 731-768, (at pp. 735-8).

producers and consumers is significant. In this sense, competition law is essential as an instrument to regulate fair competition because, as I mentioned earlier, it is compatible with liberalisation since it is basically neutral and non-discriminatory.

Secondly, in an emerging ASEAN free market economy, monopolies and restrictive business practices are viewed as undesirable because they are likely to distort prices and the efficient allocation of resources. Therefore, contestability has to be realised, so that free entry and the competitive pressure of new competitors will function and balance market power and structure in the ASEAN market. The goal of market contestability and undistorted competition is to create an ultimate public benefit for the consumers, to enable great varieties of product ranges at the minimum price.[9] Competition law generally takes a pro-consumer policy perspective that fundamentally strengthens consolidation of social wealth and of general consumers.

In addition, competition law and policy enables small and medium sized enterprises to enter the market, therefore it can be implemented as an alternative to industrial policy based on strategic policy, which has been regarded as non-neutral government intervention. Hence, competition law not only enhances consumers' interest, it also helps small and medium sized firms to compete equally with other firms in the regional economy, again while complying with the principles of liberalisation on a non-discriminatory basis. Additionally, the state still plays an important role in preventing market failure so that ASEAN countries may feel confident in their roles of monitoring the behaviour of the private sectors as they still prefer to play their part in overseeing economic transactions, and do not leave the private sectors alone to interact with each other as in neo-liberal ideology. Therefore, since ASEAN

---

[9]UNCTAD (1997) *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy*, New York and Geneva: United Nations Publication.

countries generally lack national competition laws (as will be discussed in section 3), it would be advantageous for ASEAN countries to launch an effective comprehensive competition law into the region, in parallel with the implementation of the trade and investment liberalisation process.

As regards foreign investment, the implementation of competition laws in ASEAN countries would ensure the realisation of more advantages from liberalising the entry, establishment, and operation of foreign investors, because competition laws would regulate and control mergers and acquisitions and the abuse of dominant market power in the ASEAN economy. The fear of economic conquest by powerful foreign TNCs might be better dealt with in this way rather than by the investment screening process employed by all ASEAN countries at present. The implementation of competition laws and policies in the ASEAN region could essentially help to eliminate the currently somewhat restrictive investment laws and regulations, even though actually some investment restrictions are in fact employed in almost if not all countries,[10] not only in ASEAN. The implementation of competition laws in ASEAN countries along similar lines to those implemented in other countries may help bring their laws into alignment with a possible future general agreement on the regulation of foreign direct investment.[11]

---

[10]Geist, Michael A. (1995) "Towards a General Agreement on the Regulation of Foreign Direct Investment", *Law and Policy in International Business*. 26 No.3 (Spring), pp.673-717.

Geist surveyed national investment laws in 11 countries from every region of the world and found that every country, including the US and the UK, which are the most liberal, employ common restrictions on entry of foreign investors in specific areas that affect economy or security of the country: restricted industries. Geist further found that the convergence of FDI policy has led to significant similarities in the standards and procedures applied to the admission of FDI internationally. The countries surveyed have adopted general policies of permitting FDI subject to certain exceptions. The almost uniform uses of a notification and/or prior approval procedure are widely used.

[11]Geist, 1995: part III the framework for a General Agreement on the regulation of foreign direct investment.

2.2 The Interaction between Competition Laws and Investment Laws of ASEAN Countries

Currently all ASEAN countries have employed a screening process and applied pre-entry requirements to all foreign investors. There are also some regulations to control foreign investors/firms from being a dominant firm in the economy, for instance, limitations on foreign equity/ownership, and divestment requirements. These laws and regulations can be used to prevent foreign investors from merging with or acquiring a local firm, as they cannot own shares above a specified limit.[12] Foreign firms also cannot merge with or acquire other foreign firms if their equity in the new company is beyond the equity ratio set by the law. Obviously, under this condition, ASEAN countries need competition law to control mergers & acquisitions. Even though ASEAN countries have been relaxing some regulations concerning the equity ratio of foreign investors, this has been applied on a case-by-case basis under specific conditions. Nevertheless, these regulations do not control local firms, or prevent them from merging with or acquiring other local or foreign firms. Indeed, local companies have sometimes established an oligopoly position in the market in specific sectors. For instance, in telecommunications, Shinnawat Co., Ltd. a dominant company in mobile phones and related products, in the Thai market; Telecom Asia, TOT as well as TT&T are also dominant telephone network providers in Thailand, and Samart Telecom Co., Ltd. is the only provider of satellite dishes. The oligopolistic market is hardly considered a fair competition market, and in fact it could easily distort price and the consumers' choice.

ASEAN countries also reserve some business sectors and exclude foreign investors from investing in those specific fields of business. But all these laws and regulations have to be phased out. All

---

[12]Generally foreign ownership or share equity cannot exceed 49% of the total share, except in the case that the company is granted promoted status under a promotion scheme.

industries will be opened for investment to ASEAN investors by 2010 and to all investors by 2020 subject to some exceptions.[13] Therefore, if ASEAN countries liberalise their investment regimes, they may be concerned that they are moving from a system of screening all take-overs by foreign firms of national firms to screening none. They may see risks of foreign firms acquiring dominant positions. To replace these investment laws by competition laws may not only prove to be more effective than the screening process, but also a more efficient way to assess the competitive effects of foreign firms at the time of entry and after entry.

Competition laws and policies thus have a major role to play in the process of ASEAN liberalisation. This is also to ensure that the ASEAN market is kept as open as possible to new entrants, and that firms do not frustrate this by engaging in anti-competitive practices. In this manner, the vigorous enforcement of ASEAN competition law can provide a reassurance that investment liberalisation will not leave the government powerless against anti-competitive transactions or subsequent problems.

Competition laws may replace the restrictive investment laws and regulations, with principles based on non-discrimination in the control of restrictive business practices among firms, regardless of the origin or the nationality of enterprises. Competition laws normally apply to all firms operating in given national or regional territories, whether through domestic sales, imports, affiliates or non-equity forms of foreign direct investment. They do not, in principle, discriminate between national and foreign firms, or between firms from different national origins. In this manner, competition law monitors the competitive behaviour of TNCs having effects in host ASEAN countries. This is to ensure that all firms do not abuse dominant market power, and to prevent inefficiencies stemming from market allocation agreements which

---

[13] See Open Regionalism and Deeper Integration, note 4.

might lessen trade and investment. Therefore, competition law strengthens the principle of national treatment and enhances investment liberalisation, to comply with the objectives of the ASEAN investment area and economic integration in ASEAN.

Now I will assess the existing ASEAN laws relating to unfair competition, to consider to what extent ASEAN needs a comprehensive competition law at a regional level and in what respect competition law could replace the current foreign investment laws in ASEAN countries.

3. Survey of ASEAN Laws Relating to Unfair Competition

3.1 Overview

Currently, ASEAN countries do not have systematic competition laws and policies. Some ASEAN countries do have some elements of anti-trust law or anti-monopoly laws. In this section, I attempt to survey, country by country, the ASEAN laws relating to unfair competition and to analyse whether those laws are effectively enforced to control anti-competitive business practices.

In Indonesia, there are no laws relating to unfair competition, monopolisation, or passing off which may affect rights in relation to industrial property in this country (this was probably due to the Soeharto regime during which the majority of business was under the control of and owned by the Soeharto family). Currently, unfair competition is controlled under Art. 1365 of *the Civil Code*, which provides that a wrongdoer whose conduct injures other people is obliged to pay compensation, and under article 382 bis of *the Criminal Code:*

> *Art. 382 bis of the criminal Code provides that: "Anyone who deceives the public or someone else with a purpose to obtain, maintain or add to his own benefit or that of his or another person's company, will be punished because of his unfair com-*

petition, with imprisonment for a maximum 16 months or fine of a maximum nine hundred rupiahs, if such acts injure his competitors or another competitor who competes with his competitor."

However, the penalty recorded here is plainly ineffective: a fine of 900 Rupiahs is approximately 4.17 Baht, (1 Indonesian Rupiah = 0.00463758 Baht or 215.630 Rupiahs = 1 Baht) which really means nothing for a dominant company, and the imprisonment sentence of 16 months is inappropriate and unrealistic. Especially, the compensation under Civil Code is not clearly defined so it can be minimal because firms that committed the offence can exercise their powerful influence on the courts concerned.

In Malaysia, there are no specific laws against unfair trading practices. There are piecemeal provisions in particular statutes such as *The Hire Purchase Act 1967, The Price Control Act 1946, and The Control of Supply Act 1961* that provide some limited protection to the consumer in specific situations or transactions. In particular, Sec. 28 of the *Malaysian Contract Act 1950* renders all covenants in restraint of trade void. However, there is no criterion for judging whether the covenants in question are reasonable, or if they are harsh or onerous or too wide. Apart from the above restriction, there are no controls or regulations over contracts relating to exclusive dealing, monopolisation, franchises or resale price maintenance. Where mergers are concerned, there are various requirements to be complied with in take-over and mergers, but these relate to the regulation of the shareholdings of a corporation in Malaysia. Section 179 of the *Companies Act 1965* prescribes a panel on Take-overs and Mergers to provide guidelines on the acquisition, take-over and merger of a company. There is no significant imposition of fines or punishment on the firms involved in unfair competition. Contracts dealing with these types of conduct, insofar as they do not infringe any of the specific laws mentioned, are valid and enforceable. It is notable that

Malaysian laws on take-over and mergers do not apply to contracts made or performed outside Malaysia unless the contract expressly states that the laws in Malaysia will apply.[14]

However, these Malaysian laws relating to unfair competition are obviously not systematically enforced and might inadequately deal with anti-competitive business practices of modern global firms, since these laws are very old and fragmented. They also do not apply to contracts made or performed outside Malaysia that might have an effect on market structure or power within the Malaysian economy and injure other competitors. Moreover, there are no controls or regulations over contract relating to exclusive dealings, monopolisation, franchises and price fixing. So there is no doubt that existing laws would ineffectively and inadequately control restrictive business practices of firms if they occurred as a result of the increasing competition among firms operating in ASEAN flowing from liberalisation.

In the Philippines, there are some laws regulating or prohibiting monopolies and restraint of trade or unfair competition. *The Philippines 1987 Constitution* provides that "the State shall regulate or prohibit monopolies when the public interest so requires, no combinations in restraint of trade or unfair competition shall be allowed."[15] There are also other general and special laws that prohibit and provide for the consequences of acts in restraint of trade. In particular, Art. 186 of The Revised Penal Code punishes monopolies and combinations in restraint of trade:

The revised Penal Code imposes a penalty of imprisonment or a fine or both upon:

** Any person who enter into any contract or agreement, or takes*

---

[14] CCH Asia Ltd. (1998) *Doing Business in Asia.* Bangkok: CCH Asia Limited.

[15] Sec. 29 Art. XIII of the Constitution.

part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market.

** Any person who monopolises any merchandise or object of trade or commerce, or combines with any other person or persons to monopolise that merchandise or object in order to alter price by spreading false rumour or making use of any other artifice to restrain free competition in the market.*

** Any person who, being a manufacturer, producer, processor of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, combines, conspires, or agrees in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, of any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, processed, assembled, or imported merchandise or object of commerce is used.*

If the offence affects any food substance, motor fuel or lubricants or other articles of prime necessity, the maximum penalty will be imposed. In addition, the object of any of the above contacts will be subject to forfeiture by the government. When the offence is committed by a corporation, the directors or managers of the corporation of the agent or representative in the Philippines, in the case of a foreign corporation, who knowingly permitted or failed to prevent the commission of such offences, will be held liable as principals.

The Penal Code gives a right of action to any person who suffers damage as a result of any act by any person involving unfair competition in agricultural, industrial or commercial enterprises or in labour, through the use of intimidation, force, deceit, machination or any other unjust, oppressive or highhanded method. Art. 188 of the Code punishes the substitution and alteration of marks and trade names, and Art. 189 of the Code provides criminal sanctions for unfair competition; fraudulent registration of marks or trade names; fraudulent designation of origin; and false description. Furthermore, Secs. 29 and 30 of *the Trademark Law* provides civil remedies against unfair competition, false designation of origin and false description. Also *The Business Names Law Act*[16] punishes certain acts where no proper registration of the firm or business name or style is effected with the Department of Trade or Industry. *The Republic Act No. 623 (1951)* prohibits certain acts if performed without the written consent of the manufacturers, bottlers, or sellers of duly stamped or marked bottles, boxes, kegs, barrels and other similar containers.

There are also special laws that regulate monopolies. Among them is *Press Decree No. 576-A*, which prohibits the ownership by one person or corporation of more than one radio or television stations in one municipality or city, or of more than five AM and five FM radio stations or of more than five television stations in the country. Any violation is punishable by imprisonment or a fine or both, and will result in the cancellation of the franchise and the confiscation of the station and its facilities without compensation. *The Price Act 1992 (Republic Act No. 7581)* imposes a penalty of imprisonment and a fine upon persons habitually engaged in the production, manufacture, importation, storage, transport, distribution, sale or other methods of disposition of goods,

---

[16] Act No. 3883 (1931).

who shall organise a cartel.[17] When a violation is committed by a corporation, its officials or employees, or in the case of a foreign corporation or association, its agent or representative in the Philippines who is responsible for the violation, shall be held liable. Alien offenders shall, upon conviction and after service of sentence, be immediately deported without need for any further proceedings.

The Philippines laws, even though there are several relating to unfair competition, mainly focus on trade, and do not cover investment. There is no regulation on mergers and acquisitions. Most laws do not clearly stipulate the amount of a fine or compensation in cases where competitors are injured. There are no criteria to justify the behaviour of firms, which might be regarded as unfair competition, and there is no measure to assess how the public interest would be affected. Also there is no clear procedure provided in the Philippines law for dealing with firms involved in unfair competition. Therefore, the existing laws are inadequate to cope with the problems that may occur when the ASEAN Investment Area is implemented.

In Singapore there is *The Multi-Level Marketing and Pyramid Selling Prohibition Act*. This Act makes it an offence for any person to promote or participate in a multi-level marketing scheme, which essentially embraces schemes, or arrangements, which recruit participants in pyramid selling on the chain-letter principle. However, apart from this, there is no Anti-competition law in Singapore. Its open economy and

---

[17] The Price Act defines a cartel as a combination of or agreement between two or more persons engaged in the production, manufacture, processing, storage, supply, distribution, marketing, sale or disposition of any basic necessity or prime commodity designed to artificially and unreasonably increase or manipulate its price. There shall be *prima facie* evidence of engaging in a cartel whenever two or more persons or business enterprises, competing for the same market and dealing in the same basic necessity or prime commodity, perform uniform or complementary acts among themselves which tend to bring about artificial and unreasonable increase in the price of any basic necessity or prime commodity or when they simultaneously and unreasonably increase prices on their competing products thereby lessening competition among themselves.

liberalised investment regime have been considered sufficient to guarantee free competition in Singapore.

In Thailand, there is *The Investment Promotion Act 1977* governing investment and encouraging foreign investment. This Act endeavors to enhance fair and non-discriminate environment and condition for both domestic and foreign investors. All investors are treated under the same standard and regulations. There are also *The Trade Competition Act B.E. 2542 (A.D. 1999), The Act on Prices of Goods and Services B.E. 2542 (A.D. 1999), The Anti-Dumping and Countervailing Act B.E. 2542 (A.D. 1999)* replacing *The Prescription of Prices of Goods and Anti-Monopoly Act of 1979.* The Trade Competition Act prohibits any business operator having power over the market to unfairly fix or maintain the level of the purchase or sale price of goods or charge for services, to impose conditions in the manner of unfairly forcing, directly or indirectly, other business operator who is his customer to limit the opportunity to choose to purchase or sell goods, to receive or provide service, or to acquire credit facility from other business operator.[18] The Act also prohibits the business operator to unreasonably suspend, reduce or limit service, production, purchase, distribution, delivery import into the kingdom, destroy or damage goods to reduce their volume to be lower than market demand or unreasonably interfere with business operator of other person.[19] Under the Competition Act, no business operator shall conduct a merger, which may cause monopoly or unfairness in competition.[20] The Act on Prices of Goods and Services prevents the fixing of prices of goods and services. Section 24 of this Act provided that *"In order to prevent the fixing of the purchase price, sale price or designation of unfair conditions and trade practice, the CCP (The Commission on Price of Goods and Services), with the approval of*

---

[18]Section 25 (10) and (2) of the Trade Competition Act B.E. 2542 (A.D. 1999).

[19]Section 25 (3) of the Trade Competition Act.

[20]Section 25 (4) of the Trade Competition Act.

the Cabinet, shall have the power to issue a notification prescribing any goods or services as the controlled goods or services." The Anti-Dumping and Countervailing Act aims at the prevention of the dumping that causes injury to a domestic industry. All these Acts mainly focus on domestic market and the fairness of competition of business operators in Thai market more than the implementation of the regional competitive fair market. These regulations include a guarantee against state competition, against competition by state monopolies selling or dealing in similar products, against price control by the state, against export restriction, and against importation by the state or its agencies and enterprises. However, the practice of imposition of import bans on competing products to protect the activities of the promoted enterprise counteracts the guarantee of fair competition in this case. This is an example of the ineffective implementation of unsystematic competition rules.

All ASEAN countries also have Anti-Dumping laws and a Consumer Protection Law. But none of them has a systematic competition law that could regulate the rivalries of firms and control the potential restrictive business practices of producers in global networks. It is important that ASEAN countries should introduce a comprehensive regime of investment liberalisation, deregulation, privatisation and competition law enforcement rather than only relaxing laws on the spot and lifting barriers item by item, which is not effective and is likely to confuse foreign investors. Foreign investors usually feel burdened by tons of laws and regulations that sometimes counteract each other. Regulatory differences in the investment field are obstacles to foreign investors.[21] Consequently, comprehensive regionalisation of competition

---

[21]Trisciuzzi, G.S (1983) "Multilateral Regulation of Foreign Direct Investment", in Fisher, B.S and Turner, J. (Eds.) *Regulating the Multinational Enterprise: National and International Challenges*. New York: Praeger. Trisciuzzi (1983) says: "Perhaps the most important potential benefit would be the harmonisation of currently diverse systems of national laws and regulations." For example, harmonisation could reduce the high costs borne by multinational corporations in dealing with widely divergent regulatory regimes in different countries."

laws could effectively enhance the favourable legal environment for attracting foreign investors.[22]

3.2 Merger Regulations for Replacing Regulations on Restriction of Foreign Equity in ASEAN Investment Laws

In this section I propose to focus on merger control in ASEAN. Even though a comprehensive regional system of merger control does not yet exist, it is in the interests of ASEAN to establish merger control in the region. Since ASEAN will have to implement national treatment in the near future and eliminate investment laws, which are incompatible with the objectives of the ASEAN Investment Area, merger regulations are needed to replace those laws used to function as a screening instrument. This is to ensure that there would be no emergence of cartels, trusts, oligopolies, concentrations or dominant market positions to harm the ASEAN economy, when the screening process and regulations of ASEAN investment laws are eliminated.

One of the main restrictions on foreign investment found in all ASEAN countries' investment laws and regulations is the limitation of foreign investors' share or equity in a company established in these countries. One rationale for limiting foreign equity in a firm established in these countries is to ensure that foreign investors cannot dominate the market and abuse their market power. A foreign company also cannot

---

[22]See note 9. Geist (1995) pointed out that it is not surprising to find that investors encounter and become discouraged with the potentially confusing and time-consuming regulations established by individual states. Also Professor Mark Baker noted in a 1991 review of Latin American FDI codes that "the greatest disincentive to direct foreign investment was dealing with local authorities. Foreign investors do not like to deal with foreign authorities because their application and approval procedures are unclear and cause substantial delays", also see Baker, Mark B. & Holmes, Mark D. (1991) "An Analysis of Latin American Foreign Direct Investment Law: Proposal for Striking a Balance Between Foreign Investment and Political Stability", *U. Miami Inter-Am. L. Rev.* Vol. 23, No. 1, p. 30., Baker &Holmes, 1991: 30.

merge with or acquire another local or foreign firms, since its equity will exceed the specified legal limit. But this kind of restrictive investment law has been regarded as being discriminatory and impeding foreign investors. Moreover, it has resulted in negative effects in ASEAN countries' economies. For instance foreign investors cannot generally hold more than 49% of shares in a company located in ASEAN countries, except in a particular case where the company has been promoted under a promotion scheme or is entitled to a specific status, such as pioneer status. Therefore, the majority of shares are held by domestic investors who have to seek capital by various methods. They mostly turn to loans and because domestic loans incur very high interest due to one of the financial policy of ASEAN governments to encourage domestic saving,[23] they turn to offshore loans. Ironically, the inflow of capital in this case is short-term foreign debt instead of an inflow of direct foreign investment. Consequently, the more foreign investment projects take place in ASEAN countries, especially with a huge capital fund project, the greater offshore loans increase. This is an example of the negative impact of wrong policies implemented in ASEAN countries, where at first, each policy seems good but the way they interact with each other eventually results in a negative impact on the overall economy. In my view, this can be regarded as one of the important causes of the Asian financial crisis.

Moreover, merger regulations are also needed to control the abuse of a dominant position by domestic companies that nowadays does occur in ASEAN countries. Therefore all firms, whether domestic or foreign, would be subject to the same regulations and control, so complying with the national treatment principle and the implementation

---

[23] See World Bank (1993a) *The East Asian Miracle: Economic Growth and Public Policy*, A World Bank Policy Research Report, New York: World Bank, also see Petri, Peter A. (1993a) *The Lessons of East Asia: Common Foundations of East Asian Success*, Washington, D.C.: The World Bank.

of the ASEAN Investment Area.

4. Rationale for a Regional ASEAN Competition Law

The removal of internal barriers among ASEAN countries to implement regional economic integration should not be allowed to result in companies creating territorial protection through cartels as well as the abuse of dominant position. While investment liberalisation in ASEAN can help promote the free entry of firms, and enhance the contestability of the ASEAN market, it is not a sufficient progress; competition laws become necessary to ensure that former statutory obstacles to contestability are not replaced by anti-competitive practices of firms, thus negating the benefits that might arise from liberalisation. The reduction of barriers to FDI in ASEAN and the establishment of positive standards of treatment for TNCs need to go hand in hand with the adoption of measures aimed at ensuring the proper functioning of the market, and measures to control anti-competitive practices by firms. The 1997 World Investment Report suggested that:

> *"The culture of FDI liberalisation that has grown world-wide and has become pervasive, needs to be complemented by an equally world-wide and pervasive culture of competition, which needs to recognise competing objectives" (UNCTAD, 1997).*

This statement could be truly applied to the ASEAN practical regulatory regime. Now I will discuss anti-competitive business practices that may occur among the international firms and to deal with the substance of competition laws designed to effectively regulate those unfair practices.

4.1 Anti-Competitive Business Practice and Substance of Competition Laws in ASEAN

Anti-competitive business practices that generally occur among international firms, and hence may also happen in ASEAN countries,

include the following[24]:

> *1) Horizontal restraints or the hard-core cartels among firms in an oligopolistic market, engaging, for example, in price fixing, output restrictions, market division, customer allocation, and collusive tendering and other anti-competitive co-operation between firms selling competing products. All these business practices distort prices and the allocation of resources as well as resulting in a dysfunctional market that causes consumer disadvantages.[25] Fair competition would exist if no single supplier or consumer could influence the market price. Competition laws and policy may play an important role not only in prohibiting the formation of cartels but also in balancing the competitive effects of each firm in the market.*
>
> *2) Vertical restraints or distribution strategies between manufacturers, suppliers or distributors, such as: tying the sale of one goods as a condition for the purchase of another goods; exclusive dealing (the seller requires the buyer to purchase the products only from the seller); territorial restraints (the seller requires the buyer/distributor to resell the product within a limited geographical area); and resale price maintenance (the seller requires*

---

[24]Compiled from various sources: UNCTAD (1997) *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy.* New York and Geneva: United Nations Publication.; Petersmann, E.U. (1993) "International Competition Rules for the GATT-MTO World Trade and Legal System", *Journal of World Trade.* Vol. 27., No. 6 (December), pp. 35-86, Petersmann, E.U. (1996a) "International Competition Rules for Government and Private Business", *Journal of World Trade.* Vol. 30, No. 3 June, Schoenbaum, Thomas J. (1996) "The Theory of Contestable Markets in International Trade: A Rationale for 'Justifiable' Unilateralism to Combat Restrictive Business Practices?", *Journal of World Trade*, Vol. 30. No. 3 (June) pp. 161-190., Schoenbaum, Thomas J., 1996.

[25]If market prices are distorted either through cartels or monopolies, they are likely to distort also the allocation, co-ordination and distribution functions of market competition so that consumer welfare will be reduced by higher prices, fewer products and less freedom of choice.

the buyer to resell the product only at a specified price). Resale price-fixing also tends to be generally prohibited. The pro-and anti-competitive effects of such vertical restraints need to be evaluated and where necessary controlled.

3) Abuse of intellectual property rights (IPR), for example where technology-licensing arrangements abuse the monopoly position of IPR holders, such as through non-competition clauses and the so-called 'grantback.' This means the licensee is required to assign inventions made in the course of working on the transferred technology back to the licensor. Another aspect of IPR abuse, "non-contestation clauses," is that the licensee is prevented from contesting the validity of the IPR or other right of the licensor. IPR abuses might be subject to general competition rules on horizontal and vertical restraints.

4) Abuse of market dominance: dominant firms accounting for a significant market share may attempt to monopolise a market, for instance through excess prices, price discrimination, predatory low prices, refusal to deal, or vertical restraints. Rules against the abuse of a dominant position may be conduct-oriented, in other words, a general prohibition against monopolising and foreclosure of competition. Another approach is result-oriented, with a prohibition for example of predatory pricing only if the losses can be recouped.

5) Mergers and acquisition policies, where horizontal, vertical or conglomerate mergers, may reduce competition or decrease efficiency. Merger policies may be designed to ensure the contestability of markets by preventing monopoly or price-setting by a single seller and price-taking by a single buyer, as well as oligopolistic or monopolised market power. On the other hand, acquisition policies also overlap with industrial policy instruments.

6) Public undertakings and enterprises with special privileges, which are not required to behave according to market principles, (Art. XVII of the GATT and Art. 90 of the EC Treaty) in view of their market power or financial independence. This includes firms with exclusive trading rights and monopolies.

In the new era, ASEAN countries do need to regulate these anti-competitive business practices to attain fair competition conditions. However, what ASEAN countries have to be aware of is the balance of market failure and government failure. If governments intervene so as to correct market failure or supply public goods, the risk of market failure has to be weighed against the risk of alternative government failure, because government intervention may lead to additional distortions. Therefore, fair competition conditions require rational behaviour of market participants or firms, perfect information, perfect mobility of the market, stable preferences and technologies, and reflection of all costs (goods) in the prices of goods and services.[26] All these requirements need a comprehensive set of competition laws and regulations among ASEAN countries. Current national laws and policy on restrictive business practices differ among these countries and the law focuses on different aspects such as anti-monopoly, anti-dumping, protection against state competition, etc. As seen in the previous section, there are no systematic competition laws in ASEAN countries. For instance, Singapore has refrained from adopting competition laws on the grounds that its liberal trade policies and its rather liberal investment regime are a significant guarantee of the contestability of its open economy. But now ASEAN countries need to introduce comprehensive competition laws and policies, and enforce them effectively. In fact, the general infrastructure and other economic comparative advantages of ASEAN countries

---

[26]Petersmann, E.U. (1996a), "International Competition Rules for Government and Private Business", *Journal of World Trade*, Vol. 30, No. 3 June.

still appear good; the only important thing that ASEAN countries lack is good governance and a rule-based system. Therefore, the combination of a sound ASEAN legal and economic systems can be viewed as favourably created factor endowments[27] that can affect ASEAN's competitiveness positively in the international trade and investment sphere.

5. The Bases of ASEAN Regional Competition Law

In the modern globally integrated world economy it is not only private enterprises but also governments that engage in competition[28] (Porter, 1990). In ASEAN countries in particular they have widely implemented strategic policies in the trade and investment sphere. In this respect, government plays an important role, as Petersman (1993: 35) pointed out:

> *"By means of industrial policies aimed at enhancing economies of scale and positive externalities of national industries, strategic trade policies aimed at shifting rents away from foreign to domestic industries, or by means of investment policies designed to attract scarce foreign capital through tax incentives and favourable investment conditions."*

Therefore markets are imperfect in many ways. Two different kinds of competition laws are thus required. The first is competition law for private restraints of competition and market failures, which are abuses of market power, externalities and asymmetries in information. The

---

[27] International competition among firms is influenced not only by "natural" production factor endowments, but also by government-determined conditions of competition, see Dunning, John H. (1992), "The Global Economy, Domestic Governance, Strategies and Transnational Corporations: Interactions and Policy Implication", *Transnational Corporations,* Vol.1, No.3, (December), pp.7-45., Dunning discussed in detail the "created" and "natural" endowments.

[28] Porter, M. (1990), *The Competitive Advantage of Nations,* New York: MacMillan Free Press.

second is competition law for governments so as to limit government failures, which may affect the supply of public goods and created endowments/comparative advantages.

Fair competition should aim to protect less-organised firms, such as small and medium firms, in entering the market while protecting public interest and consumers in a liberal economy. Competition rules may need to be evaluated to determine how far or to what extent competition rules should regulate the behaviour of firms. For instance, in some business areas merged lines of business or operators might provide more adequate and effective operation, more varieties of products, more available services, including advanced research and technological development that individual separate smaller firms/operators are unable to undertake.[29] Therefore there is a concern that competition rules may be applied so as to protect smaller firms at the expense of larger, irrespective of efficiency. It is a very difficult decision whether collaboration or competition in a particular market leads to a better use of resources. While competition is desirable in lessening economic power, businessmen believe that in some industries resources are put to better use if competition is limited. Therefore collaboration or natural monopolies may sometimes occur responding to the achievement of economies of scale. For instance, if a firm has merely expanded its plant in good time to meet an expected increase in demand, so that it is unprofitable for other firms to enter the industry, there is no objection to its monopoly.[30] Many markets can be supplied only after considerable capital invest-

---

[29]For instance if a single plant or a merged enterprise that can process all the spent nuclear fuel in the region substantially more cheaply than could smaller plants, it would be unprofitable for a second firm to establish a smaller plant.

[30]Korah, Valentine (1968), *Monopolies and Restrictive Practices.* Middlesex: Penguin Book Ltd, p. 64., Korah concluded that "it is so much cheaper to produce a product in a large plant that can be continuously used than in many smaller ones, that one or two plants of the minimum efficient size can supply the expected demand and there is room for only one or two suppliers."

ment is made or technology developed.

On the other hand, if capital requirements are a hindrance to the entry of small and medium firms into the market and one goal of competition is to enable small firms to compete in the market, then entry barriers exist on the ground of financial constraint. Hence, there are no barriers to the entry of an equally efficient firm in this case where a huge investment is required, but obviously small and medium firms are unable to compete with bigger firms. Is this regarded as unfair competition? Therefore the evaluation of whether there is unfair competition requires the consideration of the public good: an enhanced distribution system, provision of goods and services, reduced cost of operation, a technological lead or reduced capital requirements of those fields of business considered. It is noted that a small firm protected only for such reasons is not in a position to hold its customers or suppliers to ransom except in the short term.[31] Therefore to control the conduct of firms by a fragile protection of small firms may discourage large firms from making investments to enable them to compete aggressively. This implies that regulation of restrictive business practice is not only to ensure fair competition, but also to maximise the public good and sound resource management.

There is a dichotomy between market function and government role that lies at the heart of competition law. On the one hand, a liberal law of the market implies that it needs no barriers, no intervention, and no control, and that the market should be left to itself to function based on the rule of supply and demand. On the other hand, fair competition means that there should be no dominant enterprise, restrictive business practices, predatory pricing, or mergers and acquisitions that impede competition. All these behaviours may need regulatory control through

---

[31]Korah, Valentine (1997a), *An Introductory Guide to EC Competition Law and Practice,* Sixth Edition. Oxford: Hart Publishing.

competition laws to adjust the behaviour of firms. However, if there is absolute freedom from constraints, or in other words there is no regulation at all for fair competition, dominant firms could conquer the market so no one can compete. Hence, the proposed criteria for regulating the behaviours of firms may need to consider the type of business, size of business, competitive position, range or category of firms that the same level of undertakings may be treated fairly under the same conditions, rules and laws as well as the economic environment.

International competition laws for the private sector have actually been developed in various previous attempts, such as part of the 1948 Havana Charter for an International Trade Organisation, the UN Codes of Conduct and the OECD Decisions and Guidelines,[32] The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,[33] and the Resolution adopted by the Conference Strengthening the Implementation of the Set.[34] However, these

---

[32]Petersmann, E.U. (1992), "Codes of Conduct" in Bernhardt, R. (Ed.), *Encyclopaedia of Public International Law*, Vol. I, p. 627.

[33] Source: United Nations Conference on Trade and Development (1981). *"The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice"* United Nations Document TD/RBP/CONF/10/Rev.1 New York, United Nations. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was adopted by the United Nations General Assembly at its thirty-fifth session on 5th December 1980 by its resolution 35/36. The Second United Nations Conference to Review all Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was held in Geneva from 26th November to 7th December 1990. That Conference adopted a resolution on "Strengthening the implementation of the Set" at its sixth meeting on 7th December 1990. A third review Conference took place on 13th-21st November 1995. This Conference adopted a resolution calling for a number of concrete actions to give effect to the implementation of the Set. The Set of Principles and Rules was also adopted by United Nations Conference on Restrictive Business Practices as an annex to its resolution of 22nd April 1980.

[34]Source: United Nations Conference on Trade and Development (1991). *"Resolution Adopted by the Conference Strengthening the Implementation of the Set."* Report of the Second United Nations Conference to Review all Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice. United Nations document TD/RBP/CONF.3/9. Geneva, United Nations, Annex, pp. 48-51.

are "soft-law rules" rather than international/multilateral treaty law. Their aim generally is to avoid mutually harmful competition policy conflicts[35] and overcome the vision gaps and jurisdictional gaps between national competition laws.[36] The reasons for regulatory differences in competition laws and the decentralised administration of competition policies are mainly due to the particularity of national conditions. For instance, the final decision on whether the costs of restraints of competition may be outweighed by economies of scale and by positive externalities will require case-by-case analysis with due regard to that particular national condition. Conflicts between national regulations can also entail market access barriers, market distortions and harmful international externalities.

Since there is no single agreed set of competition laws available at the moment and not even a competition law model, ASEAN countries need to develop a regional consensus on this issue. They can also refer to general basic rules of conduct established in those various codes/ guidelines that have common features. However, the main aim of a regional competition law for ASEAN could be to facilitate the development of a strengthened regional market, as envisaged in the 1998 agreements setting up AIA, AFAS, and AFTA. {Framework Agreement on the ASEAN Investment Area (AIA), ASEAN Framework Agreement on Services (AFAS) and Framework Agreement on Enhancing Economic Co-operation (AFTA)}.

---

[35] Since the over two hundred international sovereign states have differing resources, preferences, comparative advantages, political system, and regulatory system, the national competition laws also differ in many respects such as exclusion of regulated sectors, exemption of exporters, rule-of-reason exceptions, focus on corporate conduct or market structures, support of "crisis cartels" and small businesses, actual enforcement and judicial review of the "law on the books."

[36] Petersmann, E.U. (1993), "International Competition Rules for the GATT-MTO World Trade and Legal System", *Journal of World Trade,* Vol. 27, No. 6, (December), pp. 35-86, (at page 37).

6. Regional competition law and policy and open regionalism[37]

The development of an ASEAN regional competition law and policy would be a new approach in this region, and even national competition law in each individual ASEAN country has not yet effectively and efficiently been developed. Hence, a regional law can be justified from the inadequacy of the national competition law of the ASEAN members as discussed above. I will not discuss here in detail the contents of a regional competition policy per se, as it is beyond the scope of this article. But I will discuss here the link between an ASEAN regional competition law and the concept of open regionalism.

I have already pointed out the functions of a feasible ASEAN regional competition law and policy (see introduction) that should include:

(1) to facilitate the liberalisation of trade and investment in ASEAN;

(2) to enhance free and fair competition among firms in ASEAN by monitoring behaviour of firms engaging business in the region, and;

(3) to ensure a proper competitive balance between intra- and extra-ASEAN business enterprises.

These three functions of a feasible ASEAN regional competition law and policy will play an important part in facilitating ASEAN open regionalism. It will, firstly, ensure that ASEAN keeps its regional market open for both intra- and extra- regional trade and investment (the first

---

[37]See Garnaut, Ross (1996), *Open Regionalism and Trade Liberalisation: An Asia Pacific Contribution to the World Trade System*. Singapore: Institute of Southeast Asian Studies and Sydney: Allen and Unwin, also see Eliassen, Kjell A. and Monsen, Catherine Borve (1997), "Institutions and Networks: A Comparison of European and South East Asian Integration" Paper presented in Panel F1.3 "Regional Institutions and Globalisation" at a Conference on "Non-State Actors and Authority in the Global System", University of Warwick, 31st October-1st November 1997, and see Garnaut, Ross; Drysdale, Peter & Kunkel, John (Eds.) (1994), *Asia Pacific Regionalism: Reading in International Economic Relations*. Australia: HarperEducational Publishers.

two functions). These have also been discussed above. The third function is fundamental to open regionalism, to ensure a proper competitive balance between intra- and extra- ASEAN firms.

Competition law and policy should help promote the growth of small and medium enterprises.[38] The liberalisation of trade and investment based on fair competition grounds will enable local small and medium firms to develop their economic strength, upgrade their technological production processes, and improve managerial systems and commercial skills, in order to compete with the foreign firms. Competition law will ensure that firms, local or foreign, cannot engage in restrictive business practices, abuse a dominant position, or form a cartel or any form of unfair practice that might damage other firms. Therefore, under such fair competition every firm either small or large can compete with each other in their relative market, size and field of business. Furthermore, competition law would permit ASEAN countries to evaluate the economic benefit from the influx of foreign firms, on the basis of whether they will damage local small and medium firms, so that they could employ competition policy in protecting local firms. This can be done through, for example, a merger control regulation so that TNCs cannot merge or acquire another company to create or strengthen their commercial dominance in the market. This would encourage foreign investment to be made on a "green field" basis that can contribute to the regional economy, ensuring that it competes with other firms (local or foreign) on the same fair basic grounds and conditions.

Since there are many small and medium firms in ASEAN countries, and these firms fear that an ASEAN regional market open to powerful TNCs might significantly affect local smaller firms, to protect the competitive position of such local companies and to ensure fair compe-

---

[38]See Whish, Richard and Sulfrin, Brenda (1993), *Competition Law,* 3rd edition London/ Edinburgh: Butterworths.

tition will increase their confidence in doing business in the single ASEAN open market.[39] A regional competition law and policy could fulfil this task.

Competition law could also allow each country to protect its indigenous enterprises or national/cultural industries to preserve country specific values or to maintain the country's specific renown for its own competitiveness globally.[40] In the Czech Beer Case, the American firm, Anheuser-Busch, brewer of the American Budweiser lager beer, wanted to acquire a stake in Czech Budvar, famous for Budweiser Budvar lager beer, so far unsuccessfully. Both companies produce the same brand name of "Budweiser" beer and they have had disagreement over the brand name, but neither of them have exclusive right to use the brand name internationally, so they settled the dispute by allocating the use of the name in different markets.[41] However, a conflict occurred when they both entered the European markets, where the agreement did not clearly define the territory of the use of the name by each party. The American firm thus wanted to merge the two companies so that it could produce and sell the product world-wide without any constraint. However, Czech Budvar has been regarded as the distinct producer of the real Czech

---

[39]In fact, ASEAN countries have been aware of this sensitive issue and have already promoted the small and medium firms in the region preparing them to be ready in competing with extra-ASEAN firms. See Joint Statement on East Asia Co-operation, 28 November 1999, Manila, The Philippines. Also each individual ASEAN country has set up Small and Medium Firm Networks to promote and strengthen S&M enterprises, for example, Malaysia set up the Small and Medium Industry Development Office, The Philippines set up the Bureau of Small and Medium Business Development to help promote S&M enterprises.

[40]See Muchlinski, P. T. "A Case of Czech Beer: Competition and Competitiveness in the Transitional Economies" (1996), *The Modern Law Review*, Vol. 59: 5 (September), pp. 658-675.

[41]The dispute was settled by the agreement of 4 September 1911, whereby the US brewer was granted exclusive use of "Budweiser" name in North America, while the Czech brewer was granted the name for the rest of the world. But it did not confer any right or imposed any restrictions on any part with the regard to the use of the name in Europe, nor did it prevent any party from establishing an exclusive right to use the Busweiser trade name as part of its trading style in any European country.

Budweiser lager beer, and the consumers, both within the Czech Republic and in other countries, favour this typical and unique beer, and prefer the Budweiser beer to be originally produced by Czech Budvar. They wanted to preserve Czech Budvar as the national indigenous industry and had active movements and campaigns to stop the acquisition by the American firm.

Muchlinski argued, in relation to this case, that since the Czech Republic, the only one among the transitional economies, has abolished specialised foreign investment laws and has actively liberalised investment, only privatisation and competition law could act as vehicles for the close screening of foreign investment. The EU law as a source of principles for the regulation of foreign investment would also be justified, because the Czech Republic and the EU have had an agreement[42] to bring the Czech's commercial and economic laws into line with EU law as a prelude to possible future membership of the EU. Therefore, EU competition law, which concerns the anti-competitive and concerted practices, abuse of a dominant position and preferential state aids that distort competition, must be taken into account regarding any business practices in the Czech Republic. Competition law could provide an alternative screening procedure for foreign investment to examine any threat of damage to national industry by means of merger or acquisition. In this perspective, the protection of indigenous industries could be based on the ground of the concern for consumers and the availability of a range of choice of products, which can include cultural diversity.

ASEAN countries follow an "Open Door" policy and thus liberalise investment so regional competition law, which is consistent to liberalisation, would play an important role in protecting domestic firms

---

[42]The Czech Republic has become a party to an EU Europe Agreement (EA), which entered into force on 1 February 1995 to ensure greater convergence between EU economic laws and the national law of the non-EU contracting states, as a precondition for any future application for membership.

from damage such as in the Czech Beer case. ASEAN can thereby reconcile a positive approach to foreign investors, justified by the lack of regulatory control, while at the same time exercising control over undesirable market and social effects of FDI through laws that apply to foreign and domestic firms alike, notably competition law, merger & acquisition control regulation, and anti-monopoly control.[43] In this way control over foreign investors and the preservation of the equal treatment of foreign investors and domestic investors in the same area of industry can be reconciled.

Therefore, ASEAN indigenous industries could be protected under the ASEAN regional competition law and policy, and by a regional merger control regulation. Moreover, consumer and local interest group opinion concerning some particular business or industries can be taken into account by the authority concerned.[44]

In conclusion, the function of regional competition law and policy and the regional merger control regulation would be to ensure the review of mergers in ASEAN countries lacking effective domestic controls and lacking experiences in dealing with mergers and acquisitions so that member countries would be able to engage the support of the Regional Merger Task Force where concentration occurs that has significant actual or potential anti-competitive effects within any member countries. An ASEAN regional competition law and policy could ensure that

---

[43]Muchlinski argued that "Maximum foreign shareholding limits in national laws have tended to be relaxed." The most promising avenue for regulation in competition law, in that a level of foreign ownership that may create an anti-competitive concentration can be legitimately challenged without upsetting the logic of free market policies. See Muchlinski, P. T. (1996) "A Case of Czech Beer: Competition and Competitiveness in the Transitional Economies", *The Modern Law Review*, Vol. 59: 5 (September), pp. 658-675, (at page 59).

[44]For instance, the issue can be brought to the Regional Merger Task Force, within the spirit of the Regional Merger Regulation, consumer groups can request that the Task Force review a concentration where FDI creates or strengthens a dominant position or merge & acquire such domestic firms.

regional economic strength would be enhanced and strengthened and that the regional open market that welcomes non-ASEAN trade and investment would not allow foreign firms to entirely dominate the regional economy. This complies with the main concept of open regionalism to enhance both intra- and extra- ASEAN trade and investment, so regional competition law and policy can be the suitable instruments facilitating the achievement of this goal.

References

Baker, Mark B. & Holmes, Mark D. (1991), "An analysis of latin American foreign direct investment law: proposal for striking a balance between foreign investment and political stability", *U. Miami Inter-Am. L. Rev.*, vol. 23, no. 1

CCH Asia Ltd. (1998), *Doing business in Asia. Bangkok: CCH Asia Limited*

Geist, Michael A. (1995), "Towards a general agreement on the regulation of foreign direct investment", *Law and Policy in International Business*, vol. 26, no.3 pp.673-717

Korah, Valentine (1968), *Monopolies and restrictive practices*, Middlesex: Penguin Book Ltd.

Korah, Valentine (1996), *Case and materials on E.C. competition law, London*: Sweet and Maxwell

Korah, Valentine (1997a), *An introductory guide to E.C. competition law and practice*, Sixth Edition, Oxford: Hart Publishing

Korah, Valentine (1997b), *Competition law in the European communities*, vol. IIIA: Rules in the International Field, situation at the 31 December 1996, Brussels and Luxembourg: European Commission

Muchlinski, P. T. (1995), *Multinational enterprises and the law*, Oxford and Cambridge: Blackwell

Muchlinski, P. T. (1996), "A case of czech beer: competition and competitiveness in the transitional economies", *The Modern Law Review*, vol.59, no.5, pp.658-675

Petersmann, E.U. (1992), "Codes of conduct" in: Bernhardt, R. (ed.) *Encyclopaedia of Public International Law*, vol.1, pp 627

Petersmann, E.U. (1993), "International competition rules for the GATT-MTO world trade and legal system", *Journal of World Trade,* vol. 27, no. 6, pp. 35-86

Petersmann, E.U. (1996a), "International competition rules for government and private business", *Journal of World Trade,* vol. 30, no. 3

Petersmann, E.U. (1996b), *Constitutionalism and international organisations: the case of the world trade organisation,* Paper presented at the Washington Conference on Institutions for International Economic Integration held on 16-19 May 1996 Washington D.C.

Picciotto, Sol (1996),The regulatory criss-cross: interaction between jurisdictions and the construction of global regulatory networks", in: Bratton, William; McCahery, Joseph; Picciotto Sol and Colin Scott (eds.), *international regulatory competition and coordination: perspectives on economic regulation in Europe and the United States,* Oxford: Clarendon Press

Picciotto, Sol (1998) "Linkages in international investment regulations: the antinomies of the draft multilateral agreement on investment", *Journal of International Economic Law,* University of Pennsylvania, vol. 19, no. 3, pp. 731-768

Picciotto, Sol & Mayne, Ruth (eds.) (1999), *Regulating international business beyond liberalisation,* Houndmills/Basingstoke/Hampshire/London: MacMillan Press Ltd.

Pinder, John (1972), "Positive integration and negative integration: some problems of economic union in the EEC", in: Hodges, Michael (ed.) *European Integration.* Middlesex: Penguin Books Inc.

Porter, M. (1990) *The competitive advantage of nations.* New York: MacMillan Free Press

Schoenbaum, Thomas J. (1996), "The theory of contestable markets in international trade: a rationale for 'justifiable' unilateralism to combat restrictive business practices?" *Journal of World Trade,* vol. 30. no. 3, pp. 161-190

Trisciuzzi, G.S (1983), "Multilateral regulation of foreign direct investment", in: Fisher, B.S and Turner, J. (eds.), *Regulating the multinational enterprise: national and international challenges,* New York: Praeger

UNCTAD (1987), *Handbook of trade control measures of developing countries,* New York: United Nations Publication

UNCTAD (1989), *Foreign direct investment and transnational corporations in services,* New York: United Nations. ST/CTC/89, Sales no. 89II.A.1

UNCTAD (1992), *World Investment Report 1992: transnational corporations as engines of growth*, New York and Geneva: United Nation Publication

UNCTAD (1993), *World Investment Report 1993: transnational corporations and integrated international production*, New York and Geneva: United Nations Publication

UNCTAD (1994), *World Investment Report 1994: transnational corporations, employment and the workplace*, New York and Geneva: United Nations

UNCTAD (1995a), *Trade and Development Report 1995*, New York and Geneva: United Nations Publication.

UNCTAD (1995b) *World Investment Report 1995: transnational corporations and competitiveness*. New York and Geneva: United Nations Publication

UNCTAD (1996a), *Trade and Development Report 1996*, New York and Geneva: United Nations Publication

UNCTAD (1996b), *World Investment Report 1996: investment, trade and international policy arrangements*. New York and Geneva: United Nations Publication

UNCTAD (1996c), *International investment instruments: a compendium*, 3 volumes, volume I: Multilateral instruments, volume II: Regional instruments, volume III: regional integration, Bilateral and Non-governmental Instruments, New York and Geneva: United Nations

UNCTAD (1996d), *Incentives and foreign direct investment*, UNCTAD/DTCI/28 Current Studies, Series A, no. 30, New York and Geneva: United Nations Publication

UNCTAD (1996e), "Competition policy and legislation: information note 21", Note by the UNCTAD Secretariat to the Intergovernmental Group of Experts on Competition Law and Policy, UNCTAD document TD/B/RBP/INF.37, mimeo

UNCTAD (1997), *World Investment Report 1997: transnational corporations*, market structure and competition policy, New York and Geneva: United Nations Publication

UNCTAD (1998a), *World Investment Report 1998: trends and determinants*, New York and Geneva: United Nations Publication

UNCTAD (1998b), *Bilateral investment treaties in the mid-1990s*, New York and Geneva: United Nations Publication

UNCTAD (1999a), *Admission and establishment: UNCTAD series on issues in international investment agreements*, New York and Geneva: United Nations Publication

UNCTAD (1999b), *World Investment Report 1999: foreign direct investment and the challenge of development*, New York and Geneva: United Nations Publication

UNCTAD (1999c), *National treatment: UNCTAD series on issues in international investment agreements*, New York and Geneva: United Nations Publication

UNCTAD & UNCTC (1991), *The impact of trade-related investment measures on trade and development*, New York: United Nations

UNCTAD and ICC (1998), *Multinational confidence full report: the financial crisis in Asia and foreign direct investment*, Geneva and New York: United Nations Publication