

References

Brason, Johannah. 2008. 'Competition policy in ASEAN: case studies'. *Asia Pacific Economic Paper* No. 374.

Freistein, Katja. 2005. 'ASEAN after the Bali Summit: From Paralysis to New Life'. *European Journal of East Asian Studies* 4(2):177-204.

Lee, Cassey. 2013. 'ASEAN Regional Cooperation on Competition Policy'. *ERIA Discussion Paper Series*.

Tan, Lay. 2004. 'Will ASEAN Economic Integration Progress beyond a free trade area?'. *International and Comparative Law Quarterly* 53: 936-967.

Sivalingam, G. 2006. 'Competition policy and law in ASEAN'. Paper presented at the sixth Global Conference on Business and Economics, GUTMAN CONFERENCE CENTER, the United States.

Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN. 2012. ASEAN Secretariat, Jakarta.

Thanadsillapakul, Lawan. 2004. 'The Harmonization of ASEAN Competition Laws and Policy and Economic Integration', *Uniform Law Review (Revue de Droit Uniforme)* IX: 479-500.

Yoshihara, K. 1988. *The rise of ersatz capitalism in Southeast Asia*. Singapore: Oxford University Press.

Gillespie, J. 1999. 'Law and development in 'the market place': an East Asian perspective.' In *Law, Capitalism and Power in Asia*, ed. K. Jayasuriya. London and New York: Routledge.

Leviter, Lee. 2010. 'THE ASEAN CHARTER: ASEAN FAILURE OR MEMBER FAILURE?' *New York University*, Accessed 20 May 2011. Available at http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_journals_journal_ofinternational_law_and_politics/documents/documents/ecm_pro_068232.pdf

Khoo How San. 2000. 'ASEAN as a neighborhood watch group', *Contemporary Southeast Asia* 22(2): 279-301.

Index of Economic Freedom. 2013. Accessed 28 May 2013. Available at <http://www.heritage.org/index>.

Nikomborirak, Deunden. 2006. "The political economy of competition law: the case of Thailand", *Northwestern Journal of International Law & Business* 26(3): 597.

(Thanadsillapakul 2004: 23). Thus, different regulatory systems in these states would prevent the flow of FDI and market integration between member states. Thanadsillapakul (2004: 23) points out that “laws and policies dealing with restrictive business practices differ from one ASEAN country to another and focus on different aspects such as anti-monopoly, anti-dumping, protection against state competition, etc”. Significantly, a number of documents underscore the inefficiency of law enforcement and regulators as evident in Malaysia and Vietnam where the judicial system is not independent and lacks efficacy (2013 Index of Economic Freedom). Nikomborirak (2006) also points out the ineffective enforcement of the Thai competition law to correct anticompetitive conduct. At the same time, various trade policies incompatible with the competition law have yet to be removed (Wisuttisak and Binh 2012).

Conclusion

When ASEAN committed itself to the creation of the AEC and the single market, the establishment of the AEC was a major milestone for deeper ASEAN economic integration. In fact, investors would come to think about the AEC as a single market rather than ten separate markets. To improve cooperation among member states, the law and legal systems of the ASEAN countries were to complement one another. To create free economies and create a favorable trade environment, competition laws and policies are necessary to ensure that anti-competitive behavior does not distort market functions and that there is a level playing field.

This requires a comprehensive set of competition laws and regulations. However, problems are manifest on both regional and national levels. On the national level, “the most important drawback is that the ASEAN countries lack good governance and a rule-based system” (Thanadsillapakul 2004: 23). This structure leads to inefficacy in the implementation of competition laws and regulations and fair competition. Also, market function is not based on market mechanisms but, rather, government intervention. On the regional level, ASEAN institutions and its mechanisms have not been shifted to constitute a supranational institution like the EU. At the same time, member states are still reluctant to pool together their sovereignty. Consequently, these factors have prevented the harmonization of laws and regulations between member states. Thus, integration of national markets into a single market very much remains a bumpy road.

Domestic economic structures and different aspects of competition laws in ASEAN

Despite ASEAN attempts to move into deeper economic integration, ASEAN states are quite heterogeneous in a variety of ways ranging from levels of economic development to law and regulation systems. In terms of economies, member states are at different stages of economic growth. However, ASEAN markets reflect a common structure in that the markets are imperfect. Thus, government intervention is required to prevent market failure. The structure of state and market in Southeast Asia is characterized by Yoshihara (1988) as ersatz capitalism dominated by crony capitalism due to the compromised and inferior role of states and their treatment of ethnic Chinese. In other words, it refers to the rent-seeking behavior of Southeast Asian Chinese capitalists. “Most market players successfully operate in the shadow of bureaucratic regulations, by relying on structures bound by interpersonal trust” (Gillespie 1999: 123).

A number of scholars (add ref) view the 1997 financial crisis as being a result of defective ASEAN crony capitalism that deviated from the principles of free market economics. Consequently, it incurred moral hazards and a lack of transparency of economic management that brought about the economic downturn. Thus, reforms under the IMF were aimed at controlling corruption and enhancing market competition. The idea of market reform is based on liberalists emphasizing that government intervention prevents market growth and competition. Significantly, reforms have attempted to eradicate the crony capitalism and lessen state intervention in the region. Privatization, deregulation and liberalization programs have been employed. However, evidence after the 1997 reform is somewhat contradictory with the neo-liberal aims.

Even though ASEAN countries have liberalized their economies, it is undeniable that state and government intervention is still prevalent. The main aim is not only to prevent market failure but to sustain government stability. The Index of Economic Freedom⁸ 2013 reveals that many ASEAN states such as the Philippines, Indonesia, Myanmar and Laos are not free, with the exception of Singapore. Furthermore, the rule of law remains an issue in many countries such as Vietnam. Although ASEAN countries have been attempting to reduce tariffs and non-tariff barriers, government and political interference and a lack of transparency have not disappeared. As evident in 2012, the Indonesian government reintroduced trade and investment barriers that included limits on the ownership of banks. Hence, freedom from corruption has been repressed (score 0-49.9) in the region ranging between 15 and 43, with the exception of Singapore (score 92).

As noted above, competition policy, law and regulations have not been established in all member states. While some ASEAN states have competition policy, many of them do not have comprehensive competition law to prevent restrictive business practices. Also, “ASEAN countries lack good governance and a rule-based system”

⁸ The overall index of economic freedom include freedom from corruption, government spending, investment freedom, business freedom, and property freedom. According to the economic freedom score, there are five ranges: 1) free (80-100), 2) mostly free (70-79.9), 3) moderately free (60-69.9), 4) mostly unfree (50-59.9) and 5) repressed (0-49.9).

competition agency is unable to deal with restrictions and conduct under a cross-regional basis (Wisuttisak and Binh 2012).

Apart from its lack of authority, the AEGC as well as the guidelines overlook the anticompetitive restrictions and conduct of state enterprises. In Southeast Asia, state-owned enterprises (SOEs) and government-linked companies (GLCs) have dominated ASEAN member state economies like Singapore, Malaysia, and Thailand. Significantly, state-owned enterprises are supported and subsidized by government. Therefore, it cannot be refuted that GLCs have the potential to restrict market access and competition either directly or indirectly. However, in some countries like Singapore, the abuse of a dominant position is not considered as really being an abuse but rather an indication of successful innovation. Consequently, this structure sustains uncompetitive markets in the region and prevents the entry of new players.

Furthermore, it is widely accepted that the ASEAN institution is ineffective and unable to force member states to comply with their regional commitments. This problem has contributed to what is termed the “ASEAN Way⁶” based particularly on non-intervention and consensus. These norms have been accepted since its formation. The ineffectiveness of the ASEAN Way manifested itself during the 1997 economic crisis when ASEAN was unable to handle the economic downturn due to the absence of any binding force. ASEAN’s failure to tackle the crisis is due to the fact that member states have prioritized their national interests and stability over ASEAN. Later, this resulted in its image of economic strength being destroyed. In fact, the ASEAN Way is a shelter for member states when any resolution or agreements work against their national interests. In the context of ASEAN economic integration, these loose instruments and non-rule based organizations affect ASEAN liberalization as evident in the ASEAN Free Trade Area (AFTA). “AFTA has only been a minor success” (Leviter 2010: 179). This is because member states have used the exception provisions for protectionist purposes. The Malaysian government protection of its automobile industry is a classic case of such state protection. Thus ASEAN is dubbed an ‘intergovernmental neighborhood watch group’ in which self interests still drives its members (Khoo How San 2000: 279).

Due to these deficiencies, ASEAN moved away from informality and personalized relations to more rule-based institutions when it adopted the Charter⁷ in 2007. However, while ASEAN has proclaimed to move toward deeper economic integration, the Charter still upholds existing norms, the ASEAN Way, and sustains its inter-governmental organization rather than create a supra-national organization like the EU. Hund (2002) underscores that the ASEAN Way is not effective in promoting ASEAN’s objective of deeper economic and political integration. Therefore, ASEAN norms directly affect the harmonization of competition laws and policy as member states have not surrendered a measure of sovereignty and national interest over regional commitments under the AEC. Thus, the convergence of regional interests on economic liberalization through the process of harmonization of competition laws and policy is unlikely to succeed as national interests have been prioritized over regional ones.

⁶ There are six principles of the ASEAN Way codified in the Treaty of Amity and Cooperation: 1) respect for state sovereignty; 2) freedom from external interference; 3) non- interference in internal affairs; 4) peaceful dispute settlement; 5) renunciation of the use of force; and 6) cooperation.

⁷ ASEAN moved closer to an EU-style community by turning into a legal entity.

competition laws under discussions either at the ministerial level (Cambodia and Laos) or legislatures (the Philippines)” (Lee 2003: 8-9). In the Philippines, competition-related provisions are those such as Article XII of the 1987 constitution and the Act to Prohibit Monopolies and Combinations in Restraint of Trade (Act No. 3247). Similarly, competition-related provisions have been implemented in Brunei in the telecommunications sector under the Authority for Info-communications Technology Industry of Brunei Darussalam Order 2011 and the Telecommunications Order 2001. Recently, due to the establishment of the AEC, Brunei and Myanmar have attempted to introduce competition legislation by 2015.

Harmonization and Implementation of ASEAN Competition Law: Issues and Challenges

ASEAN announced the liberalization of its regional economy and establishment of the single market by 2015. Various tasks have been implemented to achieve a competitive economic region including the introduction of a nationwide competition policy and law. According to the implementation of the Blueprint, competition law is given priority to ensure fair competition and create a level playing field. At the same time, AEGC was established as a regional forum to discuss and cooperate on competition law and policy. Though ASEAN agreed to adopt the ASEAN regional guidelines on competition policy in 2010, there has been slow progress on the harmonization and implementation of competition law and policy. The slow progress is a result of various factors. The paper argues that problems are the consequences of: 1) the ineffectiveness of AEGC and ASEAN institutions, and 2) domestic factors and differences in competition laws in ASEAN member states.

Ineffectiveness of AEGC and ASEAN institutions

On the regional level, to increase awareness in promoting and protecting competition in ASEAN economies, the AEGC and guidelines were established. On the one hand, the AEGC is a main discussion forum for ASEAN economic ministers. It is composed of representatives from the competition authorities and agencies. Generally, the AEGC oversees the implementation of competition policy-related tasks and activities as specified in the Blueprint (Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN 2012). On the other hand, the guideline serves as a non-binding framework guide for the ASEAN member states. It was set up to ensure regional consistency on developments in competition policy in ASEAN and enhance regional market competition. Nevertheless, ASEAN is still faced with challenges relating to the development of regional competition law and market integration.

Though the AEGC and guidelines can stimulate member states to consider competition awareness as evidence during the AEGC meetings, questions are raised as to the ability of the AEGC to foster and enhance competition policy in the ASEAN economic region. Wisuttisak and Binh (2012: 25) state that, “the only broad principles derived in the guidelines may not constitute a solid use and development of competition law and policy as to facilitate market liberalization and integration in ASEAN”. Unlike the European Union (EU), the AEGC is not empowered to enforce regional rules. Instead, it is merely a consultative forum. Significantly, domestic

has also restructured ASEAN member state economies like Vietnam to open up and integrate with world economy. Also, the proliferation of the bilateral and regional trade agreements is considered a significant factor that forced ASEAN states to move towards more open markets and employ competition law as evidenced by the US - Singapore FTA and Vietnam-US FTA. Thus, it cannot be denied that the implementation of competition law in ASEAN states has largely been a consequence of external factors rather than regional commitment to deeper economic integration.

At present, there are only five ASEAN countries that have economy-wide competition law and competition authorities in place: Singapore, Thailand, Vietnam, Indonesia and Malaysia. Generally, the objectives of competition law in the five states are similar in terms of creating a conducive business environment, and restrictive business practices and promoting an equitable competitive market. In terms of barriers to competition, almost all five countries prohibit both horizontal⁴ and vertical⁵ restraints that prevent regional integration.

However, there are significant differences in the laws of the five countries. “These include the objectives of the laws, content/provisions, legal standard (per se vs. rule-of reason) and the form as well as quantum sanctions” (Lee 2013: 9). Significantly, although competition laws and policies in these countries attempt to foster competition, some economic activities have not been included in their legislation. For example, state-owned enterprises and the central, provincial and local administration do not comply with the Thai Trade Competition Act. Similarly, state-owned enterprises in Indonesia are exempt from competition law. In Singapore, the Competition Act does not apply to the entire economy. Some industries such as telecommunications, media, post, transportation and energy are partly regulated (Sivalingam 2006). Such exemptions of specific activities are due to domestic reasons, particularly social, political and economic stability.

Table 1: Competition Laws in five ASEAN countries

Country	Competition Laws
Singapore	Competition Act
Thailand	Trade Competition Act 1999
Vietnam	Competition Law No. 27/2004/QH11
Indonesia	Law No. 4 of 1999 (concerning the prohibition of monopolistic practices and unfair business competition)
Malaysia	The Competition Act 2010 (came into force in 2012)

Source: Handbook on Competition Policy in Law in ASEAN for Business

Even though other member states have not employed the competition policy, they have relied on sector-level policies and regulations such as the Philippines, Cambodia, Myanmar and Brunei. However, “Cambodia, Laos and the Philippines have drafted

⁴ Horizontal agreements involve coordination of prices between two competing firms or among firms in an oligopolistic market. These include price fixing, output restrictions and market division. In Thailand, Singapore, Vietnam and Indonesia, horizontal agreements are considered illegal per se.

⁵ Vertical restraints or distribution strategies between manufacturers, suppliers or distributors are anti-competitive and have the effect of restricting entry to newcomers.

on Competition Policy and a Handbook on Competition Policy and Law in ASEAN for Business were launched in 2010. These two publications were intended to level the playing field and enhance the economic performance and competitiveness of the region.

However, evidence has revealed that various barriers hindering ASEAN economic integration process have not been phased out. Additionally, ASEAN does not have a single regulator and no comprehensive set of laws and regulations that a nation-state would have. Instead, it has to acknowledge that the legal infrastructure of the AEC is based very much on national level (Chang and Thorson 2010). Therefore, harmonization of laws and regulations between member states is not an easy task due to all the differing laws and legal systems (Kamarul and Tomasic 1999).

Therefore, this paper argues that the slow progress of ASEAN economic integration and the establishment of the AEC is because the inherent problems within ASEAN have not been resolved. Regional differences on political economic structures and legal systems still act as the main obstacle to the harmonization of laws and removal of economic barriers. Furthermore, ASEAN states are still reluctant to liberalize their industries, as they desire to protect their national interests and domestic markets. To effectively establish the integrated market, a process to harmonize laws and regulations is urgently required. Additionally, despite moving toward rule-based regionalism, the ASEAN charter persistently enshrines and upholds the "ASEAN Way".

The paper is divided into three sections. The first section gives an overview of competition laws in ASEAN. Issues and challenges to the harmonization of law and regulation are provided in the second section. The last section provides conclusions.

Competition Laws in ASEAN

To facilitate the movement of goods, services, investment, labor and capital, greater competition is required across ASEAN markets. Thus, competition laws and policies are vital to liberalize the ASEAN economy as laws are employed to prevent and restrict anti-competitive behavior. According to neo-liberalists, "strong competition law and policy, with effective enforcement capacity, promotes static economic efficiency, fair and efficient markets, lower production costs and consumer prices and consumer welfare and sovereignty" (Branson 2008: 5). At the same time, competition law is viewed as an effective tool in preventing administrative barriers and, in turn improves competitiveness in economies and technological innovation. Consequently, ASEAN members are attempting to establish nation-wide competition laws in preparation for the AEC in 2015.

Competition laws and policies have been employed in some ASEAN countries since 1997 arising from two significant events: the 1997 economic crisis and the proliferation of bilateral and free trade agreements (BTAs and FTAs). On the one hand, member states such as Malaysia, Thailand and Indonesia liberalized and privatized their economies to attract foreign direct investment during the 1997 economic crisis. When Thailand and Indonesia were severely hit by the crisis, they enacted national competition laws influenced by the International Monetary Fund (IMF) assistance program. The accession of the World Trade Organization (WTO)

Introduction

The Association of the Southeast Asian Nations (ASEAN) was established in 1976 by the five founding father states of Thailand, Malaysia, Indonesia, the Philippines and Singapore. Later, membership was extended to ten countries when Brunei Darussalam, Viet Nam, Lao PDR, Myanmar and Cambodia joined the Association. Although ASEAN aims to establish regional peace stability and development, the *raison d'être* of ASEAN was political (Tan 2004). In ASEAN, economic growth and development, society and culture in the region have been prioritized by the member states. Since the formation of the association, ASEAN has received credit for its achievements and regional prosperity. However, “the shock of the economic crisis in 1997 dealt the regional institution a hard blow, and since then ASEAN has suffered a row of harsh setbacks; inability to react in a co-ordinated fashion and to overcome the crisis by itself has damaged the image of the former growth region” (Freistein 2005: 177).

To regain its regional confidence, ASEAN leaders agreed to establish an ASEAN Economic Community (AEC)¹ by 2020² at its Ninth Summit in 2003. The AEC is considered the realization of the end goal of the ASEAN economic integration outlined in the ASEAN Vision 2020³ (*ASEAN Secretariat*. 2006). The AEC is characterized as a single market and production base that facilitates the free flow of goods, services, investment, and skilled labor and freer flow of capital. According to the Bali Concord II, there are four primary objectives of the AEC: 1) a single market and production base, 2) a highly competitive region, 3) a region of equitable economic development, and 4) a region fully integrated into the global economy. One of its main aims is to create and promote a fair business environment and competition for enhanced economic liberalization. Thus, the purpose of the AEC is to create a stable, prosperous and highly competitive ASEAN economic region. Later, the deadline was brought forward to 2015 at the 12th ASEAN Summit in Cebu.

To form a single market, Lloyd (2005) articulates that a single market requires the harmonization of tariffs across countries and the implementation of national treatment. Also, the market should be competitive and a level playing field needs to be established. Thus, to achieve a single market and production base and competitive region, competition policy, consumer protection and harmonization of laws are required to facilitate the flow of goods, services and investments. In other words, a level playing field and fair business competition are essential as a catalyst to achieving AEC.

To foster fair competition, the ASEAN Experts Group on Competition (AEGC) was established through the endorsement by the ASEAN Economic Ministers in 2007. To strengthen competition related policy capabilities, the ASEAN Regional Guidelines

¹ The ASEAN Economic Community (AEC) is one of the three pillars of ASEAN Community. The other two pillars are ASEAN Security Community and ASEAN Socio-cultural Community. These pillars are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region.

² The deadline to realize the AEC was brought forward to 2015 at the ASEAN summit held in Cebu in 2007.

³ ASEAN Vision 2020 was adopted at the second ASEAN Informal Summit in 1997 which set out a broad vision for ASEAN in the year 2020. The ASEAN Vision 2020 envisioned that “...a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services and investment, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities”.

*Unresolved Issues on ASEAN Harmonization of Laws and Regulations and Their
Implications for the ASEAN Economic Community*

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Abstract

At its Ninth Summit in Bali in 2003, ASEAN leaders agreed to establish an ASEAN Economic Community (AEC) by 2020. The AEC will transform ASEAN into a competitive and more dynamic region. However, by the end of 2012, ASEAN decided to put back the inauguration of the ASEAN Economic Community from January 1 to December 31, 2015 as evidence and studies reveal that the member states have only met 72% of the economic blueprint. Significantly, harmonization of laws and regulations among member states has not been achieved. The paper argues that the slow progress on harmonization of laws and regulations is because inherent problems within ASEAN have not been resolved. Regional differences on political economic structures and legal systems still act as prime barriers to the harmonization of laws. In fact, ASEAN states are still reluctant to liberalize their markets as they desire to protect their national interests and domestic players. Additionally, despite moving toward a rule-based regionalism, the ASEAN Charter persistently enshrines and upholds the "ASEAN Way". Consequently, ASEAN remains a toothless institution unable to force member states to comply with their commitments. Thus, it is still a bumpy road for ASEAN to achieve its aims.

