The Harmonization of ASEAN: Competition Laws and Policy from an Economic Integration Perspective

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1. Introduction

The Association of Southeast Asian Nations (ASEAN)[2] is an economic group comprised of the countries of Southeast Asia.[3] ASEAN and Asia Pacific

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[2] The Association of Southeast Asian Nations or ASEAN was established in Bangkok on 8 August 1967 by the five original member Countries: Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam joined on 8 January 1984, Vietnam on 28 July 1995, Laos and Myanmar on 23 July 1997 and Cambodia on 30 April 1999. The ASEAN region has a population of about 500 million, a total area of 4.5 million square kilometers, a combined gross domestic product of US$ 737 billion and a total trade volume of US$ 720 billion. Recently, ASEAN launched several new economic co-operation schemes: the ASEAN Free Trade Area (AFTA), the ASEAN Framework Agreement for Liberalisation on Trade in Services (AFAS), the ASEAN Investment Area (AIA) and the ASEAN Industrial Co-operation Scheme (AICO) for implementing open regionalism aimed at enhancing economic integration and creating an open regional economic group. See L Thanadsillapakul, (2000) 'Open Regionalism and Deeper Integration: the Implementation of AFTA, AIA, and AFAS' http://www.worldbank.org.eapsocial, and http://www.cepmlp.org/ journal/ Dundee University (the CEPMLP Internet Journal).

[3] The new approach to ASEAN economic integration based on 'Open Regionalism', which balances intra -and extra-regional liberalisation of trade and investment aimed at creating a natural, de facto integrated regional market was launched by ASEAN in its 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 need not necessarily be followed by other regions; in fact, the EU is a model implemented by the European countries to accommodate the different strands of historical, political, social and economic backgrounds in the region. ASEAN is fundamentally different from the EU as it has its own development. See J PINDER, 'Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC', in M Hodges, (ed.) (1972), European Integration, Middlesex, Penguin Books Inc. See also R Garnaut, Open Regionalism and Trade Liberalisation: An Asia Pacific Contribution to the World Trade System, Institute of Southeast Asian Studies (Singapore) and Allen and Unwin (Sydney) (1996). See also KA ELIASSEN, and CB MONSEN , '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, 31 October – 1 November 1997, and RP GARNAUT, .JK DRYSDALE, (eds.) (1994), Asia Pacific Regionalism: Reading in International Economic Relations, Australia: Harper Educational Publishers.

has been the most dynamic and fastest growing region in the world,[4] but the 1997 Asian crisis sent the 'Asian Tigers' into turmoil. The rise and fall of Asia clearly reflects both the interdependence of the East Asian countries and the world economy, on the one hand, and the impact of the changing global legal and economic environment on these countries, on the other hand. The ASEAN countries have gone through a volatile period and in response have embarked on a process of deeper integration to strengthen their regional economic self-reliance while committing themselves to an open market orientation. A new direction for ASEAN, dubbed 'Open Regionalism', will balance regional integration and global liberalization. The ASEAN countries need to develop their sustainable regional market to replace the current separate national ASEAN markets, and to do so need to regionalise ASEAN laws and regulations, especially those relating to trade and investment, in order to facilitate the free flow of goods, capital, services and labour. A more liberalised trade and investment regime in ASEAN will enhance their free economies and create a more favourable trade and investment climate in the region.

Consequently, the ASEAN countries need to develop the effective legal systems to encourage and oversee the increasingly competitive business activities in the region. The need to eliminate barriers to trade and investment in turn generates a need to provide, at regional level, effective protection against

[4] See World Bank (1993a), 'The East Asian Miracle: Economic Growth and Public Policy'. A World Bank Policy Research Report, New York: World Bank; also PA Petri,. (1993a), 'The Lessons of East Asia: Common Foundations of East Asian Success', *The World Bank* (Washington, D.C.), and UNCTAD (various years) World Investment Report New York and Geneva: United Nations Publication.

unfair competition,[5] to govern the economic activities and transactions of the transnational corporations (TNCs) located in the ASEAN region. As more liberal trade and investment regimes are established in the ASEAN countries, competition rules are called for to regulate competition among business players and to supervise their conduct.[6] Korah has stated that there would be very little point in removing the various internal barriers and national boundaries imposed by Governments if these governmental restraints were replaced by concentrations, other restrictive business practices, and concerted practices among private firms.[7] Since the rationale for a regional competition law is to strengthen economic integration in the ASEAN region, it is important that any agreements restricting competition as well as abuse of dominant market positions be controlled[8] by effective competition laws. Control of restrictive business practices in the process of liberalization is a key element in the new

[5] 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.

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

[7] K Valentine (6th ed) (1997a), An Introductory Guide to EC Competition Law and Practice,., Oxford: Hart Publishing , 1.

[8] To "control" here means to "check", "verify", and "vet" substantive rules of 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 abuse of dominant market power.

approach to positive integration.[9] This approach is different from neo-liberalism, which tends to assert that the free market needs no control, regulation or restriction, either by government or public bodies.

This article analyses the rationale, scope and basis for a comprehensive competition law in ASEAN to enhance the implementation of economic integration in the region. This includes a discussion of the complementarity between competition law and policy, liberalization of trade and investment intra and extra ASEAN and regional economic integration, as well as the interaction between industrial/investment policy and competition policy and law, especially the way in which competition law and policy reinforces the liberalised investment regime in the region. Also, an effort has been made to provide optional models of regional competition law and policy in ASEAN.

Following a brief introduction, Section II focuses on competition law and policy as a tool to reinforce the ASEAN investment regime and regulations. Since ASEAN is committed to developing its integrated regional market, it requires a regulatory regime that can facilitate the free movement of intra-ASEAN trade and investment. Competition law is compatible with 'open regionalism'[10] 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 may also provide a basis

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

[10] Thanadsillapakul, see *supra* note 1.

for evaluating the economic benefit to ASEAN of entry by a foreign investor on competitive grounds rather than by means of the discriminatory criteria used in screening procedures. In this way, ASEAN regional competition laws and policies would play a multifunctional role, i.e. they would encourage the free flow of trade and investment, monitor the conduct of firms, and evaluate the economic role or potential dominance of extra-ASEAN TNCs in the region. Unlike the assumptions of neo-liberalism,[11] 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.[12] Moreover, competition law generally takes a pro-consumer policy perspective that takes into account the public good and social welfare, thereby ensuring that the advantages of liberalization within ASEAN resulting from economic integration contribute directly to the general public wealth through consumers. The harmonization/unification of ASEAN competition law, rather than shaping separate, and probably diverse, competition laws in each ASEAN country, would ensure that competition was

[11] 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, supra note 8 (at 738).

[12] Picciotto (supra note 8) 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.

evaluated on a regional basis, thus maintaining the principle of open regionalism in ASEAN. However, the central issue to be considered is to what extent and at what level ASEAN substantive competition law and policy among its members can be harmonized.

Section III focuses on the rationale for a regional ASEAN competition law. Section IV provides the optional models of such law and policy and Section V looks at the interaction between it and open regionalism. Section VI sums up the argument.

2. Competition law and the ASEAN investment regime

2.1 Why does ASEAN require a competition law?

First, 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 liberalization within the ASEAN market. The interaction between government, consumers and producers has generated a concern that the rules-based system needs to be strengthened. How the competitive process actually works and to what extent governments should regulate relationships between producers and consumers is significant. In this sense, competition law is essential as an instrument to regulate fair competition since, as mentioned earlier, it is compatible with liberalization in that it is basically neutral and non-discriminatory.

Second, in an emerging ASEAN free market economy, monopolies and restrictive business practices are viewed as undesirable, being likely to distort prices and inhibit the efficient allocation of resources. Thus, there is a call for contestability to ensure that free entry and the pressure of new competitors

can function properly and balance the market powers and structures within the ASEAN market. Ultimately, the goal of market contestability and undistorted competition is to benefit consumers and enable a wide variety of product ranges at the lowest prices.[13] Competition law generally takes a pro-consumer policy perspective that fundamentally consolidates social wealth and the well-being of consumers.

In addition, competition law and policy enables small and medium-sized enterprises to enter the market; as such, it may form an alternative to an industrial strategy-based policy, which has been regarded as a non-neutral form of government intervention. Hence, competition law enhances consumer interests and helps small and medium-sized firms to compete on equal terms with other businesses in the regional economy, while complying with the principles of liberalization on a non-discriminatory basis. In addition, States continue to play an important role in preventing market failure so that the ASEAN countries may feel confident in their role of monitoring private sector conduct, preferring, as they do, to take part in overseeing economic transactions and not to leave private sector enterprises a free hand to interact with each other as in neo-liberal ideology. It would be advantageous for the ASEAN countries to launch an effective, comprehensive competition law in the region, in parallel with the implementation of trade and investment liberalization.

As regards foreign investment, the implementation of competition law in the ASEAN countries would yield further advantages apart from liberalising

[13] UNCTAD World Investment Report 1997 (1997): 'Transnational Corporations, Market Structure and Competition Policy', New York / Geneva: United Nations Publications.

the entry, establishment and operation of foreign investors. It would regulate and control mergers and acquisitions as well as abuse of dominant market positions in the ASEAN economy. This would probably be a better way of dealing with the fear of economic conquest by powerful foreign TNCs than the investment screening process which is the current trend in all ASEAN countries. The implementation of competition law and policy in the ASEAN region could be a key factor in phasing out the currently somewhat restrictive investment laws and regulations, even admitting that some investment restrictions tend to be applied in almost all, if not all, countries,[14] not only in ASEAN. The implementation of competition law in ASEAN countries in the same direction as those laws implemented elsewhere may pave the way for possible future general agreement on foreign direct investment regulation.[15]

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[14] MA Geist,, 'Towards a General Agreement on the Regulation of Foreign Direct Investment', Law and Policy in International Business 26, (1995) No. 3., 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 means of notification and/or prior approval procedure are widely used.

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

2.2 Interaction between competition laws and investment laws in the ASEAN countries

Currently, all ASEAN countries use a screening process and apply pre-entry requirements to all foreign investors. There are also some regulations to prevent foreign investors/firms from becoming a dominant force 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 local firms, since they are not permitted to own shares exceeding a specified limit.[16] Likewise, foreign firms cannot merge with or acquire other foreign firms if their equity in the new company exceeds the equity ratio set by the law. Obviously, under these circumstances, the ASEAN countries need a competition law to control mergers and acquisitions. While they have been relaxing some of the regulations relating to foreign investors' equity ratio, this has been on a case-by-case basis and under specific conditions only. At the same time, these regulations do not control local firms or prevent them from merging with or acquiring other local or foreign firms. Indeed, local companies have been known to establish an oligopoly position in specific sectors. In the Thai market, for instance, in the telecommunications sector, Shinnawat Co., Ltd. have a dominant position for mobile phones and related products; Telecom Asia, TOT and TT&T are dominant telephone network providers and Samart Telecom Co. Ltd. are the

[16] Generally, in all ASEAN countries except Singapore, foreign ownership or share equity may exceed 49% of the total share, except when the company is granted promoted status under a promotion scheme.

sole providers of satellite dishes. The oligopolistic market can hardly be regarded as a fair competition market, and could in fact easily distort prices and restrict consumers' choice.

The ASEAN countries also reserve some business sectors by barring them from foreign investment. It is now time for all these laws and regulations to be phased out. All industrial sectors will be opened up to ASEAN investors by 2010 and to all investors by 2020, with some exceptions.[17] In thus liberalising their investment regimes, the ASEAN countries may feel some concern at this sweeping move from a system of screening all foreign take-overs of national firms to screening none. They may fear that foreign firms will acquire dominant positions. Yet replacing these investment laws with competition laws may not only prove more effective than the screening process, it may also be a more efficient way of assessing the competitive impact of foreign firms both at the time of entry and thereafter.

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

Competition laws may replace the current restrictive investment laws and regulations, incorporating principles based on non-discrimination in the

[17] See Thanadsillapakul, supra note 1.

control of restrictive business practices among firms regardless of their origin or nationality. Competition laws normally apply to all firms operating in given national or regional territories, whether in the field of domestic sales, imports, affiliates or non-equity types of foreign direct investment. They do not, in principle, discriminate between national and foreign firms, or between firms of different national origins. In this way, competition law monitors the competitive behaviour of TNCs in the ASEAN host countries. It ensures that firms do not abuse dominant market positions and to prevent inefficiencies stemming from market allocation agreements which might curb trade and investment. Therefore, competition law strengthens the principle of national treatment and enhances investment liberalization in compliance with the objectives of the ASEAN investment area and economic integration in ASEAN.

3. Rationale for a regional ASEAN competition law

The removal of internal barriers among the ASEAN countries to promote regional economic integration should not be allowed to result in companies creating territorial protection through cartels or abuse of a dominant position. While investment liberalization within ASEAN can encourage the free entry of firms and enhance the contestability of the ASEAN market, this is not enough. Competition laws are needed to ensure that the former statutory obstacles to contestability are not replaced by anti-competitive business practices, thereby wiping out the benefits that might arise from liberalization. The reduction of barriers to foreign direct investment (FDI) in ASEAN and the establishment of positive standards of treatment for TNCs must go hand in hand with the adoption of measures aimed at ensuring the proper functioning of

the market and at controlling anti-competitive business practices. The 1997 World Investment Report suggested that:

> "The culture of FDI liberalization 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 has great relevance for ASEAN regulatory practice. Anti-competitive businesses practices are common among international firms and are likely to spread to the ASEAN countries include the following: [18]

(a) Horizontal restraints or hard-core cartels among firms in an oligopolistic market, engaging, for example, in price fixing, output restrictions, market division, customer allocation, collusive tendering and other anti-competitive co-operation between firms selling competing products. All these business practices distort prices and the allocation of resources and result in a

[18] Compiled from various sources: UNCTAD (1997) 'World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy'. United Nations Publication: New York and Geneva:.; EU Petersman, "International Competition Rules for the GATT-MTO World Trade and Legal System", Journal of World Trade, Vol. 27, No. 6 (December 1993), 35-86; idem, "International Competition Rules for Government and Private Business", Journal of World Trade, Vol. 30, No. 3 (June 1996a); TJ Schoenbaum,, '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 1996), 161-190.

dysfunctional market to the disadvantage of consumers.[19] Fair competition would exist if no single supplier or consumer was able to influence market prices. 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's activity on the market.

(b) Vertical restraints or distribution strategies between manufacturers, suppliers or distributors, such as: tying the sale of one product to the purchase of another; exclusive dealing (the seller requires the buyer to purchase products only from the same 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 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 restraints need to be evaluated and, where necessary, controlled.

(c) Abuse of intellectual property rights (IPR), for example where technology-licensing arrangements abuse the monopoly position of IPR holders, *e.g.* through non-competition clauses and the so-called 'grant back'. This means the licensee is required to assign inventions made in the course of working with the transferred technology back to the licensor. Another aspect of IPR abuse, that of 'non-contestation clauses', is that the licensee is prevented

[19] 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.

from contesting the validity of the IPR or other right of the licensor. IPR abuses may be subject to general competition rules on horizontal and vertical restraints.

(d) Abuse of market dominance: dominant firms accounting for a significant market share may attempt to monopolise a market, for instance through price discrimination, predatory low pricing, 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, on predatory pricing only if the losses can be recouped.

(e) Mergers and acquisition policies, where horizontal, vertical or conglomerate mergers are apt to reduce competition or decrease efficiency. Merger policies may be designed to ensure market contestability by preventing a 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.

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

In the new era, the ASEAN countries will need to regulate these anti-competitive business practices so as to achieve fair competitive conditions. However, they will have to beware of balance-of-market failure and government

failure. If governments intervene to correct market failure or supply public goods, the risk of market failure has to be weighed against that of alternative government failure, since government intervention may lead to additional distortions. Therefore, fair competitive conditions rely on the rational behaviour of market participants or firms, perfect information, perfect market mobility, and the need to reflect all costs in the prices of goods and services.[20] All these conditions require a comprehensive set of competition laws and regulations in the ASEAN countries. Currently, 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. There are no systematic competition laws in the ASEAN countries except in Indonesia and Thailand. Singapore for its part has refrained from adopting competition laws on the ground that its liberal trade policies and its rather liberal investment regime are a significant guarantee of the contestability of its open economy. Now, however, all ASEAN countries are called upon to introduce such comprehensive competition laws and policies and to enforce them effectively. In fact, the general infrastructure and other comparative economic advantages of the ASEAN countries appear good; the only important drawback being that these countries lack good governance and a rule-based system. Therefore, a combination of sound ASEAN legal and

[20] Petersmann, supra note 17.

economic systems may be viewed as favourably created factor endowments[21] capable of producing a positive effect on ASEAN's competitiveness in international trade and investment.

4. The bases of an ASEAN regional competition law and optional models of a regional competition regime

In the modern, globally integrated world economy, both private enterprise and governments engage in competition.[22] In the ASEAN countries in particular, governments have widely implemented strategic policies in the trade and investment sphere. In this respect, government plays an important role, as Petersman[23] has 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

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

[22] M Porter (ed),, The competitive Advantage of Nations (1990), New York: MacMillan Free Press.

[23] EU Petersmann, 'International Competition Rules for the GATT-MTO World Trade and Legal System', Journal of World Trade, (1993) Vol. 27, No. 6 (December), 35.

scarce foreign capital through tax incentives and favourable investment conditions."

Markets, then, are imperfect in many ways. In effect, two kinds of competition law are required: the first to deal with private restraints of competition and market failures (abuses of market power, externalities and asymmetries in information), the second aimed at government competition to limit government failures, which may affect the supply of public goods and created endowments/comparative advantages.

On the one hand, fair competition should aim to protect less-organised firms, such as small and medium-sized enterprises, upon entry into the market while protecting the public interest and consumers in a liberal economy. On the other hand, competition rules may need to be assessed so as to determine how far or to what extent they should regulate the behaviour of firms. For instance, in an example given by Korah,[24] in some business areas, merged lines of business or operators may result in more adequate and effective operation, greater product variety and more readily available services – including advanced research and technological development – than those which individual, separate smaller firms or operators are able to provide. For instance, if a single plant or a merged enterprise can process all the spent nuclear fuel in a region at substantially lower cost than could smaller plants separately, it would be unprofitable for a second firm to establish such a smaller plant. Therefore, there is a concern that competition rules may be applied to

[24] V Korah, Monopolies and Restrictive Practices (1968), Middlesex, UK: Penguin Books Ltd, 64.

protect smaller firms at the expense of larger enterprises irrespective of efficiency. Whether collaboration or competition in a particular market leads to better use of resources is always a difficult question to answer. 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 in response to the need for economies of scale. For instance, if a firm has merely expanded its plant in good time to meet an expected increase in demand such that it is unprofitable for other firms to enter the industry, there is no objection to its exercising a monopoly.[25] Many markets can be supplied only after considerable capital investment has been made or appropriate technology developed.

Korah has further explained that, if capital requirements are a hindrance to the entry of small and medium firms into the market and if 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, in this case, while there are no barriers to the entry of an equally efficient firm where a huge investment is required, small and medium firms are obviously unable to compete with these larger firms. Should this be regarded as unfair competition? The evaluation of whether there is unfair competition requires consideration of the public good: an enhanced distribution system, provision of goods and services, reduced cost of operation, a technological

[25] Ibidem: 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, where one or two plants of the minimum efficient size can supply the expected demand and there is room for only one or two suppliers."

lead or reduced capital requirements in the fields of business under consideration. It should be noted that a small firm protected for such reasons alone cannot hold its customers or suppliers to ransom except in the short term.[26] Therefore, to control the conduct of firms by such fragile protection of small firms may discourage larger firms from making investments to enable them to compete aggressively. This implies that the regulation of restrictive business practices is intended to both ensure fair competition and maximize the public good and sound resource management. The ASEAN countries should give careful thought to this particular issue when they establish and enforce their competition law. They need to have a clear perspective in mind that balances the imperatives of collaboration, competition, the public good and efficient resource allocation.

A dichotomy between market function and the role of government 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 function solely based on the rule of supply and demand. On the other hand, fair competition implies that there should be no dominant enterprise, no restrictive business practices, no predatory pricing, no mergers and acquisitions that impede competition. All such conduct may need control through competition laws. However, if there is absolute freedom from constraints or, in other words, if there is no regulation at all to ensure fair competition, dominant firms could easily conquer the market, preventing any-one else from competing. Hence, the proposed criteria for regulating the behaviour of firms may need to

[26] V Korah, (ed) (1997), An Introductory Guide to EC Competition Law and Practice,, Oxford, UK: Hart Publishing

consider type, size, competitive position, range or category of business so that the same level of undertaking may be treated fairly subject to the same conditions, rules and laws, as well as the economic environment itself.

4.1 Development of an international competition regime

There have previously been various attempts to develop international competition laws for the private sector, such as part of the 1948 Havana Charter for an International Trade Organisation, the UN Codes of Conduct and the OECD Decisions and Guidelines,[27] the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,[28] and the Resolution adopted by the Conference to strengthen implementation of the Set.[29] However, these were "soft-law rules" rather than international/multilateral treaty law, aimed

[27] EU Petersmann, 'Codes of Conduct', in Bernhardt, R. (ed.), Encyclopaedia of Public International Law (1992), Vol. I, 627.

[28] 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. This was adopted by the United Nations General Assembly at its thirty-fifth session on 5 December 1980 (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 26 November – 7 December 1990. That Conference adopted a resolution on 'Strengthening the implementation of the Set' at its sixth meeting on 7 December 1990. A third review Conference took place on 13-21 November 1995 and 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 the United Nations Conference on Restrictive Business Practices as an annex to its resolution of 22 April 1980.

[29] 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, 48-51.

generally at avoiding mutually harmful competition policy conflicts[30] and overcoming the policy divergences and jurisdictional gaps between national competition laws.[31] Regulatory differences in competition laws and the decentralised administration of competition policies are mainly due to specific national conditions. For instance, the final decision as to whether the costs of restraint of competition may be outweighed by economies of scale and positive externalities will require case-by-case analysis with due regard to the particular conditions prevailing in a given national market. Conflicts between national regulations can also result in barriers to market access, market distortions and harmful international externalities.

[30] Since the more than two hundred international sovereign States have different resources, preferences, comparative advantages and political and regulatory systems, 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'.

[31] Petersmann, supra note 17 (at 37.)

4.2 The new search for an international competition regime[32]

Recently, the issue of competition law and policy in the global trading system has been looked into by various international organisations, including GATT/WTO, OECD and the World Bank. The approach to a common international competition law and the various routes to achieve it have been studied in order to shape and elaborate a comprehensive multilateral regime. The WTO has sought a consensus on the issue of internationalisation of antitrust law focusing either on the extent to which antitrust rules should be harmonised or on the content of such rules.[33] The World Bank and OECD have jointly developed a framework for the design and implementation of a competition law and policy that could be used as a model by developing countries and transitional economies. Optional models for creating a common international law of competition have been proposed by various experts. Nonetheless, no

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[32] See EM Graham and DJ Richardson (eds), Global Competition Policy, Washington, D.C, US: Institute for International Economics (1997). ; Also see R Zach (ed.) (1999), Towards WTO Competition Rules: Key Issues and Comments on the WTO Report *(1998) on Trade and Competition*; C Yang-Ching, S Gee, L Changfa and H Jiming (eds.), International and Comparative Competition Laws and Policies, Kluwer Law International, The Hague/London/New York (2002) and J Drexl (ed.) (2003), The Future of Transnational Antitrust – From Comparative to Common Competition Law, Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich Series, Kluwer Law International, The Hague/London/New York.

[33] R ZACH (eds) (1999), Towards WTO Competition Rules: Key Issues and Comments on the WTO Report (1998) on Trade and Competition, The Hague, the Netherlands, London, UK and Boston, US: Kluwer Law International.

consensus exists among countries on any single model. A variety of ideologies, methodologies and competition regimes, especially the issue of effective enforcement of competition law to cross-border transactions, have stood in the way of such consensus.[34]

On the one hand, the proposed optional models[35] for an international competition/antitrust law are, essentially: (1) The WTO model, which is one of international agreement. It would include an international enforcement system and there would be an international agency or commission responsible for ensuring respect of the international antitrust rules or competition law. (2) The sovereignty model, which applies purely national law to all antitrust disputes within the jurisdiction of the nation State involved but which would apply the extraterritorial principle where the disputes related to cross-border transactions. (3) The network model, which relies on the adoption of mutual assistance and

[34] At the OECD Conference on Trade and Competition held at Paris on 29-30 June 1999, the US and the EU, the two leaders in the competition regime stakes, defended diametrically opposing views. The EU suggested that negotiations on multilateral or international competition law should begin immediately, while the US insisted that "it was far too early to move in that direction". However, according to Frédéric Jernny, "the divergence of opinions was really a question of methodology: one believes in negotiating before agreeing on the solutions to be found, and the other believes in exploring alternatives solutions before agreeing to negotiate". See J WILSON (2003) Globalization and the Limits of National Merger Control Laws, Kluwer Law International, The Hague/London/New York, 241.

[35] H FIRST, 'Towards an International Common Law of Competition' in Zach, R. supra note 32.

co-operation agreements or formal protocols, enforcement networks, information-sharing and networking of substantive competition law.

On the other hand, the proposed routes to an international competition law are:[36] (1) Uniform law, the most complete but least frequently achieved approach. (2) Harmonized law, which is less than uniform and narrows the distinctions between national laws while leaving detail variations to national legislators. (3) Convention law, which has less harmonising effect (Convention law permits national laws to be implemented in solving cross-border cases while avoiding heavy inroads by claims to national sovereignty). (4) The conflicts-of-law approach or "choice-of-law approach".

All these approaches and models have their strong and weak points that suit the particular legal and economic structure of each economy or group of countries. For instance, uniform law or harmonised law may be more effectively implemented and well-suited to more closely integrated regional economies. Convention law may be more flexible for countries engaged in bilateral or multilateral economic co-operation. The WTO model, which would be more comprehensive to implement, may be efficient in a global trading system. Co-operation between WTO and WIPO, which has long experience in setting international competition rules, is regarded as helpful in drafting an international competition code. International attempts at drafting international competition law has influenced the ASEAN move towards a regional competition regime,

[36] W Fikentscher, 'Antitrust, Market Conceptualization and the World Trade Organization - The Convention Approach', in Zach, supra note 32.

especially in the APEC as a whole. APEC strongly encourages the development and enhancement of regional competition law and policy.[37]

4.3 ASEAN regional competition law: harmonisation and the networking approach

There is no single agreed set of international competition law that suits all and no consensus has been reached so far on any of the proposed models or approaches towards a multilateral competition regime. Therefore, ASEAN countries need to develop their own consensus on what will suit them for a regional competition regime. Now, in fact, would be the time for ASEAN to implement a regional competition law and policy, since all ASEAN countries are now embarked on their own national competition law. It would be easier to agree on the design of a regional competition regime by harmonising the substantive national competition rules to achieve the effective enforcement of competition law at the regional level.

Adapted from the optional models for, and approaches to international competition or multilateral competition law, there are two main avenues to regional harmonisation of competition law. The first rests on trade policy measures, which have indeed been implemented in ASEAN through its trade and investment liberalization. Under this approach, governments can rely on trade liberalization and favour foreign direct investment to promote competition.

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[37] WASHINGTON UNIVERSITY, 'Symposium on APEC Competition Policy and Economic Development', in Washington University Global Studies Law Review, Vol. 1, No. 1 and 2 (Winter/Summer 2002). See also C Yang-Ching and S Gee, L Changfa / H Jiming (eds) (2002), International and Comparative Competition Laws and Policies, The Fair Trade Commission of the Republic of China, , The Hague/London/New York: Kluwer Law International.

In this case, existing trade rules can be used or else some competition principles may be incorporated into trade policy measures. This approach is consistent with the WTO system.[38] The alternative approach is based on competition rules, which opens up three options.[39] First, under the co-ordinated or sovereignty model, governments can rely on the co-ordinated application of national competition laws based on positive agreements. Second, using the harmonised law model, countries can harmonise their national competition laws in accordance with international guidelines. Finally, the highest degree of collaboration would be an agreement on international competition laws, implicating a notion of supranationality. Of these three options the harmonised law model (the second), is the most suitable to an ASEAN regional competition law. Why is this?

ASEAN must bear in mind the diversity of its economic structures, economic history, legal systems, societal goals and culture as well as the differences in national socio-economic infrastructure. As Jernny puts it,

> "any solution to the general problem of promoting the complementarity of trade liberalization, regulatory reform (regional economic integration)

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[38] See M Bacchetta,, H HORN, and PC MAVROIDIS., "Does Negative Spill-Over from Nationally Pursued Competition Policies Provide a Case for Multilateral Competition Rules?", June 4, mimeo 1997); BM HOEKMAN and PC MAVROIDIS., "Competition, Competition Policy and the GATT", World Economy, 17 (1994), 121-150; PA MESSERLIN., Development in European Competition Policy, European Institute of Public Administration, Maastricht (1996); EU Petersmann, "The Need for Integrating Trade and Competition Rules in the WTO World Trade and Legal System", PSIO Occasional Paper, WTO Series No. 3, The Graduate Institute for International Studies, Geneva (1996).

[39] See A Mattoo and A Subramanian (1997), 'Multilateral Rules on Competition Policy: a possible way forward', *Journal of World Trade, 31* (5), 95-115.

> and competition policy must be flexible enough to allow such national differences to continue to exist"[40] and "the existing international commitments at the multilateral level in the trade area are not designed to prevent countries from pursuing the domestic policies they see fit to pursue. Multilateral agreements allow differences in national legislation as long as these differences are not contradictory with the underlying principles of the WTO."[41]

Even within the European Union, national competition law is still in effect. With this in mind, this author agrees with Jernny's statement, especially where it applies to ASEAN. Currently, a single, unified or unique regional competition law is too ambitious a goal for ASEAN for several reasons. First, because ASEAN is not a supranational organisation, and thus there is no regional institution or court to implement or enforce supranational law. Under those circumstances, it would be difficult to create a supranational competition law at this stage unless ASEAN were to develop the regional legal and institutional framework for the purpose. Second, even though ASEAN has embarked upon de facto regional economic integration, there is not yet the political will to develop such a supranational organisation. Third, the ASEAN countries enjoy widely diversified levels of economic development: Singapore is regarded as a more developed economy, Indonesia, Malaysia, and Thailand

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[40] See Jernny, 'Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation' in Yang-Ching Chao *et al*, supra note 67 (at 68).

[41] Ibidem.

are placed somewhere in the middle, Cambodia and Laos are less developed economies and Vietnam and Myanmar are transitional economies. Fourth, the ASEAN countries' economic structures are different. For example, Brunei is a small, rich oil country; Thailand, Indonesia and the Philippines are mixed agricultural/industrial/commercial economies, while Malaysia is an industrial/commercial economy endowed with oil resources; Singapore is a commercial economy. This variety of economic structures within ASEAN affects the competition regime in each Member State. Economic theory and policy in each ASEAN country are geared towards its own brand of economic development, and so perforce are their national competition law and policy. Consequently, in harmonising its national competition laws, ASEAN may need to tolerate the persistence of some national differences until the individual economies are more evenly developed.

A combination of these factors, the structure of ASEAN 'Open Regionalism' – and more especially the 'ASEAN Way' – and concerted action in terms of economic co-operation have forced ASEAN to consider the synchronized model[42] of harmonized law and enforcement networks. For substantive competition law enforceable at the regional level, ASEAN can refer to the general basic rules of conduct in the various codes and guidelines that have common features, while leaving the national authorities to deal with particular features of their specific competition laws. At the regional level, ASEAN may need the Regional Competition Committee to oversee and enforce competition law in cross-border cases, as well as to co-ordinate with the

[42] See Thanadsillapakul, supra note. 1.

national authorities. This may be regarded as an initial step towards further development of common regional institutions designed to lead ASEAN to a higher degree of integration.[43] As Bilal and Olarreaga have argued:

> "Indeed, successful RTAs inevitably entail the existence of common rules, the creation of common institutions, the delegation of authority to supranational instances, and more generally the development of a co-

[43] Winters identified five forms of economic integration, ranked in increasing order of integration:

1. Preferential Trade Areas (PTAs), where member countries agree to levy reduced, or preferential, tariffs on partner countries;

2. Free Trade Area (FTAs), where trade barriers between partner countries are abolished, but each member country determines its own external barriers;

3. Custom Union (CUs), where intra-union free trade prevails and a common external trade policy is adopted by member countries;

4. Common Markets, which are CUs with further provisions to facilitate the free movement of goods, services and factors of production, and the harmonisation of trading and technical standards;

5. Political Unions, which are the ultimate form of economic integration.

While PTAs and FTAs do not require inter-governmental institutions, since each member country remains in complete charge of its own policy, CUs and higher forms of economic integration do involve a delegation of sovereignty, and thus an element of supranationality, as at least external trade policy is the result of a common decision by member countries.

operative framework among member countries. Of course, a crucial aspect here is the degree of regional integration."[44]

4.4 Some concerns in designing substantive competition law

(a) Determination of "market power"

In principle, competition policy does not seek to prohibit market power per se, but rather abuse of a dominant position. The basic idea is that competition law should not penalise efficient firms that have established a dominant position in the market by performing better than their competitors. The objective is rather to ensure potential access to the relevant market and to guarantee "fair" competition.[45] The contentious issues are how to determine what behaviour constitutes "abuse" of market power and how to promote competition without penalising successful enterprises that are possibly in a dominant position. Generally, competition law specifies that if an enterprise gains a market share exceeding the specified ratio, it must be carefully monitored for possible abuse of its dominant market position. However, market share is not a correct indicator of market power for at least three reasons as argued by Wood. First, the definition of relevant market is not clear when there

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[44] See S Bilal, and M Olarreaga, Regionalism, Competition Policy and Abuse of Dominant Position, Working Paper, European Institute of Public Administration, the Netherlands (1998).

[45] See DP WOOD, 'Competition and the Single Firm: Monopolization and Abuse of Dominant Positions', Paper presented at the Symposium on Competition Policy in a Global Economy, Pacific Economic Co-operation Council, Taipei, Taiwan (1995) and see citation in BILAL *et al*, *supra* note 43.

is high substitutability in consumption. This is illustrated in United States v. E. I Du Pont de Nemours & Co (Cellophane).[46] If the relevant product market was 'all flexible packaging material', then Du Pont's share was only 20%. But if, instead, it was only 'cellophane', Du Pont had cornered 75% of the market. Second, small market shares may be consistent with market power. Indeed, this would be the case when several small firms collude to control a market. For example, ten firms, each with 10% of the market, may collude to charge monopolistic prices. Obviously, there is a limit to this, given the free-rider problem when the number of firms increases in a collusive agreement, as in any other co-operative agreement.[47] Third, large market shares may be consistent with low market power. Indeed, potential entry may significantly reduce incumbent firms' market share, as underlined by the 'contestability theory'. For firms with a large market share, the presence and nature of barriers to entry is a much more useful guide to policy than the market shares themselves.[48]

A thorough analysis of entry barriers is clearly crucial to the proper implementation of competition law, in particular when it comes to assessing levels of dominance, since a firm may not exercise significant market power

[46] Ibidem.

[47] See M Olson (eds) (1965) , The Logic of Collective Action: Public Goods and the Theory of Groups, Cambridge, US: Harvard University Press,

[48] See KU KUHN, P SEABRIGHT and ASMITH, 'Competition Policy Research: Where Do We Stand?', CEPR Occasion Paper No. 8, Centre for Economic Policy Research, London (1992).

over time in the absence of barriers to new entries in the relevant market. Barriers to entry can be of three types: artificial (introduced by government regulation or trade associations), natural (linked to the production technology, scale and scope economies) and strategic (created by firms to deter entrants, for example through over-investment or loyalty bonuses). Common practice in US and EU competition law suggests that while most effort has been put into determining the relevant market and assessing market power – usually in terms of market share –, little (or at least not enough) attention has been paid to entry barriers.[49] In applying Article 82 (ex 86) of the EC treaty on the abuse of dominant position, 'the primary indicator' of dominance is market shares, while the level of entry (and exit) barriers is only a 'secondary indicator'. Another proxy for market power sometimes used is the level of profits. The idea is that firms with high profit levels abuse their dominant position.

Any legislation implicitly or explicitly forbidding high profit levels may have unexpected effects. If the competition authority regulates the abuse of a dominant position by imposing profit ceilings, firms will have a serious incentive to artificially inflate costs. This, in turn, provokes misallocation of resources. Competition authorities, when regulating, should bear in mind that firms react strategically to competition rules. More importantly, as already mentioned, high

[49] See D Harbord and T Hoehn (1994), 'Barriers to Entry and Exit in European Competition Policy', International Review of Law and Economics, 14 (4), 411-435.

profits may simply reflect the greater efficiency of the firm with a competitive edge.[50]

To summarise, competition policy, as any other government policy, should include efficiency considerations. If, in dealing with abuse of a dominant position, competition policy tends to focus on firms' market share rather than on strategic barriers against entry into the market, then efficient firms may be penalised. This will give the wrong signals to firms, which will concentrate on controlling its market share, rather than on becoming more efficient. This is particularly important in developing countries where market failures are due to market distortions. Clearly, if a firm has a dominant position owing to credit constraints in the domestic market, the best policy must surely be, not to prevent 'abuse' of a dominant position by the incumbent firm, but rather to correct the credit shortage and so in turn allow for entry of new firms.

(b) Monitoring horizontal agreements, vertical restraints and unfair competitive practices

Bollard and Vautier have suggested seven frameworks to assess the competitive environment under competition law and policy in developing economies: (1) merger regimes, (2) abuse of dominant power, (3) horizontal

[50] See H Demsetz (1974), 'Two Systems of Belief about Monopoly', in Harvey Goldschmid et al (eds.), Industrial Concentration: The New Learning, Little Brown.

agreements, (4) vertical restraints, (5) jurisdiction exemption, (6) unfair trade practices and (7) role, enforcement and powers.[51]

In many developing countries, mergers and abuse of dominant power are monitored while horizontal agreements, vertical restraints and unfair competitive practices are not. In addition to this shortcoming of their competition laws, the existing rules appear to be poorly enforced in these countries. Among the ASEAN member States, only Indonesia and Thailand regulate competition. The other members, while legislating on competition law, regulate non-competitive behaviour by alternative means. Singapore promotes competition by inducing foreign competition under liberalised trade and FDI regimes. The ASEAN countries differ considerably as to the type of rules they impose and the basic design and type of enforcement arrangements. Last but not least, competition law in Indonesia and Thailand and the draft competition law in other ASEAN members are predominantly structure-based, not outcome-based, and enforcement is administration-based, not judicially-based.[52] This entails difficulties in effectively enforcing competition law and monitoring horizontal agreements, vertical restraints and unfair competitive practices.

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[51] See A Bollard and KM Vautier (1998), 'The Convergence of Competition Law within APEC and the CER Agreement', in Rong-I Wu and Yub-Peng Chu (eds.), The Asia-Pacific: Competition Policy, Convergence and Pluralism, 126-34.

[52] Ibidem.

(c) The interaction of competition law and other government measures, laws and regulations

A competition regime encompasses any government measure that affects private sector activity. State-owned enterprises constitute a typical form of regulated activity, though they are by no means the only one. Regulations generally fall into one of two categories: First, economic, including agricultural price restrictions and restrictions on entry into certain sectors – such as telecommunications. Secondly, social, including environmental and sanitary requirements for certain products. Generally, economic regulations induce cost efficiency, while social regulations are considered beneficial from a public welfare point of view. However, social regulations can be created for and used to provide industrial protection. The ASEAN governments therefore need to balance economic and social regulations and carefully analyse the impact of all their laws and regulations on the competitive economy. It is very important to re-assess all relevant government legislations and regulations to ascertain to what extent they distort or enhance competition by minimizing the risk of anti-competitive conduct through appropriate disciplines on business conduct. Competition policy that comes along with the national competition law also emphasises the importance of international co-operation between both competition agencies and authorities to deal with ever-increasing cross-border issues and capacity building in the ASEAN members. National Competition policy should serve an important role in formulating and implementing competition and fair competition environment in the ASEAN member countries' economy.

5. The interaction between regional competition law and policy and open regionalism[53]

The functions of a feasible ASEAN regional competition law and policy (discussed in the Introduction to this article) should include the promotion of:

(1) liberalization of trade and investment in ASEAN;

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

(3) 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. They will ensure that ASEAN keeps its regional market open for both intra- and extra- regional trade and investment (the first two functions). The third function is fundamental to open regionalism, which ensures a proper competitive balance between intra- and extra-ASEAN firms.

Competition law and policy should help to promote the growth of small and medium-sized enterprises, which form the majority in local ASEAN economies, and allow them to compete with their stronger rivals.[54] The liberalization of trade and investment based on fair competition will enable local small and medium firms to develop their economic strengths, upgrade their technological production processes and improve managerial systems and

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[53] See Garnaut , Eliassen ,Monsen and Garnaut, Drysdale, Kunkel, supra note 2

[54] See R Whish and B Sulfrin (3rd eds) (1993), Competition Law, London/Edinburgh: Butterworths,

commercial skills, in order to compete with foreign firms. Competition law will ensure that both local and foreign firms are prevented from engaging in restrictive business practices, abusing a dominant position or forming a cartel or engaging in any other type of unfair practice that might damage other firms. Under such fair competition circumstances, every firm, be it small or large, will be able to compete in its respective market, size and field of business. Furthermore, competition law would permit the ASEAN countries to assess the economic benefit deriving from the influx of foreign firms on the basis of whether or not they are likely to damage local small and medium firms, and thus enable them to use competition policy to protect these local firms. This may be achieved through, for example, merger control regulations preventing TNCs from merging with or acquiring 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 could contribute to the regional economy, ensuring that it could compete with other (local or foreign) firms on the same fair basic grounds and conditions.

Since there are many small and medium firms in the ASEAN countries, and since these firms fear that an ASEAN regional market open to powerful TNCs might significantly affect smaller local businesses, efforts to protect the competitive position of these local companies and to ensure fair competition will help to increase these firms' confidence in doing business in the single ASEAN

open market.[55] A regional competition law and policy could be instrumental in ensuring this.

Competition law could also allow each single country to protect its indigenous enterprises or national/cultural industries to preserve country-specific values or safeguard the country's international renown for a given speciality.[56] In the Czech beer case, an American firm, Anheuser-Busch, brewer of the American Budweiser lager beer, made a fruitless bid for a stake in Czech Budvar, famous for its Budweiser Budvar lager beer. Both companies produce beer with the same "Budweiser" brand name, but neither has an exclusive right to use the name internationally. They settled the matter of the name by allocating its use in different markets.[57] However, a dispute arose

[55] In fact, the ASEAN countries are aware of this sensitive issue and have already canvassed the small and medium firms in the region, preparing them for 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, the Small and Medium Industry Development Office in Malaysia and the Bureau of Small and Medium Business Development in the Philippines.

[56] See PT Muchlinski, 'A Case of Czech Beer: Competition and Competitiveness in the Transitional Economies', The Modern Law Review, Vol. 59, 5, 658-675.

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

when they both entered the European market, since the agreement did not clearly define the territory assigned to each party in using the brand name. Anheuser-Busch wished to merge the two companies so that they could produce and sell the product world-wide without any constraint. However, Czech Budvar is traditionally regarded as the producer of the true Czech Budweiser lager beer and consumers both in the Czech Republic and elsewhere favour the typical, unique flavour of the original beer it produces. Consumer campaigns were mounted to preserve Czech Budvar as a national, indigenous industry and to block its acquisition by the American firm.

In relation to this case, Muchlinski has argued, that since the Czech Republic, alone among the transitional economies, has abolished specialized foreign investment laws and has actively liberalized investment, only privatisation and competition law could act as vehicles for the close screening of foreign investment. EU law as a source of principles for the regulation of foreign investment would also be justified, since the Czech Republic and the EU have an agreement[58] to bring the Czechs' commercial and economic laws into line with EU law as a prelude to possible future EU membership. As a result, EU competition law, which concerns anti-competitive and concerted practices, abuse of a dominant position and preferential State aids that distort competition, must be taken into account as regards any business practices in the Czech Republic. Competition law could provide an alternative screening

[58] The Czech Republic has become 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.

procedure to examine any threat of damage to national industry by means of merger or acquisition by foreign investors. From this point of view, the protection of indigenous industries could be based on concerns for consumer interests and the availability of product choice, which are in keeping with cultural diversity.

The ASEAN countries follow an 'open door' policy in their investment liberalization efforts so as to allow regional competition law, which is consistent with liberalization, to play an important role in protecting domestic firms from harm (such as in the Czech beer case). In this way, ASEAN can reconcile a positive approach to foreign investment, exemplified by a lack of regulatory control, with controls over any undesirable effects both in the market and in social terms of FDI, by means of laws that apply to foreign and domestic firms alike, notably competition law, merger and acquisition control regulation, and anti-monopoly control.[59]

In other words, ASEAN indigenous industries could be protected under the ASEAN regional competition law and policy and by regional merger control regulation. Moreover, consumer and local interest group views on

[59] Muchlinski argued that "maximum foreign shareholding limits in national laws have tended to be relaxed. The most promising avenue for regulation should be 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, *supra* note 55 (at 59).

particular businesses or industries can be taken into account by the authority concerned.[60]

6. CONCLUSION

In conclusion, the function of regional competition law and policy and regional merger control regulation would be to ensure the review of mergers and anti-competitive practices in the ASEAN countries, which currently lack both effective domestic controls and experience in dealing with mergers, acquisitions and anti-competitive practices. Therefore, in this way, member countries could enlist the support of the Regional Merger Committee in the event of concentrations with significant actual or potential anti-competitive impact. As regards the shaping of an ASEAN regional competition law, this may be developed and adapted from the models for international competition law and the approach towards a multilateral competition regime proposed at international level. Harmonisation of substantive national competition law combined with the network model, especially the regional enforcement network, may be suitable to ASEAN's open regionalism infrastructure and its 'ASEAN way', and concerted actions. An ASEAN regional competition law and policy could enhance regional economic strengths and ensure that the regional market open to non-ASEAN trade and investment would prevent powerful

[60] For instance, the issue can be brought to the Regional Merger Committee, within the spirit of the Regional Merger Regulation; consumer groups can request that the Committee review a concentration where FDI creates or strengthens a dominant position or merges with or acquires such domestic firms.

transnational corporations from dominating the regional economy. This is consistent with the main concept of open regionalism, which enhances both intra- and extra-ASEAN trade and investment, so that a regional competition law and policy would be suitable instruments to achieve this goal.