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**A Critical Analysis of the Prospects for the Effective Development of a
Regional Approach to Competition Law in the ASEAN Region**

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Abstract

This thesis is an examination of the ASEAN's prospects in establishing regional competition policy in the Southeast Asia region, a topic of contemporary relevance in light of the ASEAN's recent foray into the economic integration field on 31 December 2015. It questions whether the current approach undertaken by the ASEAN could contribute to an effective regional competition policy under the regional market integration. In answering this question, the thesis first critically surveys the current terrain of regional competition laws and policies in order to determine the possible existence of an optimal template. It argues that although the EU model is oft used as a source of inspiration, each regional organisation conceives different configurations of the model in order to best adjust to the local regional contexts.

The thesis makes an inquiry into the narratives of the ASEAN's competition policy, as well as the ASEAN's specific considerations in the development of competition policy, before comparing the findings to the actual approaches taken by the ASEAN in its pursuit of regional competition policy. This thesis reveals that the actual approach taken by the ASEAN demonstrates an important discrepancy from the economic integration goal. The ASEAN applies a soft harmonisation approach regarding substantive competition law while refraining from establishing a centralised institution or a representative institution. The sole organ with regards to competition policy at the regional level is an expert organ. The thesis also conducts an investigation into the reception of the ASEAN's regional policy by the member states in order to ascertain the possibility of the achievement of the ASEAN's aspiration of regional competition policy. The study reveals that despite some shared similarities in the broad principles of competition law amongst the member states, the various competition law regimes are not harmonised thus creating challenging obstacle to the ASEAN's ambition. The thesis then concludes that the ASEAN's approach to regional competition law is unlikely to be effective.

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Acknowledgement

This thesis was born of the sheer bravado of youth. While working on my Master's dissertation, I noticed the dearth of literature on the ASEAN's efforts regarding competition policy, leading to perhaps a delusional endeavour on my part to rectify this situation. I thus embarked on the journey of making a contribution, however meagre, to the bibliography of the ASEAN's regional competition policy.

I am very grateful to my supervisor, Professor Mark Furse, whose advice and generous support regarding both this work and my future career have always been valuable. Through his exemplary conduct, I have learned the inspiring lesson that hard work yields satisfying results. I have also benefited from my discussions with Doctor Akbar Rasulov throughout my study and I hope that some of them are reflected in my work. I would be remiss if I neglected to express my gratitude to Professor Jörn Dosch, Doctor Pornchai Wisuttisak, and Ms. Waraluck Nakasen for their aid in providing useful materials.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature _____

Printed name __Ploykaew Porananond_____

List of Abbreviations and Acronyms

ABA	American Bar Association
AEC	ASEAN Economic Community
AEGC	ASEAN Expert Group on Competition
AEM	ASEAN Economic Minister
AFTA	ASEAN Free Trade Area
AMS	ASEAN Member State
APEC	Asia Pacific Economic Cooperation
ASA	Association of Southeast Asia
ASEAN	Association of Southeast Asian Nations
CARICOM	Caribbean Community and Common Market
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
DOJ	US Department of Justice's Antitrust Division
EAC	East African Community
ECJ	European Court of Justice
ECN	European Competition Network
ECOWAS	Economic Community of West African States
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
FTC	US Federal Trade Commission

GCEU	General Court of the European Union
ICN	International Competition Network
IMF	International Monetary Fund
MERCOSUR	Southern Common Market
NAFTA	North American Free Trade Agreement
OECD	The Organisation of Economic Cooperation and Development
SACU	Southern Africa Customs Union
SADC	Southern African Development Community
SME	Small and Medium Enterprise
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
US	United States
WAUMU	West African Economic and Monetary Union
WTO	World Trade Organisation

Chapter 1 Introduction

The 20th century witnessed a surge in regional competition law agreements, a phenomenon now apparent in several continents and encompassing more than sixty states. As an illustration, there are the European Union (EU) in Europe; the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the West African Economic and Monetary Union (WAEMU or UEMOA), the Southern African Development Community (SADC), and the Southern Africa Customs Union (SACU) in Africa; the Southern Common Market (MERCOSUR), the Andean Community, the Caribbean Community and Common Market (CARICOM), and the North American Free Trade Agreement (NAFTA) in the Americas and the Caribbean; and the Association of Southeast Asian Nations (ASEAN) in Asia. It is indisputable that regional competition law and policy are no longer reserved for developed economies and in most cases, involve developing economies.¹ There is no definitive classification or measurement of development. Each international organisation appears to employ distinct criteria in its classification. The United Nations' (UN) definition of a developing economy is intended to reflect basic economic conditions by utilising the exchange-rate based method, having determined that this method would more accurately measure the growth and changes in developing economies.² In contrast, the International Monetary Fund (IMF) distinguishes between advanced economies, and emerging market and developing economies.³ This distinction is based on population, exports of goods and services, and the gross domestic product (GDP) valued by purchasing power parity (PPP). The World Bank on the other hand, categorises countries according to gross national income (GNI).⁴ Countries or economies with a GNI per capita of USD 1,045 or less are low-income economies; middle-income economies should have a GNI per capita of between USD 1,045 and 12,736; and high-income economies exceed USD 12,736.

Although a generalisation, income-based or growth-based definitions are convenient for locating countries within a meaningful category and for grouping together countries with outward similarities. Many commentators have contested this method on the basis that it ignores the roots of low-income levels and neglects social, political, and other variables, such as physical infrastructure.⁵ These affect the level of competition or the prospects of an effective implementation of a competition law regime. Without commenting on the theoretical debate regarding their appropriateness or suitability, this thesis uses the term “developing economy” and mostly follows the IMF classification for its advantageous ease

¹ There is a general abandonment of the term “developing country” in favour of “developing economy.” See, in particular, the UN switch in 2013: UN, *World Economic Situation and Prospects* (2013).

² UN, *World Economic Situation and Prospects* (2015) 137-143.

³ IMF, *World Economic Outlook Database* (April 2015) 147-164.

⁴ World Bank, *Country and Lending Groups* <<http://data.worldbank.org/about/country-and-lending-groups>>.

⁵ See, for example, Indig, Tamar and Gal, Michal S., ‘Lifting the Veil: Rethinking the Classification of Developing Economies for Competition Law and Policy’ in Gal, Michal S. et al. (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar Publishing 2015).

of use and availability of information. Furthermore, the IMF categorisation best reflects the level of diversity experienced in Southeast Asia.

The ASEAN was the latest addition to the movement of the regionalisation of competition law in the 21st century. In 2007, at the 39th Meeting of the ASEAN Economic Ministers, the ASEAN leaders agreed to form a regional single market with a competition policy as an important part of the mechanism. This marked the ASEAN's first endeavour into the realm of regional competition policy. It was argued that the ASEAN's regionalisation process had been slow and difficult due to political fragmentation, internal conflicts, and external pressures.⁶ Others, however, asserted that the slowness was by design since the original conception for the ASEAN was that it should merely be a loosely formed cooperation in Southeast Asia.⁷

The ASEAN regroups ten countries in the Southeast Asia region: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Thailand, Singapore, and Vietnam. The concept of "Southeast Asia" is in itself an artificial construct having been referred to as such by the Western Allies in the aftermath of the World War II.⁸ The ten ASEAN member states [*hereinafter* AMSs] represent the full spectrum of political, legal, and ideological diversity.⁹ Politically, the ASEAN includes countries governed by democracies, monarchies, military juntas and communist parties that have varying interpretations of the relationship between the private sector and the government.¹⁰ Cambodia¹¹ and Malaysia¹² have a constitutional monarchy while Brunei Darussalam has the system of Malay Islamic monarchy.¹³ Thailand, while officially a constitutional monarchy,¹⁴ is currently under the rule of the military junta. Singapore supports a parliamentary republic political system.¹⁵ The Philippines, Indonesia,¹⁶ and most recently Myanmar¹⁷ are presidential republics. In terms of population within the region, the ASEAN's overall population places it third after China and India at 621 million, with Indonesia holding the largest population within the region at 252 million. Brunei

⁶ Hung, Lin Chun, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9 Chinese J. of Int'l L 821 (2010).

⁷ Imada, Pearl, Montes, Manuel and Naya, Seiji, *A Free Trade Area: Implications for ASEAN* (ISEAS 1991).

⁸ Tan, Kevin Y.L., *The Making and Remaking of Constitutions in Southeast Asia: An Overview*, 6 Sing. J. Int'l & Comp. L. (2002).

⁹ Desierto, Diane A., *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 Int'l J. Legal Info. 387 (2008).

¹⁰ Hung, Lin Chun, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9 Chinese J. of Int'l L 821 (2010).

¹¹ The Constitution of the Kingdom of Cambodia [1993] art. 1.

¹² The Federal Constitution of Malaysia [1957] art. 1. Malaysia is a federal constitutional monarchy in which the head of State is the Yang di- Pertuan Agong and the head of government is the Prime Minister. The Yang di- Pertuan Agong is elected for a five-year term by and from the rulers of the nine States in Peninsular Malaysia which have retained their hereditary Malay royal family.

¹³ The Constitution of Brunei Darussalam [1959] art. 4.

¹⁴ The Constitution of the Kingdom of Thailand [2007] sec. 2.

¹⁵ The Constitution of the Republic of Singapore [1965] art. 3.

¹⁶ The Constitution of the Republic of Indonesia [1945] art. 4.

¹⁷ Constitution of the Republic of the Union of Myanmar [2008] art. 16.

Darussalam has a population of only 0.4 million.¹⁸ The legal systems of the AMSs also vary considerably, ranging from common to civil law systems or a hybrid of both.¹⁹ Brunei Darussalam, Malaysia, and Singapore have common law systems; the Philippines and Thailand use a hybrid of civil and common legal systems; Indonesia has a civil law system; Vietnam inherited the French civil law system but this is located in communist legal theory; Laos, Myanmar, and Cambodia are still struggling to find a legal identity. In the global economy, the contribution of the ASEAN to world GDP, in PPP dollars, is six per cent, which amounts to 6.5 trillion dollars.²⁰ Furthermore, the GDP per capita of the AMSs demonstrates significant diversity.²¹ Only Singapore and Brunei Darussalam report a GDP per capita of above USD 40,000 followed at a distance by Malaysia at USD 11,049 while Cambodia ranks the lowest at USD 1,081. The rest of the AMSs' GDP per capita ranges between USD 6,000 to 1,200. According to the IMF, Singapore is the only advanced economy in the region. Brunei Darussalam is a developing economy whose main source of earnings is from fuel exports. The other AMSs are all classified as emerging markets and developing economies. Among these developing economies, Cambodia, Lao PDR, and Myanmar are classed as low-income developing countries.²² In applying the World Bank criteria, Cambodia is a low-income economy, Singapore is a high-income economy and the rest of the AMSs are middle-income economies.²³ According to the UN classification, most of the AMSs are developing economies although Cambodia, Lao PDR, and Myanmar figure among least developed countries. In the same classification report, Myanmar appeared twice, both as a developing economy and as a least developed country.²⁴ In the end, the sole shared trait among the AMSs is their geographical proximity.

1.1. Background on the ASEAN²⁵

1.1.1. The Formation of the ASEAN

At the initiation of Thailand,²⁶ the ASEAN was established by the *ASEAN Declaration of 1967*²⁷ as a regional intergovernmental organisation by five founding member states:

¹⁸ IMF, *World Economic Outlook Database* (April 2014).

¹⁹ Haas, Deborah A., *Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 Am. U. J. Int'l L. & Pol'y 809 (1994).

²⁰ *World Economic Outlook Database*.

²¹ *Ibid.*

²² *World Economic Outlook Database*, 147-152.

²³ World Bank, *Country and Lending Groups* <<http://data.worldbank.org/about/country-and-lending-groups>>.

²⁴ *World Economic Situation and Prospects*, 137-143.

²⁵ For more information on the conception and evolution of ASEAN see, Khoman, Thanat, 'ASEAN Conception and Evolution' in Sandhu, K.S. et al. (eds), *The ASEAN Reader* (ISEAS 1992). [Providing a personal account of one of the initiators and original signatories of the *ASEAN Declaration*]; Irvine, Roger, 'The Formative Years of ASEAN: 1967-1975' in Broinowski, Allison (ed), *Understanding ASEAN* (Macmillan 1982); Palmer, Ronald D. and Reckford, Thomas J., *Building ASEAN: 20 Years of Southeast Asian Cooperation* (Praeger 1987); Severino, Rodolfo C., *ASEAN* (ISEAS 2008).

Indonesia, Malaysia, the Philippines, Singapore, and Thailand. It was born out of a combination of external threats and domestic challenges.²⁸ The *ASEAN Declaration* was drafted against a background of political discordance in the region fuelled by general apprehension over new territories arbitrarily acquired through colonial intervention.²⁹ During that time, Indonesia had a *Konfrontasi* (Borneo confrontation) with Malaysia, Singapore was ejected from the Federation of Malaysia, a dispute between Malaysia and the Philippines over North Borneo remained unresolved, and Malaysia was distrustful of Thailand over the latter's lack of cooperation in combatting the Malayan Communist Party. Despite the evident discord, a degree of concordance emerged between these states in their stance against communism and authoritarian regimes,³⁰ which are collectively referred to as "common problems among countries of Southeast Asia" in the *ASEAN Declaration*.

The *ASEAN Declaration* is a two-page document of only three articles describing the rationale for the establishment of the ASEAN and its ambitious objectives. It cites cooperation in various fields (including economic, social, cultural, technical, and educational), the promotion of regional peace and stability through abiding by the respect of justice and the rule of law, and adherence to the principles of the *United Nations Charter* as the organisation's aims and purposes.³¹ Given the political climate of the region, it is evident that the ASEAN's primary objective was to prevent regional conflicts, build mutual confidence, and promote regional stability and security by laying a regional foundation for the pursuit of economic development. However, the *ASEAN Declaration* refrains from giving any directions on how to achieve these expansive aims and purposes. It was later suggested that economic cooperation was included as an afterthought merely to dispel suspicion over the ASEAN becoming a military alliance.³² While the formulation of the *ASEAN Declaration* is laudable for its achievement amidst regional political instability, its weakness lies in its lack of measures regarding how the goals of the organisation were to be pursued. In its own words, the *ASEAN Declaration* represents the organisation's modus operandi of building on small voluntary steps and informal arrangements while moving towards more binding and institutionalised agreements.³³ As its name suggests, the

²⁶ Khoman, Thanat, 'ASEAN Conception and Evolution' in Sandhu, K.S. et al. (eds), *The ASEAN Reader* (ISEAS 1992).

²⁷ The ASEAN Declaration [1967]. [alternatively known as the *Bangkok Declaration*]

²⁸ Hung, Lin Chun, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9 *Chinese J. of Int'l L* 821 (2010).

²⁹ For more in depth information on the conflictual political climate surrounding Southeast Asia, see, Leifer, Michael, *ASEAN and the Security of Southeast Asia* (Routledge 1989); Haacke, Jürgen, *ASEAN's Diplomatic and Security Culture: Origins, Development and Prospects* (Routledge 2005); Roberts, Christopher B., *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Routledge 2012).

³⁰ Roberts, Christopher B., *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Routledge 2012) 178.

³¹ The ASEAN Declaration, , art. 2.

³² Chia, Siow Yue and Plummer, Michael G., *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions* (Cambridge University Press 2015) 1.

³³ ASEAN, *ASEAN History* <<http://www.asean.org/asean/about-asean/history>>.

ASEAN membership is open to all states within the Southeast Asia region subscribing to its aims, principles, and purposes.³⁴

It is noteworthy that while it is the largest in scope and membership, the ASEAN was not the first regional organisation in the Southeast Asia region. Previous regional organisations included the MAPHILINDO and the Association of Southeast Asia (ASA) which were both dismantled in the wake of the establishment of the much larger ASEAN. The MAPHILINDO, using the first syllables of its three member states, was composed of Malaysia, the Philippines, and Indonesia, regrouping the three Malay-based populations of the region, and sought to resolve their conflicting territorial claims. It ended prematurely because of the hostilities generated by Indonesia's *Konfrontasi*.³⁵ Another regional organisation was the ASA, composed of Malaysia, the Philippines and Thailand, which emphasised cooperation in economic, social, cultural, scientific and administrative matters. The ASA's life was cut short due to the dispute between the Philippines and Malaysia over North Borneo.³⁶ North Borneo later became Sabah as part of the Malaysian Federation in 1963.

The ASEAN membership was expanded over time to finally include the whole Southeast Asia region, with the exception of Timor Leste, in accordance with the *ASEAN Declaration*. It was first joined by Brunei Darussalam in 1984, as soon as the latter gained independence from the United Kingdom. Vietnam, Lao PDR, Myanmar and Cambodia (often collectively referred to as the CLMV) entered the ASEAN during the period between 1995 until 1999. It was argued that the fear of perceived external threats, including the looming unified economic blocs of the EU and the NAFTA, played a role in the successful expansion of the ASEAN.³⁷ The increase in the number of the AMSs engendered new and challenging issues, in particular an increase in the existing diversity in the economic development between the AMSs.

1.1.2. The Transformation of the ASEAN

During its 48-year existence, the ASEAN has constantly evolved. Given its humble origins, a fundamental change in both structure and the ideological content was crucial to

³⁴ The ASEAN Declaration, , art. 4.

³⁵ Fifield, Russel H., *National and Regional Interests in ASEAN: Competition and Co-operation in International Politics* (ISEAS 1979) 3.

³⁶ Irvine, Roger, 'The Formative Years of ASEAN: 1967-1975' in Broinowski, Allison (ed), *Understanding ASEAN* (Macmillan 1982) 9.

³⁷ Haas, Deborah A., *Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 Am. U. J. Int'l L. & Pol'y 809 (1994); Roberts, Christopher B., *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Routledge 2012).

its future survival.³⁸ The ASEAN's transformation was necessary to give a new purpose to the organisation in order to maintain and gain political momentum.

1.1.2.1. Economic Cooperation³⁹

The changes in the ASEAN were ushered in because of the expansion of membership accompanied by the perceived fear of the rapid growth of China and India⁴⁰ which led to the realisation that the ASEAN needed to be reinvented.⁴¹ The *Declaration of ASEAN Concord*⁴² marked a crucial point as the ASEAN's first cornerstone to economic cooperation. It aimed to expand the ASEAN cooperation in economics, social, cultural and political areas. Primarily, it provided the general framework of trade and industrial cooperation that led to the establishment of various programmes including the *ASEAN Preferential Trading Agreements* (PTA),⁴³ the ASEAN Industrial Projects,⁴⁴ the ASEAN Industrial Complementation,⁴⁵ and the ASEAN Industrial Joint Venture Scheme.⁴⁶ None of these efforts would yield adequate results in the development of intra-regional trade and investment. It was described as a "futile attempt"⁴⁷ largely because of the PTA's flexibility which contributed to widespread abuse of exclusion lists that has weakened the PTA scheme to the point of ridicule by critics.⁴⁸

Concerned about the rapid proliferation of free trade areas and custom unions, such as the EU and the NAFTA, the leaders of the ASEAN decided to make similar attempts to deepen economic cooperation.⁴⁹ With the support of Thailand and Singapore, the ASEAN

³⁸ Hung, Lin Chun, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9 Chinese J. of Int'l L 821 (2010).

³⁹ For more information, see, Kenevan, Peter and Winden, Andrew, *Flexible Free Trade Area: The ASEAN Free Trade Area*, 34 Harv. Int'l L.J. 224 (1993); Davidson, Paul J., *ASEAN: The Evolving Legal Framework for Economic Cooperation* (Times Academic Press 2002).

⁴⁰ Tay, Simon S. C., *The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment*, 12 S.Y.B.I. L. 151 (2008).

⁴¹ Tay, Simon S. C., Estanislao, Jesus P. and Soesastro, Hadi, *Reinventing ASEAN* (ISEAS 2001).

⁴² Declaration of ASEAN Concord [1976]. [*hereinafter* ASEAN Concord I]

⁴³ ASEAN Preferential Trading Agreements [1977].

⁴⁴ Basic Agreement on ASEAN Industrial Projects [1980].

⁴⁵ Basic Agreement on ASEAN Industrial Complementation [1981].

⁴⁶ ASEAN Industrial Joint Venture Scheme [1983].

⁴⁷ White, George O. III, *From Snowplows to Siopao—Trying to compete in a Global Marketplace: The ASEAN Free Trade Area*, 8 Tulsa J. Comp. & Int'l L. 177 (2000).

⁴⁸ Many observers mocked the inclusion of snowploughs and other Southeast Asian nonessentials in the exclusion list, see, Kenevan, Peter and Winden, Andrew, *Flexible Free Trade Area: The ASEAN Free Trade Area*, 34 Harv. Int'l L.J. 224 (1993); White, George O. III, *From Snowplows to Siopao—Trying to compete in a Global Marketplace: The ASEAN Free Trade Area*, 8 Tulsa J. Comp. & Int'l L. 177 (2000).

⁴⁹ Lopez, Carolina Alberto and Matutes, Jacint Soler, *Open Regionalism Versus Discriminatory Trading Agreements: Institutional and Empirical Analysis*, 14 ASEAN Econ. Bull. 253 (1998); White, George O. III, *From Snowplows to Siopao—Trying to compete in a Global Marketplace: The ASEAN Free Trade Area*, 8 Tulsa J. Comp. & Int'l L. 177 (2000).

undertook another economic cooperation project.⁵⁰ Following the fourth ASEAN Summit in 1992, the ASEAN leaders established the ASEAN Free Trade Area (AFTA) through the adoption of a series of three important documents. The first document was the *Singapore Declaration*⁵¹ describing the ASEAN's intention to forge closer political and economic cooperation. Regarding the economic cooperation, the document serves as an outline of economic measures to be taken in order to achieve the AFTA. The *Framework on Enhancing ASEAN Economic Cooperation*⁵² provided the principles of the ASEAN economic cooperation and stressed that the AFTA was only one of the mechanisms in place relating to trade cooperation. Finally, the primary vehicle of the AFTA was the *Agreement on the Common Effective Preferential Tariff Scheme (CEPT)*.⁵³ The *CEPT* was an agreed effective tariff ranging from 0% to 5% applied to certain manufactured goods originating from the AMSs. It takes precedence over the ASEAN Industrial Joint Venture Scheme and the goods covered in the *PTA* shall be transferred to the *CEPT*.⁵⁴ In avoiding a repetition of the *PTA*'s inefficient performance, the *CEPT* was drafted more precisely with less flexibility for the AMSs. What is striking about the *CEPT* is the lack of a concrete mechanism for dispute resolution. While the AMSs can submit their unresolved issues to the AFTA Council – a ministerial-level council established by the *Singapore Declaration* to supervise, coordinate and review the implementation of the AFTA⁵⁵ – the *CEPT* fails to proscribe the Council's role in dispute resolution. Ultimately, the AMSs are encouraged to resolve any disputes in a peaceful and amicable manner.⁵⁶ It was suggested that the AFTA was actually created to give the ASEAN new political purpose after the end of the US-Soviet confrontation and the Cambodian Crisis.⁵⁷ Indeed, it appears that the purpose of the AFTA is not for trade liberalisation or the increase of ASEAN intra-regional trade, but rather to attract foreign direct investment (FDI).⁵⁸

1.1.2.2. Towards the ASEAN Community

The final transformation commenced at the ASEAN Summit in December 1997 when the ASEAN leaders produced the *ASEAN Vision 2020*⁵⁹: they envisioned a peaceful and stable region and planned to forge closer economic integration within the ASEAN by the year 2020. Thus, the *ASEAN Vision 2020* departed from the ASEAN's political and security intergovernmental origin and started steering it in a new direction. In this regard, it was

⁵⁰ Davidson, Paul J., *ASEAN: The Evolving Legal Framework for Economic Cooperation* (Times Academic Press 2002) 74.

⁵¹ Singapore Declaration [1992].

⁵² Framework on Enhancing ASEAN Economic Cooperation [1992].

⁵³ Agreement on The Common Effective Preferential Tariff (CEPT) Scheme For the ASEAN Free Trade Area [1992].

⁵⁴ Davidson, Paul J., *ASEAN: The Evolving Legal Framework for Economic Cooperation* (Times Academic Press 2002) 75.

⁵⁵ Singapore Declaration.

⁵⁶ CEPT.

⁵⁷ Buszynski, Leszek, *ASEAN's New Challenges*, 70 *Pacific Affairs* 555 (1997).

⁵⁸ Narine, Shaun, *Explaining ASEAN: Regionalism in Southeast Asia* (Lynne Rienner Publishers 2002) 10.

⁵⁹ ASEAN Secretariat, *ASEAN Vision 2020* (1997).

argued that the ASEAN's morphology emerged more from perceptions of external threats, in particular the economic rise of China and India, than from an internal conviction of the benefits of stronger intra-regional integration.⁶⁰ Another impetus for the ASEAN's most important transformation was the effect of the aftermath of the Asian Financial Crisis in 1997 when the ASEAN's inability to react to crises was revealed and the necessity of better cooperation at the regional level was recognised.⁶¹ The ASEAN failed to present a united front to effectively resolve the crisis and instead left the AMSs to recover independently.⁶²

Following the *ASEAN Vision 2020*, the ASEAN leaders decided, in the *Declaration of ASEAN Concord II*,⁶³ that the ASEAN Community would be supported by three pillars: the ASEAN Political-Security Community (APSC), the ASEAN Socio-Cultural Community (ASCC), and the ASEAN Economic Community (AEC). The choice of language leaves no doubt that ASEAN's transformation is modelled on the EU. The economic pillar is believed to be the most feasible of the three.⁶⁴ The AEC's goal is regional economic integration with free movement of goods, services, investment, skilled labour, and the freer flow of capital.⁶⁵ It envisages the following key characteristics: a single market and production base, a highly competitive economic region, a region of equitable economic development and a region fully integrated into the global economy. In 2007, the ASEAN leaders agreed by consensus to accelerate the establishment of the AEC, originally planned for 2020, to 2015.⁶⁶ The reason behind this unexpected acceleration was the ASEAN leaders' satisfaction with the progress towards narrowing the development gap within the region. They were in agreement that decreasing the deadline of the AEC would encourage a more enthusiastic attitude towards stronger regional integration.⁶⁷ Nonetheless, the formal establishment of the ASEAN Community comprising of the ASEAN Political-Security Community, the ASEAN Socio-Cultural Community, and the ASEAN Economic Community was later delayed to 31 December 2015.⁶⁸

The *ASEAN Charter*⁶⁹ was adopted to facilitate economic integration and enhance security cooperation among the AMSs. It arrived with much anticipation that it could be the harbinger of the new ASEAN, one which focused on more meaningful regional integration

⁶⁰ Chia, Siow Yue and Plummer, Michael G., *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions* (Cambridge University Press 2015) 3.

⁶¹ Das, Sanchita Basu, *The ASEAN Economic Community and Beyond: Myths and Realities* (ISEAS 2016) 15-16.

⁶² Narine, Shaun, *Explaining ASEAN: Regionalism in Southeast Asia* (Lynne Rienner Publishers 2002) 139.

⁶³ Declaration of ASEAN Concord II [2003]. [*hereinafter* ASEAN Concord II, also alternatively known as Bali Concord II]

⁶⁴ Roberts, Christopher B., *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Routledge 2012) 187.

⁶⁵ ASEAN Secretariat, *ASEAN Economic Community* <<http://www.asean.org/communities/asean-economic-community>>.

⁶⁶ ASEAN Secretariat, *ASEAN Economic Community Blueprint* (2007).

⁶⁷ *Ibid.*

⁶⁸ Kuala Lumpur Declaration on the Establishment of the ASEAN Community [2015].

⁶⁹ The ASEAN Charter [2007].

and departed from the tradition of non-interference and mutual respect.⁷⁰ In reality, the *ASEAN Charter* did little more than grant the ASEAN a legal personality which is rather inconsequential in light of the its institutional capacity.⁷¹ Furthermore, it was argued that the ASEAN had always had legal personality⁷² although this had never been publicly acknowledged before the *ASEAN Charter*. While the *ASEAN Charter* failed to meet the expectations and the ASEAN's own ambitious goals, observers were quick to defend it.⁷³ What it did achieve was to guide the ASEAN in an unprecedented direction; one that focuses on a rule-based approach and a more formal institution.

1.2. The Beginning of the ASEAN Competition Policy

At the 39th Meeting of the ASEAN Economic Ministers (AEM), the ASEAN leaders agreed to prioritise the ASEAN market integration as the main projected plan. The objective was to form a single regional market with competition policy as an important part of the mechanism.⁷⁴ This marked the first time that competition policy had ever been mentioned within the ASEAN. There is no other public record that suggests the ASEAN's interest in competition law and policy derive from external or internal pressures. Nevertheless, it is worth mentioning that at that time, only four AMSs had introduced and implemented competition law: Thailand,⁷⁵ Indonesia,⁷⁶ Singapore⁷⁷ and Vietnam.⁷⁸ There is considerable variance in the range and depth of the national competition regulations in these four regimes and questions may arise as to the effectiveness of the enforcement of the competition laws. For these four AMSs, the primary emphasis would be on how to harmonise and make their existing national competition laws more effective within the regional common framework. For the AMSs without established competition law, the primary focus would be on how best to introduce domestic competition law. Therefore, it

⁷⁰ Hung, Lin Chun, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9 Chinese J. of Int'l L 821 (2010).

⁷¹ Leviter, Lee, *The ASEAN Charter: ASEAN Failure or Member Failure?* 43 N.Y.U. J. Int'l L. & Pol. 159 (2010).

⁷² Chesterman, Simon, *Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person*, 12 S.Y.B.I. L. 199 (2008). [He inferred ASEAN's legal personality based on the principle laid down by the ICJ Advisory Opinion 11 April 1949 *Reparations* Case that the member states intended ASEAN to have the necessary authority to exercise its functions and fulfil its purpose as specified or implied in the treaty.

⁷³ See, for example, Tay, Simon S. C., *The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment*, 12 S.Y.B.I. L. 151 (2008); Desierto, Diane A., *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 Int'l J. Legal Info. 387 (2008); Asian Development Bank, *Institutions for Regional Integration: Toward an Asian Economic Community* (2010) 123.

⁷⁴ ASEAN Secretariat, *The Thirty-Ninth ASEAN Economic Ministers Meeting Makati City* <<http://www.asean.org/news/item/the-thirty-ninth-asean-economic-ministers-aem-meeting-makati-city-philippines-24-august-2007>>.

⁷⁵ Thailand Trade Competition Act of 1999 [1999]. [*hereinafter* TCA]

⁷⁶ Law of the Republic of Indonesia Number 5 Year 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition [1999].

⁷⁷ Singapore Competition Act of 2004 (Cap. 50B) revised on 30 January 2006 [2004]. [*hereinafter* SCA]

⁷⁸ Vietnam Law on Competition of 2004, No.27/2004/QH11 [2004].

is reasonable to deduce that the AMSs' experiences were not strong enough to influence the organisation to adopt a regional competition law and policy regime. The only plausible justification regarding the origin of ASEAN competition law is the organisation's internal conviction that there was a natural correlation between trade liberalisation, a single regional market and a competition policy. Once the ASEAN leaders had fixed their sights on the establishment of a regional economic community with a single regional market, it was only natural they would want to introduce a competition policy.

The management and development of the ASEAN competition policy was placed under the authority the Sectoral Bodies and under the purview of the AEM. Moreover, the ASEAN Expert Group on Competition (AEGC) was also established in order to promote the exchange of information, experience and cooperation on competition policy within the region.⁷⁹ The AEGC does not have the status of a competition authority in that it is not charged with any enforcement responsibilities. It merely functions as a regional network forum to help coordinate and encourage the introduction of national competition laws. Since its conception, the AEGC has been working consistently on capacity building in respect of domestic competition policies with the AMSs' national authorities.⁸⁰

Finally, at the 13th ASEAN Summit on 20 November 2007,⁸¹ the AMSs adopted the *ASEAN Economic Community Blueprint*⁸² to serve as a master plan to facilitate and ensure the coherence of the AEC. The *Blueprint* is significant in that it represents a shift from a style of operation that depended more on leaders' declarations, to one that is more methodical and relies on a collectively endorsed set of objectives.⁸³ According to the *Blueprint*, each AMS is committed to implementing national competition law by 2015. By admitting that the main objective of the competition policy is to "foster a culture of fair competition,"⁸⁴ the *Blueprint* calls attention to competition advocacy. The emphasis on advocacy is reflected in the *Blueprint's* first action plan regarding competition policy which is to introduce competition policy in all AMSs by the AEC deadline of 2015 through the aides of capacity building programmes and regional guidelines. The AMSs' commitment to the implementation of competition policy is to "ensure a level playing field and incubate a culture of fair business competition for enhanced regional economic

⁷⁹ ASEAN Secretariat, *The Thirty-Ninth ASEAN Economic Ministers Meeting Makati City* <<http://www.asean.org/news/item/the-thirty-ninth-asean-economic-ministers-aem-meeting-makati-city-philippines-24-august-2007>>.

⁸⁰ ASEAN, *Activities & Archived Activities, in Competition Policy* <<http://www.asean.org/communities/asean-economic-community/category/competition-policy>>.

⁸¹ ASEAN Secretariat, *Chairman Statement of the 13th ASEAN Summit, One ASEAN at the Heart of Dynamic Asia* <<http://www.asean.org/news/item/chairman-s-statement-of-the-13th-asean-summit-one-asean-at-the-heart-of-dynamic-asia-singapore-20-november-2007>>.

⁸² *The Blueprint*.

⁸³ Tay, Simon S. C., *The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment*, 12 S.Y.B.I. L. 151 (2008).

⁸⁴ *The Blueprint*.

performance in the long run.”⁸⁵ The ASEAN’s reluctance to push beyond competition advocacy is understandable in light of the AMSs’ significant differences in economic and social structures. Moreover, it was claimed that a “uniform system would only be equitable when countries enjoy the same levels of economic development, research and development capability, infrastructure and technological prowess.”⁸⁶ Put differently, a unified regional competition law is too ambitious for the ASEAN’s current state of diversity. Furthermore, since the ASEAN is not a supranational organisation⁸⁷ it neither has a regional institution nor a judicial organ to implement and enforce competition law.

Because of the lack of a central institution within which to develop competition law, the *Blueprint* sets out to establish “a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies”.⁸⁸ It remains unclear whether the *Blueprint*’s “network of authorities or agencies” will be different to the already established AEGC since they share similar characteristics as a regional discussion and cooperation platform. The network has yet to be introduced. The AEGC first met in 2008⁸⁹ and agreed to focus on building up competition policy capabilities and best practices in the member countries during the following three to five years. Following the goal specified in the *Blueprint*, the AEGC released the *ASEAN Regional Guidelines on Competition Policy*,⁹⁰ a self-proclaimed “pioneering attempt”⁹¹ to achieve a highly competitive economic region. The *Guidelines I* are based on the experiences of both the AMSs and the wider international community and have as their aim the harmonisation of the AMSs’ competition rules. They were later complemented by the *Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN*⁹² which concentrate more on the development of competition law enforcement mechanisms. The AEGC hopes that both *Guidelines* will raise the awareness of competition policy, stimulate the development of best practice in competition policy, and enhance cooperation between the AMSs. To date, these are the only two documents established by the ASEAN in pursuit of a regional competition policy framework.

⁸⁵ Abad, Anthony Amunategui, ‘Competition Law and Policy in the Framework of ASEAN in Competition Policy and Regional Integration’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

⁸⁶ Thanadsillapakul, Lawan, ‘The Harmonization of ASEAN: Competition Laws and Policy from an Economic Integration Perspective’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

⁸⁷ ASEAN Secretariat, *The ASEAN Charter* <<http://www.asean.org/archive/publications/ASEAN-Charter.pdf>>.

⁸⁸ *The Blueprint*, art. 41.

⁸⁹ ASEAN, *Activities & Archived Activities, in Competition Policy*

<<http://www.asean.org/communities/asean-economic-community/category/competition-policy>>.

⁹⁰ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy* (ASEAN Secretariat August 2010).

⁹¹ *Ibid*, Foreword i.

⁹² ASEAN Secretariat, *Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN* (2012).[hereinafter the Guidelines II]

1.3. The Scope and Nature of the Thesis

The ASEAN's efforts to establish a regional competition policy are often overlooked by the literature even when the discussion is about global competition law or regional competition laws.⁹³ It is plausible that this is due to the ASEAN's relatively recent interest in competition law and the region's moderate impact on the global market. In light of the arrival of the AEC where competition policy occupies an important place, there is a pressing need to examine the ASEAN's competition policy. This thesis aims to bridge the gap in the literature by providing a detailed analysis of the ASEAN's approach to regional competition policy. In doing so, it is hoped that it will contribute to the expansion of the literature of the ASEAN competition law. While the subject of the present study is specifically the ASEAN, the findings of this thesis could contribute to a better understanding of competition law regimes in developing economies and contribute to the more general literature on global competition law. Another purpose of this thesis is to expand the discourse on the issues surrounding developing economies' endeavours in establishing and enforcing competition law both at the national and the regional level.

As the title would suggest, this thesis is essentially an analysis of the prospect of an effective regional competition policy framework within the ASEAN region. It attempts to answer whether the current approach undertaken by the ASEAN could contribute to an effective regional competition policy under the fast-approaching economic integration. To answer the primary research question, the thesis must first determine whether there is an optimal template for a regional competition policy on which the ASEAN's endeavour could be based. This particular question would lead to an examination of important regional competition law regimes in the world, including the experiences of developing economies. However essential the experiments of other regional organisations may be, they are not the primary subject of this study and thus are only examined to the extent that they aid the understanding of the ASEAN's efforts. This thesis will then make an in depth inquiry into the narratives of the ASEAN's competition policy, as well as the ASEAN's specific considerations in the development of competition policy before comparing the findings to the actual approaches taken by the ASEAN in its pursuit of regional competition policy. Lastly, an investigation into the reception of the ASEAN's regional policy by the AMSs is imperative in order to ascertain the possibility of the achievement of the ASEAN's aspirations.

The present study incorporates analyses from different perspectives. Historical and legal economic methodologies are employed to help answering these research questions. While a comparison of different regimes is inevitable during the course of the study, this thesis is

⁹³ See, for instance, Gerber, David J., *Global Competition: Law, Markets and Globalisation* (Oxford University Press 2010); Gal, Michal S., *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 U. Toronto L.J. 239 (2010); Fox, Eleanor M. and Trebilcock, Michael J., *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2012). [Neither the ASEAN or the AMSs are selected as one of the subjects in the examination competition law outside of the US-EU comparison]

not a comparative study in the strict sense and shall not engage in the theoretical rhetoric of comparative methodology. The thesis involves a review of both primary and secondary sources. Primary materials consist of laws, regulations, cases, official public statements and official reports from the ASEAN and the AMSs. Secondary sources containing academic articles, legal opinions and working papers are also consulted. In recognition of the challenge of transparency encountered throughout the study, the thesis is confined to using publicly available material. Although there has been significant improvement in this regard, most of the discussions behind the development and drafting of important ASEAN agreements and other official documents remain shrouded in mystery. All the materials used in this thesis are stated as of December 2015.

The thesis is organised as follows: Chapter 2 begins with a review of the current landscape of regional approaches to competition law. Chapter 3 examines the goals and challenges of the ASEAN competition policy. Chapter 4 and Chapter 5 investigate the substantive and institutional approaches, respectively, taken by the ASEAN towards its announced goals. Chapter 6 then compares the AMSs' domestic competition laws with the ASEAN's competition policy.

Chapter 2 Regional Harmonisation of Competition Policy

“Harmonisation of competition laws and policy is an integral part of effective economic integration in regional trade agreements. Nations committed to trade liberalisation will not allow inconsistent or discriminatory application of competition laws to nullify the benefits gained from dismantling formal trade barriers, competition law harmonisation, however does not follow a single model.”⁹⁴

In recent years, competition law and policy framework have been among the most common features in the ongoing process of regionalisation.⁹⁵ Cernat employed the term “new wave of regionalism”⁹⁶ to describe the proliferation of regional competition law agreements and the new dynamism of a more ambitious and deeper level of integration that goes beyond information sharing and comity. At the regional level, several trade arrangements have included competition laws and policies on an area-wide basis. This trend towards harmonisation now covers many corners of the world. For instance, African developments include the COMESA, the EAC, the ECOWAS, the WAEMU, the SADC, and the SACU. Asian development has seen the formation of the ASEAN while the Americas and Caribbean formations include the MERCOSUR, the Andean Community, the CARICOM, and the NAFTA. Thus, more than fifty regional trading partners are now involved in regional competition law agreements.⁹⁷ It is important to note that regional competition law agreements are no longer reserved for developed economies but have extended to include developing economies, and in some instances are reserved exclusively for developing economies. What is striking about such agreements is the diversity of their institutional features, varying provision for competition, and differing implementation success.⁹⁸

There are a number of reasons for the proliferation of regional competition policies.⁹⁹ The most obvious of these is that competition policy is regarded as a necessary complement to

⁹⁴ Cunningham, O. Richard and LaRocca, Anthony J, *Harmonisation of Competition Policies in a Regional Economic Integration*, 27 *Law & Pol’y Int’l Bus.* 879 (1995).

⁹⁵ Mehta, Pradeep S. and Nanda, Nitya, ‘The Role of Civil Society in Promoting Competition Culture at the Regional Level’ in Brusick, Philippe, Alvarez, Ana Maria and Cernat, Lucian (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1 2005).

⁹⁶ Cernat, Lucian, ‘Eager to Ink, But Ready to Act? RTA Proliferation and International Cooperation on Competition Policy’ in Brusick, Philippe, Alvarez, Ana Maria and Cernat, Lucian (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1 2005).

⁹⁷ Ly, Luu Huong, *Regional Harmonization of Competition Law and Policy: An ASEAN Approach*, 2 *Asian J. Int. Law* 291 (2012).

⁹⁸ Heimler, Alberto and Jenny, Frédéric, ‘Regional Agreements’ in Lewis, David (ed), *Building New Competition Law Regimes* (Edward Elgar Publishing 2013).

⁹⁹ See, Fox, Eleanor M., ‘Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries’ in Drexel, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012); Lipimile, George K., ‘The COMESA Regional Competition Regulations’ in Drexel, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012). [Have described the benefits of regionalisation of competition laws in great detail]

trade policy, and especially to regional trade liberalisation and market integration within specific geographical regions.¹⁰⁰ Furthermore, regional competition agreement makes it easier to detect and regulate anticompetitive conduct with trans-border dimensions, thus enhancing the ability of a single national competition authority confined within the scope of its territory to act against such practices.¹⁰¹

This chapter offers a review of the regional approach to competition policy. It first examines the definition of harmonisation. Since the concept is central to the thesis, it is imperative to clarify the terms. The chapter then briefly describes various configurations of regional competition laws. The experiences of these regional arrangements will provide a helpful guide to locating the ASEAN's approach to competition policy. Dabbah once noted that "looking at different regional communities established around the world, it is clear that there has been too much borrowing from the EU experience and at the same time extremely little – if any – consultation on the experience of other regions in the field of competition law."¹⁰² In response to his observation, this chapter will focus more on developing economies' experiences with regional competition law. Finally, the chapter discusses some nominal issues that arise when jurisdictions in developing economies venture into competition law at regional level.

2.1. Defining Harmonisation

The terms "harmonisation" and "convergence" are often confused and used interchangeably. Gerber referred to convergence as being independent choices made by the states while harmonisation refers to decisions resulting from international agreements.¹⁰³ Harmonisation implies that the states are bound by the agreements and have no choice but to comply or face sanction. Within the harmonisation process, there is a distinction between "hard harmonisation" and "soft harmonisation." Hard harmonisation is used to describe binding multilateralism.¹⁰⁴ Binding multilateralism in the field of competition law can take on the form of legally binding multilateral agreements, international competition law codes or international competition law regimes, with an international institution capable of handling international competition cases.¹⁰⁵ Interest in multilateral competition

¹⁰⁰ Lawrence, Robert Z. and Litan, Robert E., *Saving Free Trade: A Pragmatic Approach* (Brookings Institution 1986); Evenett, Simon J., 'What Can We Really Learn from the Competition Provision of RTAs?' in Brusick, Philippe, Alvarez, Ana Maria and Cernat, Lucian (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1 2005).

¹⁰¹ Jenny, Frédéric, *Competition Enforcement in Testing Times: Beyond National Level* (Competition Principles under Threat, IDRC Pre-ICN Forum on Competition and Development 2009).

¹⁰² Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010) 412.

¹⁰³ Gerber, David J., The Extraterritorial Application of German Antitrust Law, 77 *American Journal of International Law* (1983).

¹⁰⁴ Wood, Diane P., *International Harmonization of Antitrust Law: The Tortoise or the Hare*, 3 *Chi. J. Int'l L.* 391 (2002).

¹⁰⁵ Gerber, David J., *The Extraterritorial Application of German Antitrust Law*, 77 *American Journal of International Law* (1983).

law was shown as early as the 1920s with the creation of the World Economic Conference.¹⁰⁶ The project was abruptly dropped due to political and economic problems. The proposal was re-considered and abandoned on several further occasions.

Non-binding multilateralism is known as soft harmonisation.¹⁰⁷ Soft harmonisation revolves around recommendations, best practices and guidelines and can cover both substantive and procedural issues. Soft harmonisation resorts to the power of persuasion rather than hard binding obligations. Legally, this means that countries are neither obliged to subscribe to nor implement the recommendations, guidelines or best practices resulting from the non-binding multilateralism into their domestic legislations. In this respect, soft harmonisation is similar to the term “convergence” which describes the transformation from a state of difference to increasing similarity without binding obligations from a multilateral source.¹⁰⁸

Soft harmonisation was an instant success because countries are more accepting and show less reticence towards it. Despite not having binding legal force, it gained a foothold in the field of competition law. In contrast to hard harmonisation, countries appear more willing to establish common understandings in the field of competition law through consultation and cooperation than through binding obligations.¹⁰⁹ Admittedly, non-binding multilateralism is more flexible and more practical than binding commitments. It is less time-consuming and does not suffer from the long and arduous negotiations that are often linked to binding multilateralism. Consequently, it is also easier to amend and update non-binding commitments. Because of its non-binding character, soft harmonisation does not pose a threat to nations' sovereignty. It appears that soft harmonisation responds well to new competition law jurisdictions' requirement of accepted up-to-date best practices in the field accompanied by a large margin of discretion that national competition authorities could enjoy.¹¹⁰ It was suggested that the fact that the US fully supported this alternative favoured its chance of success.¹¹¹ Nonetheless, soft harmonisation also has its disadvantages. Ironically, its shortcomings are inherent in its principal characteristic which is the lack of binding obligations. Non-binding multilateralism could translate into uncertainty. Soft harmonisation has been justifiably criticised for leaving too much to the discretion of national authorities.¹¹² Furthermore, the language used in the recommendations, guidelines and best practices appears too general and does not provide

¹⁰⁶ League of Nations, *Report and Proceedings of the World Economic Conference* (CEI 46 II: League of Nations Pub, 1927) 146-8.

¹⁰⁷ Wood, Diane P., *International Harmonization of Antitrust Law: The Tortoise or the Hare*, 3 Chi. J. Int'l L. 391 (2002).

¹⁰⁸ Gerber, David J., *The Extraterritorial Application of German Antitrust Law*, 77 American Journal of International Law (1983).

¹⁰⁹ Wood, Diane P., *International Harmonization of Antitrust Law: The Tortoise or the Hare*, 3 Chi. J. Int'l L. 391 (2002).

¹¹⁰ Cheng, Thomas K., *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 Chi. J. Int'l L. (2012).

¹¹¹ Fox, Eleanor M. and Crane, Daniel A., *Global Issues in Antitrust and Competition Law* (West 2010) 505.

¹¹² Wood, Diane P., *International Harmonization of Antitrust Law: The Tortoise or the Hare*, 3 Chi. J. Int'l L. 391 (2002).

sufficient guidance on how best to implement the commitments within domestic competition law regime.¹¹³

Harmonisation of competition laws can occur at three distinct levels: substantive law, procedural requirements, and enforcement practices.¹¹⁴ The harmonisation of substantive law rests on the assumption that economic integration can only occur after member states have adopted competition laws and policies that are generally consistent. It can either be a part of a regional trade agreement or a conditional clause for regional economic formation. An example of a direct and explicit linkage between harmonisation of general competition law standards and economic integration is the EU. In this regard, market integration and competition law harmonisation exist on a relatively parallel track. The structural reorganisation of regional markets is a major objective of regional integration and regional arrangements are aimed at- and have resulted in increased cross-border investment. Accordingly, an obvious target for harmonisation of procedural requirements is in the area of merger control. This can be harmonised by creating parallel procedures, establishing direct enforcement cooperation, or creating a single merger system. Harmonising enforcement practices means coordinating the enforcement of existing competition laws by related national authorities. Enforcement coordination is a necessary complement for substantive law harmonisation in the sense that it could bring about more tangible benefits. The most obvious example of this is the EU's creation of a supranational enforcement authority. The harmonisation of enforcement practices is also attempted in a more limited capacity under cooperation agreements which typically contain four types of cooperation:¹¹⁵

1. Exchanging information and data that might be relevant to the other country's enforcement activities;¹¹⁶
2. Notifying other authorities and consulting with them about areas where enforcement conduct in one country is likely to create friction with another country;¹¹⁷
3. Assisting other enforcement agencies with investigations that those agencies are carrying out in their own territory;¹¹⁸
4. Coordinating parallel investigations into similar conduct.¹¹⁹

¹¹³ Ibid.

¹¹⁴ Cunningham, O. Richard and LaRocca, Anthony J, *Harmonisation of Competition Policies in a Regional Economic Integration*, 27 *Law & Pol'y Int'l Bus.* 879 (1995).

¹¹⁵ Ibid.

¹¹⁶ Agreement between the Government of the United States of America and the Commission of the European Community Regarding the Application of Their Competition Law [1991] art. 3(2).

¹¹⁷ Agreement between the United States of America and Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws [1997] art. II(I).

¹¹⁸ Agreement between the Government of the United States of America and the Commission of the European Community Regarding the Application of Their Competition Law, art. 4(1).

¹¹⁹ Agreement between the United States of America and Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, art. IV(1).

2.2. Regional Competition Law

Regional competition agreements are often entered into by neighbouring countries. They appear in various configurations in both the scope of the arrangement and the institutional features. This section will categorise these agreements according to the degree of harmonisation. The least developed regional agreements are limited to broad and non-binding language with no realistic intention of disciplining anticompetitive conduct. The NAFTA is the best-known agreement in this category. At the opposite end of the spectrum are region-wide common competition regimes that not only impose substantive rules directly on participating states and private undertakings but also establish a supranational authority to enforce those rules. Except for the EU, which still offers an exemplary model, it is rare to find a region with such an advanced regime and most regional cooperation falls somewhere between these extremes.¹²⁰ The EU and the NAFTA, despite being at opposite ends of the spectrum, both enjoy successful harmonisation and convergence within the regional framework; however developing economies' efforts at regionalisation do not yield the same results. This categorisation coincides with the Organisation of Economic Cooperation and Development's (OECD) report in which regional trade agreements are divided into two families: the North American style that focuses more on coordination and cooperation provisions, and the European-style agreements that are oriented towards more substantive rules.¹²¹ The experience of developing economies in regional harmonisation warrant special attention due the disparity between the proposed goal for harmonisation and the actual approach taken to achieve it.

2.2.1. Regional (Preferential) Trade Agreements

“Regional trade agreements seek to reduce obstacles to trade within a specific geographical region.”¹²² Typically, competition law only plays a marginal role in these regional agreements since there is little evidence that competition provisions have been an important focus of negotiations leading to such agreements and they appear not to have played a major role in implementation.¹²³

¹²⁰ Desta, Melaku Geboye, ‘Exemptions from Competition Law in Regional Trade Agreements: A Study Based on Experiences in the Agriculture and Energy Sectors’ in Brusick, Philippe, Alvarez, Ana Maria and Cernat, Lucian (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1 2005).

¹²¹ Solano, Oliver and Sennekamp, Andreas, *Competition Provisions in Regional Trade Agreements* (OECD, COM/DAF/TD(2005)3/FINAL 2006).

¹²² Gerber, David J., *Global Competition: Law, Markets and Globalisation* (Oxford University Press 2010) 110.

¹²³ On regional trade agreements and their values see, Marcos, Francisco, ‘Downloading Competition Law from a Regional Trade Agreement: A Strategy to Introduce Competition Law in Bolivia and Ecuador’ in Fox, Eleanor M. and Sokol, D. Daniel (eds), *Competition Law and Policy in Latin America* (Hart Publishing 2009).

The NAFTA

A prominent regional trade agreement is the NAFTA, a trade bloc comprising the US, Canada and Mexico. A requirement of the NAFTA is that each party adopt or maintain measures to proscribe anticompetitive activity and take appropriate measures against it.¹²⁴ Under this requirement, Mexico was obliged to enact a comprehensive competition law in 1993.¹²⁵ The NAFTA does not contain any substantive rules whether general or specific regarding the field of competition nor does it establish a supranational authority in charge of enforcing competition regulations. It does, however, contain provisions on cooperation and coordination among national competition authorities.¹²⁶ The NAFTA provisions seem to reflect the US's vision of the institution of global competition law as opposed to far-reaching harmonisation with common competition rules and a centralised competition authority. It prefers a more practical approach based on cooperation in the enforcement of domestic competition laws between countries with similar economic, political and legal backgrounds. The NAFTA has established a Working Group to oversee convergence in participatory states.

The NAFTA does not rely on supranational institutions for enforcement since the agreement does not include market integration. It is merely a free trade area. Instead of depending on a centralised institution, the NAFTA calls upon members to consult with one another on the effectiveness of their national competition laws and to cooperate in the enforcement of those laws via mutual legal assistance, notification, consultation, and the exchange of information.¹²⁷ What is interesting in the case of the NAFTA is that despite having a dispute settlement mechanism involving multilateral panels, the competition provisions are expressly excluded from the dispute settlement procedures.¹²⁸ This is evidently a unique feature of competition law provisions in regional trade area agreements.¹²⁹ Consequently, disputes on competition policy between participating parties are settled by informal cooperation¹³⁰ or in rare circumstances, taken to the World Trade Organisation (WTO).¹³¹ "One conclusion is that something is seriously wrong with the competition rules of the NAFTA when the Parties have to resolve their competition-related issues by the dispute procedures of the WTO."¹³² It is precisely this absence of dispute resolution mechanism for competition law matters that contributes to the NAFTA's limited effectiveness. Yet, in spite of their non-binding nature, countries still include competition

¹²⁴ North American Free Trade Agreement [8 December 1993] art. 1501(1).

¹²⁵ Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], as amended, Diario Oficial de la Federación [D.O.] (Mex.) [1992].

¹²⁶ NAFTA, art. 1501(2).

¹²⁷ Ibid, art. 1501.

¹²⁸ Ibid, art. 1501(3).

¹²⁹ Sokol, Daniel D., *Order Without (Enforceable) Law: Why countries Enter into Nonenforceable Competition Policy Chapters in Free Trade Agreements*, 83 Chi.-Kent L. Rev. 231 (2008).

¹³⁰ Jones, Clifford, *Competition Dimensions of NAFTA and the European Union: Semi-Common Competition Policy, Uncommon Rules, and No Common Institutions* (Jean Monnet/Robert Schuman Paper Series, 2006)

¹³¹ WTO Panel Report, *Mexico-Measures Affecting Telecommunications Services* (WT/DS204/R, 2004).

¹³² *Competition Dimensions of NAFTA and the European Union: Semi-Common Competition Policy, Uncommon Rules, and No Common Institutions*.

chapters in regional trade agreements. It was suggested this particular feature contains symbolic value which contain the possibility to lead to a natural improvement in cooperation between national authorities.¹³³

It should be noted that the NAFTA countries' experience in the field of competition law differs from other regional groups. By the time the Agreement came into force, all three members had already enacted domestic competition laws.¹³⁴ Thus the NAFTA only serves to coordinate existing competition law regimes; it is not concerned with implementing competition law. Admittedly, the three regimes do diverge in some aspects. The Mexican law leans more towards economic efficiency and producer welfare; the American law favours consumer welfare while the Canadian law falls somewhere between these.¹³⁵ Nonetheless, this divergence is not significant and does not warrant serious consideration; there are more similarities between the three countries than differences.¹³⁶

The European Free Trade Association (EFTA)

Another notable example of regional trade agreement is the EFTA. It was established as a free trade zone by the *Stockholm Convention*¹³⁷ in 1960 which was later revised by the *Vaduz Convention*.¹³⁸ The original signatory states were Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom. The EFTA was created in response to the EU's progressive move towards integration.¹³⁹ It was essentially established as an alternative for states which disagreed with the integration approach or did not wish to join the EU.¹⁴⁰ Its purpose is to pursue economic objectives notably the operation of free trade between members in industrial products. The *EFTA Convention* contains competition law related provisions, namely, the prohibition of anticompetitive agreement, the prohibition of abuse of dominant position,¹⁴¹ and state aid.¹⁴² The EFTA has undergone various changes in membership: Finland joined as an associate member in 1961 before fully joined in 1981, Iceland joined in 1970, and Lichtenstein in 1991. There

¹³³ Sokol, Daniel D., *Order Without (Enforceable) Law: Why countries Enter into Nonenforceable Competition Policy Chapters in Free Trade Agreements*, 83 Chi.-Kent L. Rev. 231 (2008).

¹³⁴ Steiger, Janet D., *Harmonization of the United States and Mexican Antitrust Law under NAFTA* (ABA Section of Antitrust Law 23 January 1995).

¹³⁵ ABA Section of Antitrust Law, *Report of the Task Force of the ABA Section of Antitrust Law on The Competition Dimension of NAFTA* (1994) 17.

¹³⁶ Steiger, Janet D., *Harmonization of the United States and Mexican Antitrust Law under NAFTA* (ABA Section of Antitrust Law 23 January 1995).

¹³⁷ Convention Establishing the European Free Trade Association [1960].

¹³⁸ Convention Establishing the European Free Trade Association [2013] Consolidated version. [*hereinafter* the EFTA Convention]

¹³⁹ Dedman, Martin J., *The Origins and Development of the European Union 1945-2008* (2nd edn., Routledge 2009), 110.

¹⁴⁰ Blanchet, Thérèse, Piipponen, Risto and Westman-Clément, Maria, *The Agreement on the European Economic Area (EEA) : A Guide to the Free Movement of Goods and Competition Rules* (Clarendon Press 1994) 1.

¹⁴¹ The EFTA Convention, art. 18.

¹⁴² The EFTA Convention, art. 16.

have been some withdrawals as well: Denmark and the UK withdrew in 1973, Portugal in 1986, and finally Austria, Finland, and Sweden in 1995. Current members of the EFTA are Iceland, Liechtenstein, Norway, and Switzerland.

Later in 1992, the *Agreement on the European Economic Area* was signed and came into force on 1 January 1994 uniting the EU members with the EFTA members¹⁴³ with a view to form the European Economic Area (EEA). Most of the EFTA members had already applied to the EU membership by the time the *EEA Agreement* came into effect.¹⁴⁴ Today, the EFTA states party to the *EEA Agreement* are Iceland, Lichtenstein, and Norway. Switzerland, while not part of the EEA, concluded a separate bilateral agreement with the EU. The *EEA Agreement* is a hybrid between a free trade area and an economic integration community.¹⁴⁵ For many of the members, the EFTA was a stepping stone to the membership of the EU and they thus supported the creation of the EEA.¹⁴⁶ The EEA objective is a continuous economic relationship aided by the development of a common set of rules for trade and competition. More specifically, its economic objective is to extend the EU's internal market rules to the EFTA states that are a part of the EEA with the exception of the custom union and common policies in taxation, agriculture, and fishery (although the *EEA Agreement* contains provisions on trade in agricultural and fishery products). The *EEA Agreement* has accepted the EU legislation almost in its entirety in relevant domain including the jurisprudence of the Court of Justice of the European Union (CJEU). Through this document, the process of soft harmonisation between the EU and the EFTA rules is ensured.

Competition rules are considered essential to the successful creation of the EEA¹⁴⁷ and have accordingly been included in the *EEA Agreement*. The *EEA Agreement* contains the prohibition of anticompetitive agreements¹⁴⁸ which mirrors Article 101 of the *TFEU*.¹⁴⁹ Its prohibition of abuse of dominant position¹⁵⁰ reflects Article 102 of the *TFEU*. Together with *Protocol 24*,¹⁵¹ the *EEA Agreement*¹⁵² extend the reach of the EU merger control regime¹⁵³ throughout the EEA. Finally, the *EEA Agreement* also contains the control of

¹⁴³ Agreement on the European Economic Area [1994] OJ L1/3. [*hereinafter* the EEA Agreement]

¹⁴⁴ Tudor, Jarrod, *A Comparison of the Jurisprudence of the ECJ and the EFTA Court on the Free Movement of Goods in the EEA: Is There an Intolerable Separation of Article 34 of the TFEU and Article 11 of the EEA?*, 17 San Diego Int'l L.J. 75 (2015).

¹⁴⁵ Brown, Jeremy and Robert, Gavin, *The European Economic Area: How Important Is It?*, 14 E.I.P.R. 379 (1992).

¹⁴⁶ Dedman, Martin J., *The Origins and Development of the European Union 1945-2008* (2nd edn, Routledge 2009), 118.

¹⁴⁷ Brown, Jeremy and Robert, Gavin, *The European Economic Area: How Important Is It?*, 14 E.I.P.R. 379 (1992).

¹⁴⁸ The EEA Agreement, art. 53.

¹⁴⁹ Treaty on the Functioning of the European Union [2008] Consolidated version 2012 OJ C326. [*hereinafter* TFEU]

¹⁵⁰ The EEA Agreement, art. 54.

¹⁵¹ Protocol 24 to the EEA Agreement on Cooperation in the Field of Control of Concentrations.

¹⁵² The EEA Agreement, art. 57.

¹⁵³ Council Regulation (EC) No 4064/89 on the Control of Concentrations between Undertakings [1989].

state aid.¹⁵⁴ The EEA rules apply only when a conduct or agreement is likely to have an effect on trade between the EEA contracting parties¹⁵⁵ or merger realised in the territory of the EFTA states.¹⁵⁶

A number of new institutions were created as a result of the *EEA Agreement*. Of particular importance to the competition law domain is the creation of the EFTA Surveillance Authority (ESA) and the EFTA Court.¹⁵⁷ Here again, both supranational institutions are modelled after the EU institutions namely the EU Commission and the CJEU. The ESA is responsible for the investigation and the enforcement of the competition rules in its area with similar powers to the EU Commission.¹⁵⁸ The decisions of the ESA are subject to the judicial review handled by the EFTA Court. The Court, composed of seven judges, is capable of handling disputes between the ESA and member states, hearing appeal concerning decisions of the ESA in the field of competition, the settlement of disputes between EFTA states, and giving advisory opinions on the interpretation of the *EEA Agreement*.

“A two pillar system”¹⁵⁹ was conceived to enforce the EEA competition rules in which the EU institutions are kept separated from those of the EFTA yet both institutions have the responsibility of maintaining the EEA system. This mechanism is implemented in pursuance of the promotion of the harmonisation of the EEA and the EU law. In this regard, both the EU Commission and the ESA function as competition enforcement bodies of the *EEA Agreement*. The choice of this system was governed by the idea that effective implementation of the substantive EEA competition rules had to be ensured in the whole of the territory covered by the *EEA Agreement*.¹⁶⁰ The two pillar system is approved by the CJEU¹⁶¹ and later by the EFTA Court.¹⁶²

The *EEA Agreement* provides certain mechanisms to ascertain harmonisation between contracting EFTA states and the EU internal market structure. Firstly, the EU Commission and the ESA are under obligation to cooperate.¹⁶³ Secondly, there is a certain regard of supremacy benefitting the CJEU since the ESA and the EFTA Court must decide in

¹⁵⁴ The EEA Agreement, art. 61.

¹⁵⁵ The EEA Agreement, arts. 53(1) & 54(1).

¹⁵⁶ The EEA Agreement, art. 57(2).

¹⁵⁷ The EEA Agreement, art. 108. Read in light of Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L344, 3.

¹⁵⁸ Protocol 21 to the EEA Agreement on the Implementation of Competition Rules Applicable to Undertakings.

¹⁵⁹ Diem, Andreas, *EEA Competition Law*, 15 E.C.L.R. 263 (1994).

¹⁶⁰ Federlin, Christine, *Enforcement of the European Economic Area Competition Rules (EEA): Division of Competence and Co-operation between the European Commission*, 4 Int'l Bus. L.J. 441 (1994).

¹⁶¹ *Opinion Pursuant to the Second Subparagraph of Article 228(1) of the EEC Treaty* (Opinion 1/92) [1992] ECR I-2821, para. 3.

¹⁶² *L'Oréal Norge AS v Aarskog Per AS and Others and Smart Club Norge* (Cases E-9/07 and E-10/07) [2008] EFTA Ct. Rep. 258, para. 28.

¹⁶³ Protocol 24 to the EEA Agreement on Cooperation in the Field of Control of Concentrations, art. 1(2).

accordance with the rulings of the CJEU.¹⁶⁴ If disputes were to arise between the EFTA Court and the CJEU relative to the interpretation of the *EEA Agreement*, the EEA Joint Committee, which is responsible of the management of the *Agreement*, will intervene in attempt to reach an agreement.¹⁶⁵ Ultimately, if an agreement cannot be reached after three months, the CJEU can give a ruling at the request of the contracting parties to the dispute. In practice, the EFTA Court generally follows the CJEU decisions.¹⁶⁶ Lastly, in the case of disparity between national laws and the EEA rules, the latter would prevail.¹⁶⁷ This particular mechanism is in place to guarantee homogeneity of the EEA since the *EEA Agreement* lacks legislative power and its provisions cannot be directly applied but must be transposed into national law by contracting members. The harmonisation mechanism is complemented by the EFTA states' eagerness to incorporate EU internal market legislation into their national regimes.¹⁶⁸

Both the mechanisms and the members' eagerness contribute to a sufficient level of effectiveness attained by the EEA. However, there have been concerns that the EEA's harmonisation approach only assists countries in improving their legal qualifications to the accession to the EU while doing little to improve the economic qualifications.¹⁶⁹ It inevitably calls into question the level of harmonisation actually achieved through the EEA. The EFTA's standing as a standalone free trade area is also ambiguous since its effectiveness is entirely dependent to that of the EU as a result of the *EEA Agreement*. In this regard, the EFTA wears an appearance of a precursor to the full membership of the EU.¹⁷⁰ Historically, many members left the EFTA to join the EU: UK, Denmark, Portugal, Austria, Sweden, and Finland. Nonetheless, it is undeniable that the *EEA Agreement* introduced important changes to the EFTA states considering that at the time of its conclusion many countries did not enact national competition law or it was rarely enforced.¹⁷¹ Its usefulness and effectiveness regarding harmonisation should not be easily ignored.

¹⁶⁴ Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L344, art. 3(2).

¹⁶⁵ The EEA Agreement, art. 111.

¹⁶⁶ Directorate-General for Internal Policies, *Internal Market beyond the EU: EEA and Switzerland* (IP/A/IMCO/NT/2009-13, 2009) 30.

¹⁶⁷ Protocol 35 to the EEA Agreement on the implementation of EEA Rules.

¹⁶⁸ EFTA Surveillance Authority, *36th Internal Market Scoreboard of the EFTA States of the European Economic Area* (October 2015). (The latest average transposition deficit of the three EFTA States is only 1.1%. In comparison, the average transposition deficit of the EU members is 0.7%)

¹⁶⁹ Evans, Andrew, *Voluntary Harmonisation in Integration between the European Community and Eastern Europe*, 22 E.L. Rev. 201 (1997).

¹⁷⁰ Brown, Jeremy and Robert, Gavin, *The European Economic Area: How Important Is It?*, 14 E.I.P.R. 379 (1992).

¹⁷¹ *EEA Competition Law*, 14 E.C.L.R. Supp. 1 (1993).

2.2.2. The European Integration Model

The EU is testament to the effectiveness of regional competition law. It features at the most advanced end of the spectrum with its region-wide common substantive and procedural competition rules complemented by a supranational competition authority enforcing those rules. This high degree of harmonisation reflects a correspondingly high level of economic integration.¹⁷² The EU's origin dates to the *Treaty Establishing the European Coal and Steel Community*¹⁷³ before the establishment of the European Economic Community in 1957.¹⁷⁴ The initial denomination of the European Economic Community was replaced by the European Community by the *Treaty on European Union* in 1992¹⁷⁵ which in turn was incorporated into the European Union by the *Treaty of Lisbon* in 2009.¹⁷⁶ Later, the *Treaty of Lisbon* renamed the *Treaty of Rome* as the *Treaty on the Functioning of the European Union*. It also renumbered the Articles and renamed some institutions. In this thesis, the names and numbers used those stated in the *TFEU*. One of the principal objectives of the formation of the EU was the establishment of an internal market with the free movement of goods, capital, services and people.¹⁷⁷ In this regard, the principle of free competition was established early¹⁷⁸ to assist with the unification of a competitive single economic area.¹⁷⁹ Competition law was recognised as fundamental to the goal of integration.¹⁸⁰ Gerber agreed that competition law has a pivotal role in the process of integration and added that it is the integration aspect that has made the EU competition law special.¹⁸¹

The EU has a comprehensive body of substantive provisions regarding competition rules. The principal EU competition rules can now be found in Articles 101 and 102 of the *TFEU*¹⁸² prohibiting anticompetitive agreements which have as their object or effect the prevention, restriction or distortion of competition within the Internal Market and abuse of dominant position.¹⁸³ The competition rules are affirmed as essential for the accomplishment of the task entrusted to the EU and in particular, the functioning of the Internal Market.¹⁸⁴ The provisions of merger control are not included in the Treaty but

¹⁷² Cunningham, O. Richard and LaRocca, Anthony J, *Harmonisation of Competition Policies in a Regional Economic Integration*, 27 *Law & Pol'y Int'l Bus.* 879 (1995).

¹⁷³ Treaty Establishing the European Coal and Steel Community [1951].(It expired on 23 July 2002)

¹⁷⁴ Treaty Establishing the European Economic Community [1957] OJ L1/1. [*hereinafter* Treaty of Rome]

¹⁷⁵ Treaty on European Union [1992] Consolidated version 2012 OJ C 326. [*hereinafter* Treaty of Maastricht]

¹⁷⁶ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306. [*hereinafter* Treaty of Lisbon]

¹⁷⁷ Originally the Common Market before the change to Internal Market in 1992 with the adoption of the Treaty of Maastricht.

¹⁷⁸ Treaty of Rome, art. 2.

¹⁷⁹ Rodger, Barry J., *Competition Law and Policy in the EC and UK* (3rd edn., Cavendish 2004) 20.

¹⁸⁰ McGowan, Lee and Wilks, Stephen, *The First Supranational Policy in the European Union: Competition Policy*, 28 *European Journal of Political Research* 141 (1995).

¹⁸¹ Gerber, David J., *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford University Press 2001) 334.

¹⁸² First enacted as Articles 85 and 86 of the Treaty of Rome.

¹⁸³ TFEU.

¹⁸⁴ *Eco Swiss China Time Ltd v. Benetton International NV* (Case 126/97) [2000] ECR I-3055 para. 36.

instead were introduced by the EC *Regulation 4064/89*.¹⁸⁵ The current merger regulation is *Regulation 139/2004*.¹⁸⁶

The substantive provisions are complemented by regional and national institutions in the enforcement of the regional competition rules. Given the novelty and almost revolutionary concept of the EU competition law, the creation of a new supranational institution was considered unavoidable in order to establish a proper culture of competition.¹⁸⁷ The EU has exclusive competence in the establishment of the competition rules necessary for the functioning of the Internal Market.¹⁸⁸ Accordingly, the initial responsibility of the enforcement of competition rules is shouldered by the European Commission.¹⁸⁹ The Commission is equipped with extensive powers from investigating to imposing penalties on relevant undertakings or member states.¹⁹⁰ It appears that a centralised institution is in the best position to establish uniform regional competition law among member states as well as ensure market integration.¹⁹¹ Moreover, the Commission is not restrained by a myopic state-centric vision. The principle of subsidiarity is that the EU shall only act of and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states in areas which do not fall within its exclusive competence.¹⁹² Later, and in accordance with this principle, a decisive change was introduced when *Regulation 1/2003* empowered national competition authorities and national courts with the direct application of the EU competition rules.¹⁹³ The Commission, consequently, concentrates on serious competition issues with an intra-regional dimension.

Since the *Treaty of Nice*¹⁹⁴ the judicial review body of first instance of the Commission decisions in competition cases is the General Court of the European Union (GCEU). Its role is the assessment of the legality of the decision in light of the *TFEU*. The Court of Justice of the European Union (CJEU),¹⁹⁵ in turn, hears appeals of the GCEU decisions strictly on points of law¹⁹⁶ and preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or

¹⁸⁵ Council Regulation (EC) No 4064/89 on the Control of Concentrations between Undertakings [1989].

¹⁸⁶ Council Regulation (EC) No 139/2004 on the Control of Concentrations between Undertakings [2004].

[Hereinafter EUMR]

¹⁸⁷ Forrester, Ian and Norall, Christopher, *The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied*, 21 Common Market L. Rev. 11 (1984).

¹⁸⁸ TFEU, 3(1)(b)

¹⁸⁹ Council Regulation (EEC) No 17/62 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13.

¹⁹⁰ Ibid.

¹⁹¹ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010) 169-170.

¹⁹² TFEU, 5(3).

¹⁹³ Council Regulation (EC) No 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1.

¹⁹⁴ Treaty of Nice Amending the Treaty on European Union [2001] OJ C80.

¹⁹⁵ Informally known as the ECJ.

¹⁹⁶ See, in particular, *John Deere v. Commission* (Case 7/95 P) [1998] ECR I-3111, paras. 17-22; *General Motors BV v. Commission* (Case 551/03 P) [2006] ECR I-3173, paras 50-51.

agencies of the Union from national courts.¹⁹⁷ The European Competition Network (ECN), established by *Regulation 1/2003*,¹⁹⁸ further strengthens the enforcement of EU competition law by offering a forum where the Commission and national competition authorities meet to discuss their common interests, coordinate their enforcement efforts as well as ensure an efficient allocation of resources. The *Commission Notice of 2004* helps regulate the issue of case allocation between members and the Commission or among members.¹⁹⁹ The ECN is a valuable platform of coordination and cooperation that considers all of the twenty-eight member states²⁰⁰. It has systems of competition law that are largely modelled after the EU competition law.²⁰¹

Dabbah boldly proclaimed that there has been no field in which European ideas have been more important or influential, within the EU or internationally, than the field of competition law.²⁰² Indeed, it is likely that the effectiveness of the EU competition law regime within its jurisdiction helps support the recognition of its distinctiveness beyond the EU. The EU competition law owes its effectiveness to the robust substantive provisions coupled with effective enforcement attempts by both national and regional competition authorities. Moreover, its continued enforcement differentiates it from other regional competition law regimes. It is thus not surprising that the EU is considered to be the laboratory of regional competition law.²⁰³ The EU's success has inspired policymakers from developing economies to seek insight and guidance from the EU when deciding to adopt or adapt existing competition laws.²⁰⁴ In this respect, the EU's influence can be felt when other legislatures and competition authorities use the EU model as a reference for the enactment and interpretation of national competition laws. Furthermore, the EU is actively seeking to establish the EU model on the global stage.²⁰⁵ Such was the case of the Economic Partnership with the CARICOM,²⁰⁶ whereby member states are obliged to establish a CARICOM Competition Commission.²⁰⁷ It is possible that the active involvement of the EU is motivated by the perception that regional competition law in

¹⁹⁷ TFEU, art. 267.

¹⁹⁸ Council Regulation (EC) No. 1/2003, O.J. L. 1 [2003] 15.

¹⁹⁹ Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101.

²⁰⁰ European Union, *EU Member Countries* <<http://europa.eu/about-eu/countries/member-countries/>>.

²⁰¹ Whish, Richard and Bailey, David, *Competition Law* (7th edn., Oxford University Press 2012) 75.

²⁰² Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010) 160.

²⁰³ Fox, Eleanor M. and Crane, Daniel A., *Global Issues in Antitrust and Competition Law* (West 2010).

²⁰⁴ Gal, Michal S., *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 *Fordham Int'l L.J.* 1 (2009).

²⁰⁵ Botta, Marco, 'Competition Policy: The EU and Global Networks' in Falkner, Gerda and Müller, Patrick (eds), *EU Policies in a Global Perspective: Shaping or Taking International Regimes?* (Routledge 2014).

²⁰⁶ The Caribbean Community and Common Market (CARICOM) consists largely of the former British West Indian colonies and regroups sixteen Caribbean nations. It was established by the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy [2001].

²⁰⁷ Economic Partnership Agreement between the CARICOM States and the European Community and its Member States [30 September 2008] art. 125(1).

developing economies is for promoting sustainable development.²⁰⁸ The EU also plays an active role in many international organisations such as the United Nations Conference on Trade and Development (UNCTAD), the OECD, and the International Competition Network (ICN).²⁰⁹ For instance, *The United Nations Set of Principles and Rules on Competition* is heavily influenced by the EU model.²¹⁰

The task of promoting the EU model does have its challenges. It should be remembered that the unique characteristic of the EU competition law is its integration of the regional organisation. In this respect, competition law is simply another means, regardless of how pivotal, of eliminating the barriers between member states and helping to establish the Internal Market. Nonetheless, Botta positively concluded that the EU would continue to actively export its competition law model through its network of bilateral trade and association agreements.²¹¹

2.2.3. Developing Jurisdictions' Experiences with Regional Competition Law

Small and developing economies could gain special benefits from the convergence efforts of competition laws.²¹² Because developing economies tend to have scarce resources and little experience in competition law, they are rarely in a position to make credible threats to deter the anticompetitive conduct of foreign companies. This problem could perhaps be resolved if they pooled their resources at a regional level. Moreover, regional cooperation could enlarge the scope of competence in the enforcement of competition law since restraints on competition would no longer be restricted to one region; it would expand across borders. Finally, regional cooperation could provide a forum for developing economies to analyse Western experiences and assess the merits of their proposals regarding global competition law. In light of its potential, there have been many attempts to regionalise small and developing economies. Although there are many possible configurations, Drexl identified three patterns in developing economies' approaches to regional competition law: a centralised approach, a convergence/soft harmonisation

²⁰⁸ Drexl, Josef, 'Economic Integration and Competition Law in Developing Countries' in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²⁰⁹ Botta, Marco, 'Competition Policy: The EU and Global Networks' in Falkner, Gerda and Müller, Patrick (eds), *EU Policies in a Global Perspective: Shaping or Taking International Regimes?* (Routledge 2014).

²¹⁰ UNCTAD, *The United Nations Set of Principles and Rules on Competition* (TD/RBP/CONF/10/Rev.2, 2000). [The anticompetitive conducts are defined in a manner which resemble the terms used in the EU competition law]

²¹¹ Botta, Marco, 'Competition Policy: The EU and Global Networks' in Falkner, Gerda and Müller, Patrick (eds), *EU Policies in a Global Perspective: Shaping or Taking International Regimes?* (Routledge 2014).

²¹² Gal, Michal S., *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 *Fordham Int'l L.J.* 1 (2009).

approach, and a “download” approach.²¹³ He further advised that the centralised approach is unsuitable for developing economies.

2.2.3.1. The Centralised Approach

The WAEMU

The WAEMU could serve as a cautionary tale for overly ambitious attempts at regional integration.²¹⁴ Its integration process began with the adoption of a common currency, the CFA franc, under the auspices of the Monetary Union of West Africa (UMOA)²¹⁵ and signed in 1994 by seven West African countries: Benin, Burkina Faso, Côte d’Ivoire, Mali, Niger, Senegal and Togo. Guinea-Bissau was the last to join in 1997. The *Treaty of Dakar*²¹⁶ would later be introduced to transform the existing monetary union into full economic integration with the creation of a common market under the auspice of the WAEMU.

The *Treaty of Dakar* institutes common competition law: the prohibition of anticompetitive agreements with the object or effect of restraining or distorting competition within the Union, abuse of dominant position in the common market or in a significant party of the common market, and state aid.²¹⁷ The WAEMU Council of Ministers, a political organ with national representatives, has exclusive competence to legislate on these matters²¹⁸ consequently reducing member states’ competence to merger control and unfair competition. The *Treaty of Dakar* also established a supranational enforcement organ called the WAEMU Competition Commission with a mandate to enforce regional competition law and cooperate with member states in the enforcement of the law.²¹⁹ The Commission can conduct independent investigations into alleged anticompetitive conduct without a request from member countries or affected undertakings. The *Treaty of Dakar* established the principle of direct applicability and supremacy of the Union’s regulations.²²⁰ In addition, the WAEMU Court of Justice ambitiously stated that the WAEMU competition law had supremacy over member states’ competition laws since the WAEMU’s law purports to be centralising.²²¹ The Court of Justice further refrained from identifying the limit of the applicability of regional competition law, thus suggesting that regional competition law applies even when there is only a small element of intra-

²¹³ Drexl, Josef, ‘Economic Integration and Competition Law in Developing Countries’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²¹⁴ Weick, Daniel P., *Competition Law and Policy in Senegal: A Cautionary Tale for Regional Integration?*, 33 *World Competition* 521 (2010).

²¹⁵ *Traité de l’Union Monétaire Ouest-Africaine* [14 November 1973].

²¹⁶ *Traité Modifié de l’Union Économique et Monétaire Ouest Africaine* [2003].

²¹⁷ *Ibid.*, art. 88.

²¹⁸ *Ibid.*, art. 89.

²¹⁹ *Ibid.*, art. 90.

²²⁰ *Ibid.*, art. 43.

²²¹ *Advisory Opinion No. 003/2000* [2000] WAEMU Court of Justice

community market and is not limited to the effect on trade between member states. It follows that the Commission's exclusive enforcement power is extended accordingly. It is not surprising that the Court's opinion was heavily criticised for its deviation from the Treaty's intent. It was argued that the *Treaty of Dakar* merely created common substantive rules and entrusted the Council of Ministers to direct the Commission in its competition-related enforcement.²²² It did not create an exclusive community regulatory authority that would supplant the national authority. In light of the Court's interpretation, Senegal, a member country with the most experience in competition law enforcement,²²³ was forced to withdraw enforcement of its own competition law to make room for the WAEMU even though the latter's credibility and efficiency had not been affirmed.²²⁴ Also of concern is the well-documented fact that the Commission's resources are extremely limited.²²⁵ Not only has the Court succeeded in alienating an important member with a reliable competition regime but local problems would not be addressed if the national authority had to defer to and await the enforcement of a supranational body.²²⁶ Regardless of the criticism and discontent expressed, the interpretation of the Court has been upheld by members who have refrained from implementing their domestic competition laws in favour of referring cases to the WAEMU Commission.²²⁷ National competition authorities' competence is thus limited to unfair competition, price regulation and merger control. Consequently, national authorities have creatively enlarged the scope of application of those provisions.²²⁸ However, member states may still participate in the regional decision-making process through the Advisory Committee on Competition, which is based on the European Competition Network (ECN) that can give opinions on pending cases. While the Advisory Committee's opinion is not binding, it has been observed that the Commission generally follows it.²²⁹

²²² Weick, Daniel P., *Competition Law and Policy in Senegal: A Cautionary Tale for Regional Integration?*, 33 *World Competition* 521 (2010).

²²³ Senegal has begun its competition law enforcement since the enactment of its competition law in 1994, see, Loi n° 94-63 du 22 août 1994 sur les Prix, la Concurrence et le Contentieux Economique.

²²⁴ Fox, Eleanor M. and Crane, Daniel A., *Global Issues in Antitrust and Competition Law* (West 2010).

²²⁵ Bakhoun, Mor and Molestina, Julia, 'Institutional Coherence and Effectiveness of a Regional Competition Policy: the Case of the West African Economic and Monetary Union (WAEMU)' in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²²⁶ Fox, Eleanor M., 'Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries' in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²²⁷ Weick, Daniel P., *Competition Law and Policy in Senegal: A Cautionary Tale for Regional Integration?*, 33 *World Competition* 521 (2010).

²²⁸ UNCTAD, *Voluntary Peer Review of Competition Policies of WAEMU, Benin and Senegal* (UNCTAD/DITC/CLP/2007/1, 2007).

²²⁹ Bakhoun, Mor and Molestina, Julia, 'Institutional Coherence and Effectiveness of a Regional Competition Policy: the Case of the West African Economic and Monetary Union (WAEMU)' in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

Despite being hailed as “the most successful of all the regional agreements [in developing jurisdictions] in terms of enforcement,”²³⁰ in reality the WAEMU’s competition law regime’s effectiveness is limited by its over-centralised enforcement as previously demonstrated. The *UNCTAD Peer Review Report* suggested a reallocation of competence whereby national competition authorities can conduct the initial investigation, leaving the Commission to make the final decision.²³¹ Such restructuring, while not ideal since the principle of subsidiarity comparable to that of the EU would be more appropriate, would undoubtedly reconnect national competition authorities in the regional structure as well as help the WAEMU gain from the experiences of more established national authorities.

The COMESA

“To date, the COMESA remains one of the most successful regional economic cooperation and integration groups in Africa.”²³² In comparison to the experience of the WAEMU, the COMESA experience with regional competition law appears to be more measured.

In 1993, the *COMESA Treaty*²³³ was signed to replace the *Preferential Trade Area Treaty*.²³⁴ This sub-regional organisation has a large membership comprising of a block of the EAC and the SADC. The COMESA was designed to provide economic integration at community level with competition law as one of the core economic tools. The *COMESA Treaty* provides some elements of competition law, namely prohibitions of collusion and state aid control.²³⁵ At the same time, the Treaty also encourages member states to adopt and enforce their own domestic competition laws. When the Treaty was adopted, some member states had already enacted national competition laws but the laws were deemed inadequate.²³⁶ In this regard, regional competition law is necessary in order to assure harmonisation and consistency in the enforcement of the law.

The *COMESA Competition Regulations* would later come to complement regional competition law inaugurated by the *COMESA Treaty*. They prohibit anticompetitive agreements, abuse of dominant position, cartel arrangements, and merger control.²³⁷ They also establish the COMESA Competition Commission as a corporate body capable of

²³⁰ Heimler, Alberto and Jenny, Frédéric, ‘Regional Agreements’ in Lewis, David (ed), *Building New Competition Law Regimes* (Edward Elgar Publishing 2013).

²³¹ *Voluntary Peer Review of Competition Policies of WAEMU, Benin and Senegal*

²³² Lipimile, George K. and Gachuri, Elizabeth, ‘Allocation of Competences Between National and Regional Competition Authorities: The Case of COMESA’ in Brusick, Philippe, Alvarez, Ana Maria and Cernat, Lucian (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1 2005).

²³³ Treaty Establishing the Common Market for Eastern and Southern Africa [1993]. [*hereinafter* COMESA Treaty]

²³⁴ The Treaty Establishing the Preferential Trade Area for Eastern and Southern Africa [1981].

²³⁵ COMESA Treaty, arts. 51 & 52.

²³⁶ Lipimile, George K., ‘The COMESA Regional Competition Regulations’ in Drexler, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²³⁷ COMESA Competition Regulations [2004], arts. 16, 18, 19 & 24. [*hereinafter* COMESA Regulations]

enforcing regional competition law.²³⁸ The Commission has the power to monitor and investigate anticompetitive behaviours, mediate disputes between member states concerning anticompetitive conduct and coordinate with national competition authorities in the enforcement of regional competition law within the regional block.²³⁹ It can only intervene when there is an effect on trade between member states. The Commission can also initiate an investigation on its own without waiting for notification or a request from member states. The decisions of the Commission can be appealed to the Board of Commissioners.²⁴⁰ In turn, the latter's decision can be heard by the COMESA Court of Justice that can conduct a judicial review of the acts of all COMESA institutions.²⁴¹

Unlike the WAEMU and more like the experience of the EU, the principle of subsidiarity applies in this case. The COMESA Commission shares jurisdiction of regional competition law with national competition authorities with the Commission having supremacy in case of conflicts.²⁴² Members are required to create conditions conducive to achieving the aims of the common market and the implementation of the *COMESA Treaty* and to refrain from undermining these aims. With a comprehensive substantive provisions complemented by enforcement by both national and regional competition authorities, the COMESA's attempt at regional competition law has all the necessary elements to achieve effectiveness.

2.2.3.2. The Harmonisation Approach

The MERCOSUR was founded in 1991 by the *Treaty of Asunción*.²⁴³ It consists of four sovereign countries: Argentina, Brazil, Paraguay, Venezuela and Uruguay. Bolivia, Chile, Columbia, Ecuador and Peru are associate member states. The MERCOSUR's main objective is to promote free trade and free movement of people, goods and currency.²⁴⁴ In light of this objective, it is necessary for member states "to harmonise their legislation in the relevant areas in order to strengthen the integration process."²⁴⁵ The field of competition law was regarded as a necessary step towards regional integration and attempts were made to harmonise members' different domestic competition laws and policies. However, it was not until 1996 when the *Fortaleza Protocol*²⁴⁶ was signed that an ambitious set of guidelines to establish a harmonised competition policy was adopted. Among other institutional innovations, the *Fortaleza Protocol* requires all members to establish national competition laws that apply to all sectors of the economy, and an

²³⁸ Ibid, art. 6.

²³⁹ Ibid, art. 7.

²⁴⁰ Ibid, art. 12.

²⁴¹ Ibid, art. 19.

²⁴² COMESA Treaty, art. 5(2).

²⁴³ Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (MERCOSUR) [1991]. [*hereinafter* Treaty of Asunción].

²⁴⁴ Ibid, art. 1.

²⁴⁵ Ibid.

²⁴⁶ The Protocolo de Defesa da Concorrência no Mercosul, Decision 18/96 [1996]. [*hereinafter* the Fortaleza Protocol]

autonomous competition agency capable of its enforcement. For the purpose of creating a common competition policy, the *Fortaleza Protocol* advocates greater harmonisation of domestic competition laws in the area of anticompetitive conduct and merger controls. This measure was of crucial importance in light of member states' frequent adoption of anti-dumping measures against each other which consequently impeded trade within the community.²⁴⁷

The MERCOSUR Trade Commission, composed of four members and four alternates from each member state²⁴⁸ and the Committee for the Defence of Competition, consisted of national competition authorities, are the two organs in charge of monitoring the enforcement of the *Fortaleza Protocol*.²⁴⁹ Both organs are not supranational but intergovernmental bodies. The Committee for the Defence of Competition handles the investigation of cross-border competition cases at the request of member states in cooperation with the national competition authorities of the state in which the infringing party is domiciled.²⁵⁰ In contrast, competition issues with no regional element fall exclusively within the jurisdiction of member states.²⁵¹ The Committee recommends sanctions or any other appropriate measures to the Trade Commission if the infringement has MERCOSUR implications.²⁵² It cannot impose sanctions or measures by its own. The Trade Commission then, taking into account the recommendation of the Committee, adopts a Directive applying sanctions or other enforcement measures.²⁵³ The national authorities of the defendant's domicile are under obligation to apply this Directive. In this regard, the Trade Commission is the sole organ with adjudicating power relative to cross-border competition issues among member states. However, its power is only indirectly since it requires actual enforcement from national authorities. While it is true that both the Trade Commission and the Committee for the Defence of Competition are composed of representative from the member states, the former is awarded a better status since it is an intergovernmental organ with decision making power within the MERCOSUR²⁵⁴ and can thus be entrusted with adopting Directives applying enforcement measures.

Following the MERCOSUR philosophy, the *Fortaleza Protocol* did not create any supranational institution. Consequently, the effectiveness of the regional competition regime relies solely on the national competition authorities' power of enforcement.²⁵⁵ In

²⁴⁷ Jenny, Frédéric and Horna, Pierre M., 'Modernization of the European System of Competition Law Enforcement: Lessons for Other Regional Groupings' in Brusick, Philippe, Alvarez, Ana Maria and Cernat, Lucian (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1 2005).

²⁴⁸ Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR [1994] [*hereinafter* Protocol of Ouro Preto], art. 17.

²⁴⁹ Fortaleza Protocol, art. 8.

²⁵⁰ *Ibid*, art. 10.

²⁵¹ *Ibid*, art. 3.

²⁵² *Ibid*, art.19.

²⁵³ *Ibid*, art. 20.

²⁵⁴ Protocol of Ouro Preto, art. 2.

²⁵⁵ De Araújo, José Tavares, Jr. and Tineo, Louis, *Harmonization of Competition Policies among MERCOSUR Countries*, 24 *Brook. J. Int'l L.* 441 (1998).

theory, the absence of a centralised institution does not necessarily translate to ineffectiveness in competition law regime provided that national competition authorities are capable of fulfilling in the role of regional enforcement. Nonetheless, this is not the case for the MERCOSUR.²⁵⁶ Consequently, the MERCOSUR's ambitious policy of economic integration has had limited success. Another contributing factor to this limitation is the economic instability of member states.²⁵⁷ The unequal development of members is also an important factor. Some members, namely Paraguay and Uruguay, lack experience and expertise in the field of competition law enforcement.²⁵⁸ Moreover, members are also resistant to anti-dumping and state aid control provisions in a perceived reaction to Brazil's trade dominance in the region.²⁵⁹

2.2.3.3. The “Download”²⁶⁰ Approach

The term “download” approach refers to the process of transferring supranational rules from a regional institution directly into national norms. This feature is unique to the Andean Community.

The Andean Community was created in 1969 by the *Cartagena Agreement*²⁶¹ originally as a free trade area, a custom union with common external tariffs and trade policy. The Andean Community achieved the elimination of tariffs in 1993.²⁶² It has undergone some changes in membership and the current members are Bolivia, Columbia, Ecuador and Peru.²⁶³ The *Cartagena Agreement* simply mandates member states to adopt regulations dealing with restrictive business practices without any explicit competition provisions. It was *Decision 285*²⁶⁴ that established substantive regulations and supranational authority in the field of competition law in intra-regional cases. It includes provisions on collusion and the abuse of dominant position. The Board of Commission, established by the *Cartagena Agreement*, is in charge of overseeing the enforcement of *Decision 285*. At the request of

²⁵⁶ Papadopoulos, Anestis S., *The International Dimension of EU Competition Law and Policy* (Cambridge University Press 2010) 197.

²⁵⁷ De Azevedo, André Filipe Zago, *MERCOSUR : Ambitious Policies, Poor Practices*, 24 *Brazilian J. of Pol. Econ.* 96 (2004).

²⁵⁸ Jenny, Frédéric and Horna, Pierre M., ‘Modernization of the European System of Competition Law Enforcement: Lessons for Other Regional Groupings’ in Brusick, Philippe, Alvarez, Ana Maria and Cernat, Lucian (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1 2005).

²⁵⁹ *Ibid.*

²⁶⁰ Marcos, Francisco, ‘Downloading Competition Law from a Regional Trade Agreement: A Strategy to Introduce Competition Law in Bolivia and Ecuador’ in Fox, Eleanor M. and Sokol, D. Daniel (eds), *Competition Law and Policy in Latin America* (Hart Publishing 2009).

²⁶¹ Andean Subregional Integration Agreement [1969]. [*hereinafter* Cartagena Agreement].

²⁶² Oliveira, Gesner, *Competition Policy in Brazil and MERCOSUR: Aspect of the Recent Experience*, 24 *Brook. J. Int'l L.* 465 (1998).

²⁶³ For general information on the Andean Community, see, Andean Community, *What is CAN?* <<http://www.comunidadandina.org/Seccion.aspx?id=189&tipo=QU&title=somos-comunidad-andina>>.

²⁶⁴ *Decision 285 Concerning Rules and Regulations for Preventing or Correcting Distortions in Competition Caused by Practices that Restrict Free Competition* (Commission of the Cartagena Agreement).

member countries or affected private parties, the Board will conduct investigations and authorise countries to impose corrective measures. It cannot impose sanctions directly on undertakings. Due to the restriction on the power of the competition authority, no anticompetitive practices were detected nor sanctioned under this rule.²⁶⁵ It was not until 2005, with the introduction of *Decision 608*²⁶⁶, that the Andean Community gained a more effective regional competition regime. *Decision 608* forbids agreements and collusion that restrict competition as well as the abuse of dominant position by undertakings that may affect trade among member states. It directly addresses the weakness of *Decision 285* by, among others, giving enforcement power to the General Secretariat in cross-border cases as well as the power to directly impose sanctions on undertakings. Addressing the issue of absence of comprehensive competition law in certain member states, it allows members to directly apply the Community's competition law regime – hence the denomination “download” approach. Member states are to refrain from adopting rules that contradict the aims or the Community law.²⁶⁷ Furthermore, the Andean Community has also established an Advisory Committee for the Protection of Competition, composed of representatives of national authorities, to facilitate the exchange of information between member states.

The justification of the download approach is to allow states without national competition law to provisionally use supranational rules until the adoption of comprehensive domestic competition law. This method should help circumvent traditional challenges, namely resource restrictions and political and institutional obstacles, when adopting new competition rules and building a competition culture. On the other hand, by avoiding addressing these challenges, the download approach would inevitably lead to the implementation of supranational rules without the necessary support of the local context. Another difficulty resides in the interpretation of *Decision 608* because its language is unclear regarding the extent of the flexibility given to members when downloading the Andean Community's competition rules. It follows that the interesting download approach to regional harmonisation may only obtain minimal effectiveness in the long run since it only allows temporary solution to use regional competition rules without aiding the actual harmonisation process within members' regimes.

2.3. Special Considerations for Developing Jurisdictions' Regional Harmonisation of Competition Law

Developing economies often face unique issues in enforcing competition law due to their natural inclination for accommodating anticompetitive practices.²⁶⁸ Their low level of

²⁶⁵ Marcos, Francisco, ‘Downloading Competition Law from a Regional Trade Agreement: A Strategy to Introduce Competition Law in Bolivia and Ecuador’ in Fox, Eleanor M. and Sokol, D. Daniel (eds), *Competition Law and Policy in Latin America* (Hart Publishing 2009).

²⁶⁶ *Decision 608 Concerning Regulations for the Protection and Promotion of Competition in the Andean Community* (Commission of the Cartagena Agreement).

²⁶⁷ *Ibid*, art. 15.

²⁶⁸ Heimler, Alberto and Jenny, Frédéric, ‘Regional Agreements’ in Lewis, David (ed), *Building New Competition Law Regimes* (Edward Elgar Publishing 2013).

economic development, often accompanied by institutional design problems and complex government regulation and bureaucracy, aggravate the difficulties facing developing countries.²⁶⁹ As has been previously shown, developing economies' regional efforts in the field of competition law have had limited success despite showing great potential. This seems to reinforce Dabbah's belief that it would be premature to fully embrace the regional option.²⁷⁰ Nonetheless, sometimes a premature regional effort can serve as added motivation for developing economies to pay attention to and commit to introducing competition law.

This section takes a step further by examining the reasons behind the limited success of developing economies' regional competition law. Despite the idiosyncrasy of each regional organisation's experience, some common causal issues emerge. Here, the principal issues are divided in three groups: resources restriction, the nature of member states, and the allocation of competence between regional institutions and member states.

2.3.1. Overcoming Resource Restriction

“Possibly the main enforcement obstacle faced by developing and small jurisdictions involves enforcement resource constraints – both financial and human.”²⁷¹ Resource scarcity is not limited to financial affairs but extends to that of human capabilities. In order to effectively enforce competition law, jurisdictions need qualified personnel, preferably with some experience. Plagued by restricted resources, many countries cannot justify the investment required to commence their own competition law regime. It is seemingly more logical to create communal enforcement at a regional level by pooling resources with neighbours. The benefits of this method seem apparent: “[j]oining forces to create some form of participatory governance, jurisdictions can reduce, *inter alia*, limitations resulting from scarce enforcement resources, political economy constraints, and limited ability to create credible enforcement threats”.²⁷² Beckford further attested to the idea that regional competition law is “the optimal solution”²⁷³ for resource-constrained countries to achieve the goal of regional competition policy.

The vision of pooling resources in the administrative design and enforcement of regional competition law is not, however, universally shared. “[T]o the extent that a regional

²⁶⁹ Gal, Michal S., ‘The Ecology of Antitrust: Precondition of Competition Law Enforcement in Developing Countries’ in Unctad (ed), *Competition, Competitiveness and Development: Lessons from Developing Countries* (UNCTAD/DITC/CLP/2004/1 2004).

²⁷⁰ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010).

²⁷¹ Gal, Michal S. and Wassmer, Inbal Faibish, ‘Regional Agreements of Developing Jurisdictions: Unleashing the Potential’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²⁷² Gal, Michal S., *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 U. Toronto L.J. 239 (2010).

²⁷³ Beckford, Delroy S., ‘Implementing Effective Competition Policy through Regional Trade Agreements: the Case of CARICOM’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

arrangement is an agreement for a community-wide competition law, and especially one with centralised enforcement, all of the problems that undermine successful national enforcement, other than lack of economies of scale, recur.”²⁷⁴ Regionalising competition law does not provide immunity from the problems of resource restriction. Furthermore, there are few incentives to conceding precious financial and human resources to a regional organisation when the same resources are needed in the national jurisdiction. The WAEMU serves as an exemplary tale of the persistence of resource starvation at regional level. In 2012, the WAEMU Competition Commission only recorded three ex-officio members of staff.²⁷⁵ It would seem that despite the effort of gathering the resources, the problem would still exist and simply manifest differently. It should not be forgotten that creating a regional competition law regime, especially when using a centralised approach, involves the direct costs of building a new institution (or institutions) and the resources for its operation.²⁷⁶ Such costs can be burdensome, especially for countries whose resources are already scarce. Moreover, the cost of complying with the obligations of the regional arrangement, especially the effective enforcement of domestic competition law, for a state with inadequate institutional and regulatory capacity can be too costly for that state.²⁷⁷ It is apparent now that regionalisation does not automatically solve the problem of restricted resources. Only with clear communal resolve and some sacrifice can participating states overcome this particular challenge.²⁷⁸

2.3.2. The Nature of Member States

The nature of participating members in regional integration directly affects the appropriate level of integration. In theory, smaller groups of countries with similar political and economic backgrounds and levels of development would be best suited to the centralised approach, the deepest form of integration. In contrast, larger groups of countries with diverse economic characteristics and differing levels of development cannot afford to adopt the centralised approach.²⁷⁹ Earlier in this chapter the case of the WAEMU was

²⁷⁴ Fox, Eleanor M., ‘Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²⁷⁵ Bakhoun, Mor and Molestina, Julia, ‘Institutional Coherence and Effectiveness of a Regional Competition Policy: the Case of the West African Economic and Monetary Union (WAEMU)’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²⁷⁶ Gal, Michal S. and Wassmer, Inbal Faibish, ‘Regional Agreements of Developing Jurisdictions: Unleashing the Potential’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²⁷⁷ Gal, Michal S., *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 U. Toronto L.J. 239 (2010).

²⁷⁸ Cunningham, O. Richard and LaRocca, Anthony J, *Harmonisation of Competition Policies in a Regional Economic Integration*, 27 Law & Pol’y Int’l Bus. 879 (1995).

²⁷⁹ Bakhoun, Mor and Molestina, Julia, ‘Institutional Coherence and Effectiveness of a Regional Competition Policy: the Case of the West African Economic and Monetary Union (WAEMU)’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

analysed and it was noted that over-centralisation halted the progress of Senegal's competition law regime as well as stifled other new jurisdictions in the nascent state. The MERCOSUR members also faced internal political and economic divisions on the importance of a free market which resulted in the slow implementation of its regulations.²⁸⁰

On the other hand, Drexl argued that “the implementation of common competition policy does not require a similar level of economic development of the participating states. What matters more is the concrete application of the rules to the individual cases.”²⁸¹ His focus is on the willingness to commit on the part of members as it is believed that commitment could overcome local contextual obstacles. Nonetheless, commitment to regional obligations is not absolute and may waver when faced with political and financial instability. If sufficient numbers of member states find themselves in such predicaments, this would in turn reduce the potential benefits that other members could gain from regional organisation. Such was the case with the COMESA when it prompted some members to leave and join a smaller and more stable regional agreement.²⁸²

2.3.3. The Negotiation of the Allocation of Regulatory Competence between Member States and Regional Institutions

Theoretically, the incentive for states to join a regional arrangement is the potential benefits to be gained in relation to the costs and burden in the form of requirements resulting from the arrangement. The benefits, in this case, are not restricted to competition law, especially if the regional competition agreement is merely part of a wider trade agreement. It is a challenge to convince states to abandon their sovereignty in favour of the regional organisation. The unwillingness to join is not reserved exclusively for developing economies with elementary experience in competition law enforcement. Indeed, “the greater the ability of a country to solve its anticompetitive issues on its own, the lower its incentive to cede sovereignty.”²⁸³ This is principally because “[n]ations normally have myopic vision and bounded concern.”²⁸⁴ Developing regional institutions must carefully package their product as politically acceptable for participating countries. One way to convince them of the regional competition authority's usefulness is to introduce an

²⁸⁰ Jenny, Frédéric and Horna, Pierre M., ‘Modernization of the European System of Competition Law Enforcement: Lessons for Other Regional Groupings’ in Brusick, Philippe, Alvarez, Ana Maria and Cernat, Lucian (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1 2005).

²⁸¹ Drexl, Josef, ‘Economic Integration and Competition Law in Developing Countries’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²⁸² Gal, Michal S. and Wassmer, Inbal Faibish, ‘Regional Agreements of Developing Jurisdictions: Unleashing the Potential’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

²⁸³ Ibid. See also, Guzman, Andrew T., *Is International Antitrust Possible?* 73 N.Y.U. L. Rev. 1501 (1998).

²⁸⁴ Fox, Eleanor M., Fingleton, John and Mitchell, Sophie, ‘The Past and Future of International Antitrust: Gaps, Overlaps and the Institutional Challenge’ in Lewis, David (ed), *Building New Competition Law Regime* (Edward Elgar Publishing 2012).

institutional feature that favours the participation of national authorities in the decision-making process at the central level.²⁸⁵ Furthermore, it must be clarified that members would preserve their sovereignty over competition cases which do not raise regional competition issues. Responding to this concern, the EU's principle of subsidiarity seems appropriate.

It should be noted that the difficulty in negotiating the allocation of competence between member states and regional institution is more pronounced the deeper the integration approach is. In this regard, the negotiation is most demanding for an institution with a centralised orientation. Among other forms of regionalisation, the negotiation of the allocation of competence continues even within the framework of mere collaboration. An effective cooperation and coordination mechanism between members and between members and the regional authority is crucial in order to avoid the risk of overlapping competences. Weak collaboration between members and the community could still occur even in looser forms of regional harmonisation.²⁸⁶

2.4. Conclusion

This chapter has explored a variety of available configurations of regional competition law which range from the loosely connected form of regional trade agreements to fully integrated systems. The experiences demonstrated in this chapter have shown that an ideal model suitable for all states does not exist. Each configuration must navigate both the particular and shared challenges of regional competition law. The experiences of developing economies are of particular interest to the ASEAN, on which this thesis is based. It is imperative that the ASEAN, as the late-comer to the foray, learns from others' experiences so as not to commit the same errors from the inception of the regime.

While there are many available models for the ASEAN to carefully choose from, the local context of both the member states and the region will be ignored at its peril. There is no shortage of examples in this regard: the WAEMU disregarded the advantages of national competition authorities in favour of its over-regionalisation approach to competition law. The result has been an unsatisfactory enforcement of regional competition law. The COMESA ignored some member states' inability to fulfil their regional obligations due to national political and economic instability, leading to a reduction in gains from the arrangement and the eventual departure of some of the member states. The MERCOSUR underestimated the importance of unequal development levels and differences in even a basic understanding of the philosophy underlying competition policy.

²⁸⁵ Heimler, Alberto and Jenny, Frédéric, 'Regional Agreements' in Lewis, David (ed), *Building New Competition Law Regimes* (Edward Elgar Publishing 2013).

²⁸⁶ Bakhoun, Mor and Molestina, Julia, 'Institutional Coherence and Effectiveness of a Regional Competition Policy: the Case of the West African Economic and Monetary Union (WAEMU)' in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

Chapter 3 The ASEAN's Considerations Regarding Regional Competition Law

When the ASEAN leaders agreed to prioritise the ASEAN single market integration as the main project and endorsed the creation of the AEGC, this decision set the stage for the formation of a regional single market with competition policy as an important part of the mechanism. Following the example of the EU model, the ASEAN leaders placed competition policy at the centre of the AEC's structure. Since inventing a new path can be difficult and costly, there is nothing wrong with travelling down a path well-travelled. However, developing economies deserve a competition law regime that fits the facts of their market and responds to their conditions and needs.²⁸⁷ A competition law that is so designed and characterised is imperative in order to obtain greater legitimacy and acceptance from national vested interests. This will result in better implementation. Consequently, the ASEAN, whose members are primarily developing economies, also need to take into consideration the reality of its own market and conditions when considering regional competition law in this region.

Chapter 1 has established that there is a lack of literature about competition law in the Southeast Asian region. Some efforts have been made to overcome this situation.²⁸⁸ For instance, Aldaba²⁸⁹ detailed the emerging issues in the development of competition policy in the ASEAN as being: the lack of a culture of competition; resistance from various interests and lobby groups; the inadequate regulatory and legal structures; conflicts with other national policies; and the differences in competition policy between members. Wong²⁹⁰ believed that the EU experience was not easy to replicate, especially not by the ASEAN that lacks a uniform understanding of competition law, substantive similarities in national competition laws, and a transnational enforcement body. Lee and Fukunaga²⁹¹ further identified two main difficulties in the process of harmonisation of the ASEAN competition law – diverse national preferences and the associated non-economic goals. Nonetheless, they insisted that these two issues should be only addressed after the introduction of the AEC since they expected some crucial changes within the ASEAN institutional structure, including the *ASEAN Charter*²⁹² itself. Despite the welcome attempts at identifying potential issues in the development of the ASEAN competition law, they do not appear specific to the ASEAN and the AMSs. They more resemble the challenges encountered by all new and developing competition law regimes. As seen in

²⁸⁷ Fox, Eleanor M., *Economic Development, Poverty and Antitrust: The Other Path*, 13 Sw. J. L. & Trade Am. 211 (2007).

²⁸⁸ See, in particular, Mark Williams (ed), *The Political Economy of Competition Law in Asia* (Edward Elgar Publishing 2013).

²⁸⁹ Aldaba, Rafaelita M., *Emerging Issues in Promoting Competition Policy in the APEC and ASEAN Countries* (Philippine Institute for Development Studies 2008).

²⁹⁰ Wong, Stanley, *The ASEAN Common Market: Challenges for Regional Competition Law Enforcement and Relevance of the European Union Experience* (9th Annual Asian Competition Conference 2013).

²⁹¹ Lee, Cassey and Fukunaga, Yoshifumi, *Competition Policy Challenges of Single Market and Production Base* (ERIA Discussion Paper Series 2013).

²⁹² The ASEAN Charter.

Chapter 2, these issues are quite common in developing economies. This chapter will examine the question of the ASEAN's specific considerations for its development of competition law. It will first begin with an examination of the need for competition law in the region before analysing possible and foreseeable obstacles unique to the ASEAN cause. The ASEAN faces some specific challenges of its own due to its aversion to binding agreements on competition law and policy. It has expressed a preference for the harmonisation approach, similar to the experience of the MERCOSUR. This preference can be explained by the fact that the ASEAN is still constrained by several factors, notably the traditional ASEAN Way, the diversity gap between the AMSs' economic conditions and competition law regimes.

3.1. Reasons for Competition Law in the ASEAN

Determining the goals of competition law is a precondition to building a body of coherent competition rules.²⁹³ Bork insisted that unveiling the goals of competition law is linked to revealing the identity of competition law itself.²⁹⁴ The objectives of competition law will directly influence how competition law is shaped and enforced.²⁹⁵ Consequently, it is essential to carefully and clearly specify the objectives of competition law while bearing in mind the practical realities of business. Unclear goals will leave margins of interpretation in the hands of competition authorities and may divert competition enforcement from its original purposes: “[w]hat [competition law] aims for must accord with what is economically feasible.”²⁹⁶ In reality, it is impossible to define with absolute specificity any economic regulation since the economy changes almost constantly. Nonetheless, competition law should have enough flexibility and discretionary room for interpretation by authorities while not hindering the ultimate goal or goals set in the legislation.

Defining the objectives of competition law serves two general purposes. First, the objectives inform the enforcement and application of the law.²⁹⁷ They can alert policy makers and decision makers to any discrepancies between actual and desired outcomes from current enforcement and assist in aligning the outcomes to the stated objectives.²⁹⁸ Secondly, the objectives can elevate the accountability of competition authorities through increasing transparency in order to “facilitate reasoned debate to the extent that they make explicit the rationale for decisions in individual cases”.²⁹⁹ In order to reveal the goals of competition law, one has to first look into the language of the statute.³⁰⁰ However, in the

²⁹³ Bork, Robert H., *The Antitrust Paradox: A Policy at War with Itself* (Free Press 1978) 50.

²⁹⁴ *Ibid.*

²⁹⁵ Stucke, Maurice E., *Reconsidering Antitrust's Goals*, 53 B.C. L. Rev. 551 (2012).

²⁹⁶ Round, David K. and Zuo, Alec, *The Welfare Goal of Antitrust Laws in Asia: For Whom Should the Law Toil?* 22 Asian-Pacific Economic Literature 2 (2008).

²⁹⁷ ABA, *Report on Antitrust Policy Objectives I* (2013).

²⁹⁸ Stucke, Maurice E., *Reconsidering Antitrust's Goals*, 53 B.C. L. Rev. 551 (2012).

²⁹⁹ *Report on Antitrust Policy Objectives I*.

³⁰⁰ Dorf, Michael C., *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875 (2003). (Scalia's crusade against use of legislative history is designed to combat interest group power by forcing them to get desired goals enacted into explicit statutory language).

field of competition law the language used in the statutes may be too vague and malleable for this approach.³⁰¹ It was also recommended that the legislative history be looked into, but unfortunately this approach is not always useful either.³⁰² As a result, the ambiguous language used in the statutes has led to too many academic debates over the true legislative intent behind the enactment of competition law. The search for the goals of competition law should not be strictly confined to legislative intent since competition law is capable of having wider overriding goals.³⁰³ Restricting debate to legislative intent could lead to a great restriction of viewpoint.³⁰⁴ Competition law is believed to belong to an order where different disciplines, factors and interests are interwoven and evolve constantly according to changes related to the relevant time period.³⁰⁵

There is no doubt that searching for the goals beyond legislative intent is not an easy task. Yet, despite Bork's insistence, the debate on the goals of competition law is ongoing and it would appear that there is still no consensus on this matter. As Dabbah opined, "[p]erhaps no aspect of the field of competition law has given rise to a more heated debate than the issue of the goals of competition law."³⁰⁶ It is plausible that the absence of a unanimous answer, despite various academic writings and competition authorities' enforcement, is the major factor behind the persistent debate on the most appropriate goals of competition law. Moreover, this debate has branched out beyond national level to regional and international level.³⁰⁷ The possibilities range from economic to socio-political goals.

Determining the goals of competition law is also "the focal point of the convergence strategy."³⁰⁸ If all competition law systems move towards the same set goal, convergence is the expected outcome generating an increasingly uniform normative framework for global competition. However, this hypothesis rests upon the assumption that the stated goals and the goals actually pursued by competition officials or national governments are identical. It has been noted before that the two are often dissimilar.³⁰⁹

³⁰¹ Hovenkamp, Herbert, *Federal Antitrust Policy: The Law of Competition and Its Practices* (Thomson West 2005) 49.

³⁰² Ibid.

³⁰³ Dabbah, Maher M., *The Internationalisation of Antitrust Policy* (Cambridge University Press 2003) 49.

³⁰⁴ Flynn, John J., *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 *Antitrust Bull.* 259 (1988).

³⁰⁵ ABA Sections of Antitrust Law and International Law and Practice, *The Internationalization of Competition Law Rules: Coordination and Convergence* (1999).

³⁰⁶ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010) 36.

³⁰⁷ Ehlermann, Claus Dieter and Laudati, Laraine L., 'Panel Discussion: Competition Policy Objectives' in Ehlermann, Claus Dieter and Laudati, Laraine L. (eds), *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing 1998).

³⁰⁸ Gerber, David J., 'Asia and Global Competition Law Convergence' in Dowdle, Michael W., Gillespie, John and Maher, Imelda (eds), *Asian Capitalism and the Regulation of Competition* (Cambridge University Press 2013).

³⁰⁹ Ibid.

It is true that the lack of consensus on the goals of competition law may not matter much as long as it is universally believed that competition is “good” and should be encouraged and that anticompetitive restriction is “bad” and should be condemned.³¹⁰ Yet, in light of the regionalisation of competition policy, consensus on the goals of competition law does matter. It is vital to address the issue of the goals of competition law from the very beginning.

Many goals have been advocated under competition law, but no exhaustive list has been drawn up.³¹¹ The difficulty in unveiling the identity of the goals of competition law lies in the fluid nature of competition law itself. Economic factors do not remain static and the understanding of competition law has to adapt accordingly.³¹² As competition law systems develop, there will inevitably be changes in the focus accorded various policy objectives within the same jurisdiction. The goals of competition law also vary according to the jurisdiction since they are related to each country’s definition of competition.³¹³ Because competition law is likely to be influenced by a country’s social and historical context, it is to be expected that countries may respond to different objectives.³¹⁴ In general, the identity of competition law remains veiled³¹⁵ and there is little awareness of how they have developed, why they were created and the extent to which the systems have achieved their intended goals.³¹⁶ This lack of awareness leads to the question of whether it is possible to overcome this difficulty or whether it is at all desirable to do³¹⁷ given the potential conflicts this question would inevitably unleash.

Generally, the goals discussed can be classified into three categories: economic, social and political. The social and political goals are sometimes referred to as “non-economic goals,” “extra-competition policies” or “non-competition law proper policies.”³¹⁸ The wording of the latter in particular suggests that competition policy should not be concerned with them and that some degree of discretion is required in their implementation, thus, reducing the legal certainties expected from having identifiable goals. Some doubts have been cast on

³¹⁰ Doern, G. Bruce and Wilks, Stephen, *Comparative Competition Policy: National Institutions in a Global Market* (Oxford University Press 1996).

³¹¹ See, for example, WTO, Annual Report (WT/GC/10, 1997); ICN, Advocacy and Competition Policy Report (2002); ICN, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies (the 6th Annual Conference of the ICN, Russia 2007). (have all tried to identify competition policy objectives, many of which do not coincide)

³¹² Whish, Richard and Bailey, David, *Competition Law* (7th edn., Oxford University Press 2012) 23.

³¹³ Stucke, Maurice E., *Reconsidering Competition*, 81 *Miss. L.J.* 107 (2011).

³¹⁴ Motta, Massimo, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 1.

³¹⁵ Bork, Robert H., *The Tempting of America* (Touchstone 1990) 33.

³¹⁶ Gerber, David J., *Law and Competition in the Twentieth Century Europe* (Oxford University Press 1998) 22.

³¹⁷ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010) 37.

³¹⁸ Rodger, Barry J., *Competition Law and Policy in the EC and UK* (3rd edn., Cavendish 2004) 16.

whether these non-economic goals are simply reflexes or have beneficial side effects.³¹⁹ It can be argued that they are achievable through other trade policies.³²⁰

- **The Economic Goals:** this category includes economic efficiency, promotion of trade, economic liberalisation and enhancing the development of a market economy. It is implemented by proscribing and preventing occurrences of pricing above the marginal cost of production. This goal is widely considered to be the primary aim of modern competition law.³²¹ However, there is no shortage of scholars arguing that economic efficiency should not be considered as the only goal of competition law since it completely overlooks the issue of income distribution among consumer and producers.³²²
- **The Social Goals:** under this category, competition law is seen as a safeguard to social values. It covers the idea of safeguarding the consumer from undue exercise of market power and the dispersion of socio-economic power of large firms, safeguarding the interest of small and medium-sized firms, protecting democratic values and principles, protecting public interest and ensuring market fairness and equity.³²³ In other words, the social goals are motivated by the risks of private power, the principles of justice and economic equity in market democracy.³²⁴ This category is sometimes criticised for its populist nature.³²⁵
- **The Political Goals:** this category relates to wide political aims such as regional market integration, prevention of the concentration of economic power, promotion of national interests, global enhancement of the international competitiveness of domestic firms and industries, national economic developments, financial stability

³¹⁹ Fuchs, Andreas, 'Characteristic Aspects of Competition and Their Consequences for the Objectives of Competition Law – Comment on Stucke' in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

³²⁰ Goyder, D. G., Goyder, Joanna and Albers-Llorens, Albertina, *Goyder's EC Competition Law* (5th edn., Oxford University Press 2009) 10; Fuchs, Andreas, 'Characteristic Aspects of Competition and Their Consequences for the Objectives of Competition Law – Comment on Stucke' in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

³²¹ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies* (Wolters Kluwer 2010) 83.

³²² See, for example, Elzinga, Kenneth G., *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. Pa. L. Rev. 1191 (1977); Sullivan, Lawrence A., *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust*, 125 U. Pa. L. Rev. 1214 (1977); Brodley, Joseph F., *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 60 N.Y.U. L. Rev. 1020 (1987); Fox, Eleanor M. and Sullivan, Lawrence A., *Antitrust – Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. Rev. 936 (1987).

³²³ Amato, Giuliano, *Antitrust and the Bounds of Power* (Hart Publishing 1997) 2; Whish, Richard and Bailey, David, *Competition Law* (7th edn., Oxford University Press 2012) 13.

³²⁴ Dabbah, *International and Comparative Competition Law* (n 19) 53.

³²⁵ Jones, Alison and Sufrin, Brenda, *EU Competition Law: Text, Cases, and Materials* (4th edn., Oxford University Press 2011) 17.

and reducing unemployment.³²⁶ It is undeniable that there is a political aspect inherent in the nature of competition law.

Admittedly, these three categories could conflict with each other.³²⁷ They sometimes are designed to not coincide.³²⁸ It is therefore hard to imagine such diverse expectations being consistent with one another.³²⁹ A lack of consensus in this area may lead to important hurdles in achieving regional harmonisation, a goal that the ASEAN wishes to reach. However, it seems that these concerns are not particularly problematic because it is enough to have commonalities in certain core principles of competition law. Accordingly, convergence is to be expected as countries increasingly look to other experiences for lessons and as increasing numbers of countries seek to become partners in the global trading system.³³⁰ It is also argued that convergence in this area cannot be achieved since competition law is dynamic and constantly evolving.³³¹ Other criticisms are that certain goals adopted by strong countries will prevail over other goals advocated by weaker countries.³³²

There is also an ongoing debate on whether competition law should have a single or multiple goals. Leading advocates for a single goal believe that efficiency is the ultimate goal of competition law while competition is only an interim goal that will often be close enough to the ultimate goal to allow the judiciary to look no further.³³³ Focusing on one well-defined concept of competition law has the advantage of simplicity in ensuring coherence throughout the system of competition law resulting in legal certainties for the subjects of the law, most notably the firms. However, Stucke³³⁴ argued that different competition scenarios require different concepts of what competition is. These different concepts are in turn connected to different objectives of competition law and, hence, the establishment of a single well-defined objective is simply impossible. There was strong opposition to his theory since different competition scenarios do not necessarily require different objectives of competition law. Instead, what is needed is a different approach in

³²⁶ Amato, Giuliano, *Antitrust and the Bounds of Power* (Hart Publishing 1997) 2-3.

³²⁷ Petersmann, Ernst-Ulrich, *Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO, "Linking Principles" for Trade and Competition*, 34 *New Eng. L. Rev.* 145 (1999).

³²⁸ Azcuenaga, Mary L., *The Evolution of International Competition Policy: a Federal Trade Commission Perspective* (19th Annual Fordham Corporate Law Institute 1992).

³²⁹ *Annual Report*, 39.

³³⁰ OECD, *Interim Report on Convergence of Competition Policies* (1994) 64; Federal Trade Commission, *Anticipating the 21st Century: Competition Policy in the New High-Tech Global Marketplace* (1996); UNCTAD, *Draft Commentaries to Possible Elements for Articles of a Model Law of Laws* (1995). (the latter gives examples of countries; Canada & Norway, who have adopted "core" goals of competition law)

³³¹ Dabbah, Maher M., *The Internationalisation of Antitrust Policy* (Cambridge University Press 2003) 55.

³³² Guzman, Andrew T., *Is International Antitrust Possible?* 73 *N.Y.U. L. Rev.* 1501 (1998).

³³³ Posner, Richard A., *Antitrust Law* (2nd edn., University of Chicago Press 2001) 29.

³³⁴ Stucke, Maurice E., *Reconsidering Antitrust's Goals*, 53 *B.C. L. Rev.* 551 (2012).

order to deal with varying competition problems.³³⁵ If a state or a region acknowledges multiple goals of competition law, these various goals need to be balanced against each other when competition law is applied in order to avoid conflicts between them.³³⁶

On one hand, competition law needs to serve multiple goals and must be flexible in order to serve different societal needs at different times. On the other hand, competition law needs to be clear, transparent and predictable in order to ensure legal certainty. “Managing with multiple goals is obviously complicated”³³⁷ and often conflicting. A legitimate social goal in the competition policy could have the effect of distorting prices away from the prices associated with economic optimality. A state may offer special conditions and incentives that could limit, restrict, or reduce national competition in order to attract foreign investment. Poverty reduction initiatives may favour small, inefficient enterprises at the expense of more efficient ones. It was argued that in some instances, the pursuit of non-economic goals may not be damaging provided that economic welfare considerations were taken into account.³³⁸ The neglect of economic considerations may reduce competition or be in direct conflict with the maximisation of economic welfare. The EU competition law, and its political goal of market integration, serves as an example for this scenario. Frequently, the aims overlook economic welfare for the benefit of enabling cross-border trade and stimulating competition in the region.

This section examines which of these scenarios the ASEAN’s harmonisation of competition law and policy falls into. An examination of any state or region’s goal of competition law would be incomplete without looking at other experiences. Establishing an understanding of the goals of different competition law systems is crucial for a better understanding of the ASEAN’s experience in the same field. This section will start with an overview of the goals of the EU competition law since this is regarded as the reference model for regional competition law. The US model, frequently regarded as another referential model, will not be examined in this section since it does not encompass the experience from a regional organisation’s point of view.³³⁹ Special attention is paid to other developing economies’ experiences in order to better appreciate how other developing economies adapt the established models to their local situations.

³³⁵ Fuchs, Andreas, ‘Characteristic Aspects of Competition and Their Consequences for the Objectives of Competition Law – Comment on Stucke’ in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

³³⁶ Ibid.

³³⁷ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 84.

³³⁸ Goyder, D. G., Goyder, Joanna and Albers-Llorens, Albertina, *Goyder’s EC Competition Law* (5th edn., Oxford University Press 2009) 10.

³³⁹ The dominant doctrine states that the purpose of the antitrust law is to enhance economic efficiency and maximise welfare. See, in particular, Bork, Robert H., *Legislative Intent and the Policy of Sherman Act*, 9 J. of L. & Eco. 7 (1966). While others argue that the aim of antitrust law is to protect small or medium firms, justice and fairness in business. See, for example, Bellamy, Christopher, *Some Reflections on Competition Law in the Global Market*, 34 New Eng. L. Rev. 15 (1999); Schwartz, Louis B., “Justice” and Other non-Economic Goals of Antitrust, 127 U. Pa. L. Rev. 1076 (1979).

3.1.1. General Goals of Competition Law

3.1.1.1. European Union

Gerber argued that there is little awareness of how European systems of competition law have developed, why they were created and the extent to which the systems have achieved their intended goals.³⁴⁰ The lack of discussion is due to the possibility of revealing major differences of opinion that might lead to division. European academics have long realised that substantive and institutional problems that have arisen in connection with the EU competition law are due to an implicit divergence of the objectives of EU competition policy.³⁴¹

Despite being called competition law, competition is not an aim in itself.³⁴² The law is often used to pursue other goals.³⁴³ These include economic welfare and the strengthening of the single market; protection of small business, economic freedom and ensuring fairness; social, political and environmental goals; and industrial or trade policy to herald national industrial champions or to prevent them from coming under foreign ownership. In the EU, competition law has one dominant objective – to further market integration. However, consumer welfare and economic efficiency are increasing in importance.

The Integration Goal

The promotion of market integration is the dominant objective of the EU competition law.³⁴⁴ The competition rules laid down in Article 101³⁴⁵ and 102 TFEU³⁴⁶ were the necessary compliments to the ultimate (the establishment of a common market)³⁴⁷ and intermediate goals³⁴⁸ of the Community since agreement or abusive conduct and state measures can create an obstacle to trade between member states.

³⁴⁰ Gerber, David J., *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford University Press 2001) 2.

³⁴¹ Ehlermann, Claus Dieter and Laudati, Laraine L., 'Panel Discussion: Competition Policy Objectives' in Ehlermann, Claus Dieter and Laudati, Laraine L. (eds), *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing 1998) vii.

³⁴² Goyder, D. G., Goyder, Joanna and Albors-Llorens, Albertina, *Goyder's EC Competition Law* (5th edn., Oxford University Press 2009) 10.

³⁴³ A detailed summary of all the goals could be found in Motta, Massimo, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 17.

³⁴⁴ Treaty Establishing the European Community OJ C 325 [2002] art. 2.

³⁴⁵ TFEU, art. 101.

³⁴⁶ *Ibid.*, art.102.

³⁴⁷ Treaty Establishing the European Community [2002] Consolidated version 2002 OJ C 325, art. 2.

³⁴⁸ *Ibid.*, art. 3.

Most commentators³⁴⁹ have accepted that market integration has traditionally been the unifying aim of the EU competition policy.

[A] genuine single market cannot be brought about except through free competition. If the market were to remain subject to the arbitrary decisions of the cartels or to the restrictive practices of monopolies, then the benefits of the single market would soon be offset by the effects of price-fixing and production quotas.³⁵⁰

This is understandable since competition law serves as part of an overall policy to promote the regional as well as national economy.³⁵¹ The aim in this case is to break down barriers to cross-border trade within the EU. This feature was said to be unique to the EU competition law.³⁵² The existence of the market integration goal explains the Commission's hostility to agreements or business practices that prevent or hinder cross-border trade.³⁵³ It is seen most clearly in cases where companies allocate different national territories, either among themselves (in a horizontal-market sharing cartel), or to different distributors (in vertical distribution arrangements.)³⁵⁴

There may be a conflict between the objective of market integration and economic welfare. Motta used the example of forbidding price discrimination across national borders to illustrate that there is generally no economic rationale for forbidding such practices.³⁵⁵ However, even though this is considered to be the primary goal of European competition law, it does not stand alone and economic considerations need to be taken into account.³⁵⁶ Ignoring economic efficiency in favour of market integration could lead to contrary outcomes; instead of promoting integration, the Commission could be retarding it.³⁵⁷ In *GlaxoSmithKline*, if the Commission were to win its case to restrict parallel importing, the company would cease trading in Spain and Greece. This would be detrimental to

³⁴⁹ Goyder, D. G., Goyder, Joanna and Albors-Llorens, Albertina, *Goyder's EC Competition Law* (5th edn., Oxford University Press 2009) 11.

³⁵⁰ High Authority, *Memorandum on the Anti-Trust Policy of the High Authority* (1964).

³⁵¹ Perret, Laura, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on Its Objectives' in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

³⁵² Goyder, D. G., Goyder, Joanna and Albors-Llorens, Albertina, *Goyder's EC Competition Law* (5th edn., Oxford University Press 2009) 11.

³⁵³ Bishop, Simon and Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn., Sweet & Maxwell 2010) 5.

³⁵⁴ *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission* (Cases 56/64, 58/64) [1966] ECR 299. (serves as an early example)

³⁵⁵ Motta, Massimo, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 23.

³⁵⁶ Bishop, Simon and Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn., Sweet & Maxwell 2010) 7.

³⁵⁷ Opinion of Advocate Jacobs in *Synetairismos Farmakopoion Aitolias & Akarnanias and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVES* (Case 53/03) [2005] ECR I-4609; *GlaxoSmithKline Services Unlimited v. Commission* (Cases 501/06 P, 513/06 P, 515/06 P, 519/06 P) [2009] I-09291, [2009] 4 CMLR 2.

consumers in these countries. A similar case took place in 1998³⁵⁸ and 1983.³⁵⁹ The result of the *United Distillers*' case was an increase in the price of some brands in the UK and the subsequent withdrawal from trade of Johnny Walker Red Label in the UK with an obvious reduction in consumer welfare. This marked an apparent difference between the brand promoted in the UK and in continental Europe.³⁶⁰ It should be noted that this conflict only arose at Community level.

The integration goal seems to have declined in importance in EU competition law, coinciding with the rising in prominence of the consumer welfare goal. Nonetheless, it was argued that the objective of market integration still remained relevant in EU competition law.³⁶¹

Consumer Welfare

Perret was convinced that consideration of consumer welfare is not a recent concept and was present during the formative years of the competition rules in the EU.³⁶² While it is true that the first decisions of the Commission and the CJEU refer to the generic benefits of competition, such as lower prices and technological advances,³⁶³ there is a strong belief that the market integration ideal assumes the interest of consumers.³⁶⁴ The interest in consumer welfare also appears in the Commission's report on Competition Policy.³⁶⁵ Furthermore, Article 101 TFEU explicitly mentions consumer welfare.³⁶⁶

There is a need to reconcile the objective of market integration with the objective of consumer welfare.³⁶⁷ A consumer-focused approach that protects weaker consumers or certain groups could potentially conflict with an approach that focuses more on the

³⁵⁸ *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH* (Case 355/96) [1998] ECR I-4799.

³⁵⁹ *Distillers Company Plc. (Red Label)* [1983] CMLR 173; [1983] OJ C245/3.

³⁶⁰ Bishop, Simon and Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn., Sweet & Maxwell 2010) 8.

³⁶¹ Perret, Laura, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on Its Objectives' in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012). (citing *GlaxoSmithKline Services Unlimited v. Commission*; *Syfait*; *Sot Lélos kia Sia EE and Others v. GlaxoSmithKline AEVE Farmakeftikon Proïonton* (Cases 468/06 to 478/06) [2008] ECR I-07139.)

³⁶² Perret, Laura, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on Its Objectives' in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

³⁶³ *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission*.

³⁶⁴ Perret, Laura, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on Its Objectives' in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

³⁶⁵ European Commission, D. G. Competition, *Report on Competition Policy* (1976) 9. "[The] aim is to ensure that business operates along competitive lines, while protecting the consumer by making goods and services available on the most favourable terms possible."

³⁶⁶ TFEU, art. 101.

³⁶⁷ Perret, Laura, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on Its Objectives' in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

economic aspects of competition law. The latter approach would lead to more aggressive competition law enforcement.

Economic Efficiency

Some scholars still believe that economic efficiency is the primary goal.³⁶⁸ Others consider economic efficiency to be a fairly new objective that was not part of older decisions.³⁶⁹ The notion of economic efficiency is increasingly present in merger control and in the discussion surrounding the enforcement of Article 102 TFEU³⁷⁰ but with a different meaning— namely, the arguments that a dominant undertaking presents to the authority to justify its behaviour.³⁷¹

The efficiency and integration goals of the EU competition law are potentially conflicting.³⁷² For example, some manufacturers may seek to confine the activities of retailers to certain territories. This behaviour could be considered economically efficient, yet it might be an infringement of the European market's integration goal. In EU law, economic welfare and consumer welfare are often closely associated³⁷³ making it difficult to distinguish between the two goals. Moreover, American commentators often criticised the EU competition policy for protecting the competitors rather than protecting the process of competition. The latter would happen with an economic approach. This comment is less true today.³⁷⁴

3.1.1.2. Developing Economies

It is generally acknowledged that “the enactment of competition legislation has become a global phenomenon.”³⁷⁵ In a short period of time, the ICN saw its membership soar from 14 jurisdictions at its launch in October 2001 to 123 competition agencies from over 108 jurisdictions in 2012.³⁷⁶ The enactment of competition policy in an emerging economy was

³⁶⁸ Goyder, D. G., Goyder, Joanna and Albers-Llorens, Albertina, *Goyder's EC Competition Law* (5th edn., Oxford University Press 2009) 11.

³⁶⁹ Perret, Laura, ‘The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on Its Objectives’ in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

³⁷⁰ TFEU, art. 102.

³⁷¹ Perret, Laura, ‘The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on Its Objectives’ in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

³⁷² Bishop, Simon and Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn., Sweet & Maxwell 2010) 7.

³⁷³ Kroes, Neelie, *European Competition Policy – Delivering Better Markets and Better Choices*, *European Consumer and Competition Day* (2005).

³⁷⁴ Vickers, John, *Competition Law and Economics: A Mid-Atlantic Viewpoint* ECJ 1 (2007).

³⁷⁵ Haley, John O., *Competition Law for the Asia-Pacific Economic Cooperation Community: Designing Shoes for Many Sizes*, 1 Wash. U. Global Stud. L. Rev. 1 (2002).

³⁷⁶ ICN, *ICN Statement of Achievements 2001-2012* (the 11th Annual Conference of the ICN 2012).

once likened to “giving a silk tie to a starving man” by Godek.³⁷⁷ Now, competition policy is no longer a luxury but has become necessary if a country wants to join an exclusive club of countries who have competition law. Enacting competition legislation has been compared to having a proper dress to enter members of an elite club.³⁷⁸ Continuing the metaphor, countries tend to too quickly put on these dresses without careful consideration beforehand regarding whether the dresses are suitable for their style, size or stature. The states’ eagerness to conform to what they perceive as the global standard has contributed to the proliferation of national competition laws and policies. This is reflected in competition law literature where few question the necessity of competition law. The question is often ignored, taken for granted or simply left unasked.³⁷⁹ There is much debate on whether countries with smaller markets and in an early stage of development should pursue different goals from countries with larger economies.³⁸⁰ However, there is no single “correct” or “best” goal of competition law that could be applied to any jurisdiction regardless of the local economic and socio-political climates.

In contrast to the smooth development of competition laws in western countries, the emergence of competition laws in developing economies have been more abrupt.³⁸¹ They are not a result of internal development but often a “top-down” legislative approach whereby the competition legislations are taken from western countries’ models. The danger resides in introducing a predefined set of goals which came with the imported legislations. Another explanation for the abrupt emergence of competition laws in developing economies is the interventions from international institutions such as the UNCTAD, the OECD, the World Bank and in particular, the Bretton Woods Institutions: the IMF and the WTO³⁸² who forced developing economies to adopt liberalisation, privatisation and competition laws. While fighting anticompetitive practices seems desirable for developing economies, the transposition of these competition laws need to be carefully considered. The predefined goals of the above-mentioned organisations for developing economies are to open their markets and force their integration into the global market economy.³⁸³ It means that developing economies’ markets are made available to global competition, in particular, international undertakings. Enacting competition law as an accompaniment to

³⁷⁷ Godek, Paul E., *One U.S. Export Eastern Europe Does Not Need*, 15 Regulation 20 (1992). [advocating for potential harms from misguided competition policy in emerging economies]

³⁷⁸ Haley, John O., *Competition Law for the Asia-Pacific Economic Cooperation Community: Designing Shoes for Many Sizes*, 1 Wash. U. Global Stud. L. Rev. 1 (2002).

³⁷⁹ *Ibid.*

³⁸⁰ See, for example, Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003); Round, David K. and Zuo, Alec, *The Welfare Goal of Antitrust Laws in Asia: For Whom Should the Law Toil?* 22 Asian-Pacific Economic Literature 2 (2008).

³⁸¹ Bakhoun, Mor, ‘Reflections on the Concepts of ‘Economic Freedom’, ‘Free Competition’ and ‘Efficiency’ from the Perspective of Developing Countries’ in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

³⁸² Marcos, Francisco, *Do Developing Countries Need Competition Laws and Policy?* (EALE Conference 2006).

³⁸³ Bakhoun, Mor, ‘Reflections on the Concepts of ‘Economic Freedom’, ‘Free Competition’ and ‘Efficiency’ from the Perspective of Developing Countries’ in Zimmer, Daniel (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012).

liberalisation was considered as merely a façade for the actual objective of protecting competition that gives international undertakings enhanced access to developing economies' markets.³⁸⁴ This suspicion of western countries' motives for encouraging competition laws in developing economies was shared by Fox³⁸⁵ who believed that western countries hide behind liberalisation and efficiency to advocate for their version of a universal norm for competition law.

Finally, competition law was seen as an essential part of the efforts by developing economies and countries with economies in transition to restructure their domestic economies and integrate them fully into the global economy.³⁸⁶ This was to exploit new opportunities to compete and, in particular, to facilitate the move from monopolisation to demonopolisation, and from state control and planning to liberalisation and privatisation.³⁸⁷ In this regard, the introduction of competition law into national legal systems is a matter of internal choice and a part of the aim to become competitive in a globalised economy.

On the surface, it appears that the goals of competition law in developed and developing economies converge and, as the ICN reported, so do the goals of unilateral conduct laws. These tend to coincide with the goals of ensuring an effective competitive process, economic freedom, economic efficiency, and consumer welfare.³⁸⁸ However, the convergence is in appearance only and does not translate into enforcement. The same concept does not always carry the same significance in a different jurisdiction. In fact, most of the respondents to the ICN report either do not define the terms or have a different understanding of the terms.³⁸⁹

It would appear that developing economies are not content with blindly importing the western models and make an effort to adapt the laws to their specific national needs. Contrary to developed economies, reforming and developing economies tend to have broader goals of competition law in order to assist them with creating a stable economic environment. Their concern seems wider than that of developed economies and they cannot focus solely on economic efficiency to bring about free and fair competition. They tend to make poverty eradication and wealth redistribution their top priorities.³⁹⁰ Some of the goals stated in developing economies' competition laws are: to expand opportunities

³⁸⁴ Ibid.

³⁸⁵ Fox, Eleanor M., *Economic Development, Poverty and Antitrust: The Other Path*, 13 Sw. J. L. & Trade Am. 211 (2007).

³⁸⁶ Ibid. (The desire to integrate more in the world economy is universally shared by many developing countries.)

³⁸⁷ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010) 36.

³⁸⁸ ICN, *Unilateral Conduct Working Group* (the 11th Annual ICN Conference, Brazil 2012).

³⁸⁹ ICN, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies* (n 24).

³⁹⁰ Lee, Cassey and Fukunaga, Yoshifumi, *Competition Policy Challenges of Single Market and Production Base* (ERIA Discussion Paper Series 2013).

for domestic enterprises to participate in world markets;³⁹¹ to promote employment; to advance social and economic welfare; to provide the small and medium enterprises (SMEs) with an equitable opportunity to participate in the economy; to increase the economic opportunities of historically disadvantage persons;³⁹² and to protect access to basic needs.³⁹³ It is to be noted that unlike the US and the EU, developing economies do not share the ongoing dilemma about whether single or multiple goals are most suitable for them. They seem to have readily adopted the idea of multiple goals.

Some authors maintain that the reasoning behind the multiplicity of social and political goals was the politicians' desire to create jobs and attract foreign investment.³⁹⁴ Both serve to minimise the social unrest associated with the hardships that typically follow economic reforms. In other words, the policymakers are buying social peace. Even when social peace is not a pressing concern, policymakers are aware that it is crucial to increase both domestic and foreign investment to fully benefit from market reforms and to ensure their re-election.³⁹⁵

These multitudes of goals “constitute not only an administrative nightmare but a source of immense confusion.”³⁹⁶ Moreover, industrial and trade policies to protect local industries through high import duties also come into conflict with the economic goal of competition policy.³⁹⁷ In this regard, it is unavoidable that competition policy takes a back seat to industrial and trade policies. It seems accepted that multiple goals contradict the primary competition policy goal—that of economic efficiency. The order of importance is said to be resolved politically. Thus, the various goals are implemented in order to ensure that there will always be a legitimate political vehicle available to give expression to latent societal goals.³⁹⁸ In return, the lack of clarity and a penchant for political resolution contribute to fears in the private sector and cools its activities, thus deliberately creating a false positive. Unlike the developed economies' models, there has been no attempt to balance the goal of economic efficiency with social and political goals. The former is always circumvented for the benefit of the latter since developing economies put more emphasis on issues not pertaining to economic efficiency or the competition process.

³⁹¹ ECOWAS, Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules and the Modalities of Their Application within ECOWAS [2008] art. 3.

³⁹² Republic of South Africa Competition Act, Act No. 89 of 1998 as amended [1998] chap. 1(2).

³⁹³ Stewart, Taimoon, Clarke, Julian and Joekes, Susan, *Competition Law in Action: Experiences from Developing Countries* (IDRC 2007) V. (mentioning Mexico and Costa Rica)

³⁹⁴ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 100.

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*, 98.

³⁹⁷ Lee, Cassey and Fukunaga, Yoshifumi, *Competition Policy Challenges of Single Market and Production Base* (ERIA Discussion Paper Series, 2013).

³⁹⁸ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 98.

3.1.2. The ASEAN's View

This section begins with an examination of the reasons for competition law from the perspective of both the ASEAN and the AMSs before proceeding to a comparison with other regimes' experiences on the subject. It will conclude with a closer look at the issues associated with the goals of competition law.

3.1.2.1. Regional Level

The ASEAN and the AMSs did not shy away from the global trend of adhering to the elite club's dress code. They dived straight into the question of how best to establish a competition law regime without sufficient prior consideration of the necessity for- or the suitability of a competition policy. Currently, seven AMSs, namely Indonesia,³⁹⁹ Malaysia,⁴⁰⁰ Myanmar,⁴⁰¹ the Philippines,⁴⁰² Singapore,⁴⁰³ Thailand,⁴⁰⁴ and Vietnam,⁴⁰⁵ have enacted national competition laws. At first glance, it would appear that the seven dresses donned by these countries are not cut from the same cloth nor worn in the same way. The remaining countries: Brunei, Cambodia, and Lao PDR, were expected to follow in their footsteps before the arrival of the AEC in 2015 per their commitment enshrined in the *Blueprint*.⁴⁰⁶ (Further discussion on the competition landscape in the AMSs can be found in Chapter 6).

The reasons behind instituting competition law might not seem important at this stage, especially as the ASEAN has explicitly announced its intention to introduce competition policy in all the AMSs before the creation of the region's economic community in 2015⁴⁰⁷ and as most AMSs have already enacted national competition laws. However, the same argument can be made to support examining this important question. The AMSs' established competition law is not without flaws. Defining the rationale behind the existence of each nation's competition law could help reformulate and direct them towards compatibility with the ASEAN regional policy. Furthermore, it could help tailor the remaining AMSs' competition laws in a way that would keep them aligned with existing members' competition regimes as well as the ASEAN approach.

The question about the reasons for competition law has never been easy to answer, particularly in the context of the ASEAN where its ten members could not give identical

³⁹⁹ Law of the Republic of Indonesia Number 5 Year 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition [1999].

⁴⁰⁰ Malaysia Competition Act, Act 712 [2010].

⁴⁰¹ The Competition Law, The Pyidaungsu Hluttaw Law No. 9/2015 [2015].

⁴⁰² Philippines Competition Act, Republic Act No. 10667 [2015].

⁴⁰³ Singapore Competition Act (Chap. 50B) revised on 30 January 2006 [2004].

⁴⁰⁴ Thailand Trade Competition Act [1999].

⁴⁰⁵ Vietnam Law on Competition, No.27/2004/QH11 [2004].

⁴⁰⁶ *The Blueprint*.

⁴⁰⁷ *Ibid*, para. 41.

answers. While adapting the law to local conditions is encouraged, too much divergence has the potential to harm the ASEAN's aim for harmonisation at regional level. Conscious of the discordance among the AMSs, the ASEAN organised two conferences, inviting competition authorities and government officials from member countries, to discuss competition law and policy, in particular the necessity of competition law and policy at both regional and national level.⁴⁰⁸ The ASEAN Conference on Fair Trade Competition Law and Policy in the AFTA took place in 2003 and the 2nd ASEAN Conference on Competition Policy and Law was held in 2006. However, few officials actually engaged in the discussion of the necessity of the ASEAN regional competition law and instead took the opportunity to introduce their own competition law and policy to other AMSs.⁴⁰⁹ Regardless of the actual outcome, in reuniting different opinions on various principles regarding competition law, the conferences were still considered a "bold first step towards an ASEAN [competition policy]."⁴¹⁰ Conferences such as these would undeniably promote awareness and sound a "wake-up call"⁴¹¹ to all AMSs.

The first conference concluded that there was no binding conclusion to the reasons for competition law. Despite the lack of consensus on what could be considered necessary, there was general acknowledgement that competition law was necessary despite a few different attitudes among AMSs.⁴¹² The economic goal of protection and promotion of the market economy⁴¹³ were heavily favoured while some officials were concerned about social goals: consumer welfare,⁴¹⁴ promotion of innovation,⁴¹⁵ and protection of SMEs.⁴¹⁶ Only one representative took his country's economic structure into account through the inclusion of the protection of SMEs and the promotion of innovation. The protection of SMEs is significant in the context of Southeast Asia since SMEs are the dominant basis for

⁴⁰⁸ The ASEAN Conference on Fair Competition Law and Policy (5-7 March 2003) and The 2nd ASEAN Conference on Fair Competition Law and Policy: Accelerate Growth and Competitiveness through Competition Policy and Law (14-16 June 2006).

⁴⁰⁹ Silalahi, Udin, *The Necessity of ASEAN Competition Law: An Idea* (Competition Policy Conference Challenges in Competition Law in Asia 23 May 2007).

⁴¹⁰ Thant, Khin Ohn, *Competition Policy and Economic Growth in ASEAN Countries: a Myanmar's Perspective* (The ASEAN Conference on Fair Competition Law and Policy 2003).

⁴¹¹ Ibid.

⁴¹² Yasuda, Noboyuki, *The Evolution of Competition Law in Southeast Asian Countries* (Globalization and Law in Asia: From the Asian Crisis to September 11, 2001, 10-11 April 2003).

⁴¹³ Vinh, Le Danh, Building Competition Law in Vietnam to meet the Need of Regulating Market Economy and in the Light of Trade Liberalisation and International Economic Integration (The ASEAN Conference on Fair Competition Law and Policy 2003); Silalahi, Udin, *The Necessity of ASEAN Competition Law: An Idea* (Competition Policy Conference Challenges in Competition Law in Asia 23 May 2007); Yodmuangchareon, Siripol, *The Urgency of Competition Law* (The ASEAN Conference on Fair Competition Law and Policy 2003).

⁴¹⁴ Thant, Khin Ohn, *Competition Policy and Economic Growth in ASEAN Countries: a Myanmar's Perspective* (The ASEAN Conference on Fair Competition Law and Policy, 2003); Yodmuangchareon, Siripol, *The Urgency of Competition Law* (The ASEAN Conference on Fair Competition Law and Policy 2003).

⁴¹⁵ Thant, Khin Ohn, *Competition Policy and Economic Growth in ASEAN Countries: a Myanmar's Perspective* (The ASEAN Conference on Fair Competition Law and Policy 2003).

⁴¹⁶ Ibid.

growth in this region. Although the globalisation of competition policy is undeniable, competition policy must also resonate at a local level to justify its existence to local taxpayers.⁴¹⁷ The best way to achieve this is to take into consideration the local economic and socio-political climate. Competition policy must combine globalism and localism to combat international cartels which are facilitated by globalisation itself. An example of taking the local context into consideration is responding to citizens' concerns about preserving and securing the benefits of smaller and local firms.⁴¹⁸ A European survey has shown that about 80 percent of the EU citizens thought that small firms needed to be protected from large firms' competition.⁴¹⁹ While this survey was conducted on the EU citizens, in our globalised world, the EU policies can have an impact on other countries and especially other regional organisation's competition policies.

In spite of the general acknowledgement, not every AMS shared the same optimism regarding the necessity of competition law. The Singaporean representative argued that competition policy was only necessary if economic efficiency could not be achieved through deregulation policies of trade.⁴²⁰ This implies that competition policy is only a substitute for trade deregulation policy since "trade policy eliminates governmental barriers to international trade and deregulatory reform eliminates domestic regulation that restricts entry and exit."⁴²¹ In contrast, "competition policy targets business conduct that limits market access and reduces actual and potential competition."⁴²² Even if it was decided that competition policy was to be implemented, the Singaporean representative advocated that governmental intervention should only occur in a cost-effective way in order to improve economic outcomes. Nevertheless, Singapore's adoption of its Competition Act in 2004⁴²³ suggests that economic efficiency could not be achieved through trade deregulation policies alone.

It was not until the second conference that the AMSs expressed the needs for a regional competition law within the ASEAN.⁴²⁴ Since only a few representatives engaged in this debate, it would seem that the AMSs are less enthusiastic about regional competition law compared to national ones. At regional level, competition law could provide an effective protection against unfair competition and strengthen economic integration in the ASEAN.⁴²⁵ With the impending regional economic integration, competition law became

⁴¹⁷ Stucke, Maurice E., *Antitrust 2025* CPI Antitrust Journal (2010).

⁴¹⁸ Ibid.

⁴¹⁹ European Commission, D. G. Competition, *Flash Eurobarometer EU citizens' Perceptions About Competition Policy (No 254)* (2010). (at 7.51 percent "totally agreed" and 30 percent "somewhat agreed" that small companies needed to be protected from large companies)

⁴²⁰ Teo, Chadwick, *Competition Policy and Economic Growth* (The ASEAN Conference on Fair Competition Law and Policy 5-7 March 2003).

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ SCA.

⁴²⁴ Silalahi, Udin, *The Necessity of ASEAN Competition Law: An Idea* (Competition Policy Conference Challenges in Competition Law in Asia 23 May 2007).

⁴²⁵ Thanadsillapakul, Lawan, 'The Harmonization of ASEAN: Competition Laws and Policy from an Economic Integration Perspective' in Drexler, Josef et al. (eds), *Competition Policy and Regional Integration*

necessary in order to ensure that former statutory obstacles to contestability are not replaced by anticompetitive practices of firms, thus ensuring true trade liberalisation in the process. With an effective regional competition regime in place, the region would project an image of economic and legal certainty to economic participants thus attracting interest in the ASEAN and more foreign direct investment (FDI). In this regard, regional competition law can reinforce the ASEAN investment regime.⁴²⁶ Consequently, the ASEAN competition law could play a multifunctional role in regional economies: encourage the free flow of trade and investment, monitor the behaviour of firms, and evaluate the economic role or potential dominance of extra-ASEAN transnational corporations in the region.⁴²⁷ Moreover, in the case of the ASEAN where most AMSs have adopted competition law statutes, having effective and enforceable unified competition legislation could help fill the void left by national competition laws.⁴²⁸ The establishment of a competition regime at a regional level may also reduce the costs of applying national competition policies. This would be particularly beneficial for micro-states without national competition laws. These states could follow the example of the EU which only has jurisdiction over cases with significant effect at regional level or trade between member states, leaving the rest under the jurisdiction of their respective nations.⁴²⁹

It was suggested that the AMSs have sufficient knowledge and experience to establish both the ASEAN competition law and a central competition authority.⁴³⁰ Since the AMSs have already acknowledged the necessity of regional competition law, all that remains is the political will to follow through on the project.⁴³¹ An AMS should take the initiative together with the ASEAN Secretariat to draft the ASEAN regional competition law. Indonesia volunteered for this role because of its successful experience in the field.⁴³²

What was missing from the discussion table was whether regional competition law was suitable for the market structure of the ASEAN. The market size and structure, whether regional or national, were never discussed by the officials or the academics.

in Developing Countries (Edward Elgar Publishing 2012); UNCTAD, *Competition Policy and Legislation: Information Note 21* (TD/B/RBP/INF.37, 1996).

⁴²⁶ Thanadsillapakul, Lawan, 'The Harmonization of ASEAN: Competition Laws and Policy from an Economic Integration Perspective' in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

⁴²⁷ Ibid.

⁴²⁸ Thanadsillapakul, Lawan, *A New Direction for ASEAN Regionalisation in the Changing Global Legal and Economic Environment* (PhD Thesis, Lancaster University 2000).

⁴²⁹ Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003).

⁴³⁰ Silalahi, Udin, *The Necessity of ASEAN Competition Law: An Idea* (Competition Policy Conference Challenges in Competition Law in Asia 23 May 2007).

⁴³¹ Thanadsillapakul, Lawan, *A New Direction for ASEAN Regionalisation in the Changing Global Legal and Economic Environment* (PhD Thesis, Lancaster University 2000).

⁴³² Silalahi, Udin, *The Necessity of ASEAN Competition Law: An Idea* (Competition Policy Conference Challenges in Competition Law in Asia 23 May 2007).

As discussed in Chapter 1, the *Blueprint*⁴³³ was adopted in 2007 to serve as a master plan to facilitate and ensure the coherence of the AEC. According to the *Blueprint*, each AMS was committed to implementing the competition policy by 2015. The *Blueprint* states that its main competition policy objective is to “foster a culture of fair competition”.⁴³⁴ The emphasis on advocacy is reflected in its first action plan regarding competition policy which is to introduce competition policy in all the AMSs by the implementation of the AEC in 2015 with the aid of capacity building programmes and regional guidelines. Unfortunately, the role of competition law in the regional economic integration has not been emphasised in the *Blueprint*.

In 2008, the *Best Practices in the Introduction and Implementation of Competition Policy and Law in East Asia Summit Countries*,⁴³⁵ commissioned by the ASEAN Secretariat with financial aid from the Australian government, was published in order to “undertake a study of best practices in the introduction and implementation of competition policy and law in East Asia Summit Countries.”⁴³⁶ The East Asia Summit is a regional leaders’ forum that was held for the first time in 2005 as “a forum for dialogue on broad strategic, political and economic issues of common interest and concern with the aim of promoting peace, stability and economic prosperity in East Asia.”⁴³⁷ The East Asia Summit countries now comprise the ten AMSs, Australia, the People’s Republic of China, the Republic of India, Japan, the Republic of Korea, New Zealand, the US and Russia. Despite the title: *Best Practices in the Introduction and Implementation of Competition Policy and Law in East Asia Summit Countries*, this document was only intended to aid the AMSs in developing their own domestic competition laws. The document is part of the Regional Economic Policy Support Facility (REPSF) intended to help the ASEAN Secretariat, its working groups and offices promote the ASEAN economic integration through economic policy research.⁴³⁸

The Best Practices suggest that the common objective of national competition law and policy in the AMSs, citing the World Bank and the OECD,⁴³⁹ should be “the maintenance of the competitive process, free competition, or effective competition.”⁴⁴⁰ The language used in this document implies that the three objectives could not coexist. Furthermore, the

⁴³³ *The Blueprint*.

⁴³⁴ *Ibid*, 41.

⁴³⁵ Orr, Jennifer, Ergas, Henry and Soon, Jason, *Best Practices in the Introduction and Implementation of Competition Policy and Law in East Asia Summit Countries* (REPSF II Project No. 07/008, 2008). [hereinafter *Best Practices*]

⁴³⁶ *Ibid*, 1.

⁴³⁷ *Kuala Lumpur Declaration on the East Asia Summit* <<http://www.asean.org/news/item/kuala-lumpur-declaration-on-the-east-asia-summit-kuala-lumpur-14-december-2005>>.

⁴³⁸ *Regional Economic Policy Support Facility (REPSF) Phase I & II*

<http://www.grminternational.com/projects/regional_economic_policy_support_facility_repsf_phases_i_ii>.

⁴³⁹ Bank, World and OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (1999) chap. 1.

⁴⁴⁰ *Best Practices in the Introduction and Implementation of Competition Policy and Law in East Asia Summit Countries*.

Best Practices distinguish between “the first order objectives”⁴⁴¹ of competition law and policy and the “second order objectives”.⁴⁴² According to the *Best Practices*, the first order objectives are economic efficiency, growth and development and consumer welfare. These objectives could be achieved through the promotion of competition. However, in certain exceptional cases the promotion of competition may be detrimental to national welfare or other first order objectives such as natural monopoly. The *Best Practices* recognise as second order objectives the promotion and protection of SMEs, the facilitation of FDI, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, job creation, gender equity or the promotion of welfare of particular consumer groups. These second order objectives cover both economic and social objectives and reflect the concerns raised by state officials during the ASEAN Conferences on Competition Policy and Law.

The *Best Practices* encourage the AMSs to freely decide on its national competition policy goals. While it is possible to have multiple, diverse goals, the *Best Practices* strongly advise against this stating that this would generate unnecessary complexities in establishing and implementing national competition policy. In addition, conflicting multiple goals could damage the first order objectives. Therefore, in order to preserve the effectiveness of competition policy goals, the *Best Practices* recommends that the AMSs pursue the second order objectives, particularly social goals, by means of alternative policy instruments without restricting competition or sacrificing the first order objectives. The *Best Practices* recommend prioritising the promotion of economic efficiency as the exclusive goal of competition law and policy, assuring the AMSs that other economic and social goals could be reached even with economic efficiency as the exclusive competition policy goal. Alternatively, it proposes adopting the New Zealand model which allows the government to require the competition authority to give priority to other competition policy over economic efficiency.⁴⁴³ While this provision brings about certain flexibility in the enforcement of competition policy, it may also disrupt the homogeneity of competition policy. Homogeneity is important in this instance since the ASEAN aims to have a harmonised competition law within the region. It is possible that, even with a single competition goal focusing on economic efficiency, the promotion of competition may conflict with economic efficiency. This conflict is generally resolved by applying the net benefit test where the restriction of competition may be permitted if it confers net efficiency benefits to society and if the restriction of competition is necessary to realise such benefits.⁴⁴⁴

In 2010, the *Guidelines I* were developed, based on the AMSs’ experiences and international best practices, to represent a common reference guide for the AMSs. They contain the goals of competition, substantive provisions of competition law, a brief mention of institutional building, competition advocacy, as well as national competition

⁴⁴¹ Ibid, 2.

⁴⁴² Ibid.

⁴⁴³ New Zealand Commerce Act of 1986 [1986] sec. 26.

⁴⁴⁴ Stucke, Maurice E., *Reconsidering Antitrust's Goals*, 53 B.C. L. Rev. 551 (2012).

authority's enforcement powers. They reaffirm the common objectives of competition policy as "the promotion and protection of competitive process"⁴⁴⁵ through the introduction of a level playing field to all market players. The *Guidelines I* considers that the pursuit of such objectives will lead to fair or effective competition. The language used in this case follows the example set by the *Best Practices* which do not believe in the coexistence of fair and effective competition. However, fair or effective competition can benefit countries in terms of economic efficiency, economic growth and development, and consumer welfare.

In addition, the *Guidelines I* persuade the AMSs that competition policy is beneficial to developing economies due to the process of globalisation. "[D]eveloping countries need a competition policy, in order to monitor and control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies."⁴⁴⁶ It should be noted that the *Guidelines I* have excluded social goals from the objectives of competition law and include them instead in "other policy objectives."⁴⁴⁷ Moreover, the integration goal is absent from the document. Despite its purpose of guiding the AMSs towards a common goal, the *Guidelines I* conclude that each AMS may individually decide which objectives to pursue.⁴⁴⁸ This final part confirms the ASEAN's lack of persuasive power over the AMSs. The document urges the AMSs to take into account their own national needs when determining the goal or goals of competition law. In retrospect, it is highly possible that the *Guidelines I* have contributed to further diversification of national competition policies to the extent that the AMSs may end up with varying objectives, making any attempt at regional harmonisation more challenging. The *Guidelines II* were published in 2012 but did not feature any discussion on the goals of competition policy instead they focus on the institutional design of competition authority as well as an in depth discussion of competition advocacy. It is evident that the *Guidelines II*'s purpose is merely to complement the *Guidelines I*.

3.1.2.2. The AMSs Level

Different regimes may have different expectations of competition law and their expectations may change over time as the economies mature and countries gain more experience in the enforcement of competition law. Among the AMSs, opinions on the subject are diverse. This section groups the ten AMSs into three categories, depending on their experiences with competition law, as follows: countries with some experience of competition law, countries with sector regulations, and countries with recently introduced competition law. Since most of the AMSs are in the early stages of development of their

⁴⁴⁵ ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy* (2010) art. 2.2.1.

⁴⁴⁶ *Ibid.*, art. 2.2.2.

⁴⁴⁷ *Ibid.*, art. 2.2.3.

⁴⁴⁸ *Ibid.*, art. 2.2.5.

competition law and only a handful has limited experiences, it is essential that careful attention be paid to the specification of the goals underlying the competition legislation.⁴⁴⁹

Countries with Some Experiences in Competition Law

The goals of the Indonesian competition law are to improve public welfare and national economic effectiveness and efficiency by creating equal business opportunities for small, medium and large scale businesses.⁴⁵⁰ Economic efficiency is directed at the firms' level. What stands out in this provision is the emphasis on the protection of business interests regardless of the size of the business, a problem for which Indonesia is known.⁴⁵¹ The language of the statute makes it explicitly clear that SMEs are not singled out as a special interest group.

The *Singapore Competition Act*⁴⁵² was enacted in 2004 with the goal "to protect consumers and businesses from anticompetitive practices of private entities."⁴⁵³ Singapore is the only member to state consumer protection as the first order objective of competition law. This protection is not limited to any national interest group but seems to be offered to both the consumer and businesses of all sizes and of all nationalities. The state's activities in economic sector are explicitly excluded from this statute.

In the case of Thailand, the principal competition-related legislation is the *Trade Competition Act of 1999*.⁴⁵⁴ What is unique about this statute is that the goals of competition law cannot be found in any provisions. Instead, they appear in a *nota bene* at the end of the document. According to the *nota bene*, the goals of Thailand's competition law are the promotion of free competition and the prevention of unfair competition in business sector.⁴⁵⁵ The literature sometimes did not take this *nota bene* into account and concluded that the *Act* focused on the prohibited practices without explicitly stating the goals sought in preventing these practices.⁴⁵⁶ Interestingly, Thailand's competition-related legislations have a habit of camouflaging their objective under the *nota bene* at the end of the statute. The *Price Fixing and Anti-Monopolies Act of 1979*,⁴⁵⁷ which was replaced by

⁴⁴⁹ Round, David K. and Zuo, Alec, *The Welfare Goal of Antitrust Laws in Asia: For Whom Should the Law Toil?* 22 Asian-Pacific Economic Literature 2 (2008).

⁴⁵⁰ Law No. 5 of Year 1999, art. 2.

⁴⁵¹ Round, David K. and Zuo, Alec, *The Welfare Goal of Antitrust Laws in Asia: For Whom Should the Law Toil?* 22 Asian-Pacific Economic Literature 2 (2008).

⁴⁵² SCA.

⁴⁵³ The Competition Commission of Singapore, *Competition Act* <<http://www.ccs.gov.sg/content/ccs/en/Legislation/Competition-Act.html>>.

⁴⁵⁴ TCA.

⁴⁵⁵ Ibid, N. B.

⁴⁵⁶ Round, David K. and Zuo, Alec, *The Welfare Goal of Antitrust Laws in Asia: For Whom Should the Law Toil?* 22 Asian-Pacific Economic Literature 2 (2008).

⁴⁵⁷ The Price Fixing and Anti-Monopolies Act [1979].

the *Act*, also featured goals “to control fair price fixing and to prevent monopolies and competition restrictions”⁴⁵⁸ in the *nota bene*.

On 3 December 2004 the National Assembly of the Socialist Republic of Vietnam enacted the *Competition Law No. 27/2004/QH11*.⁴⁵⁹ Under article 4 titled, “Right to business competition”,⁴⁶⁰ it would appear that the purpose of the law is the protection of “freedom to competition within the legal framework”.⁴⁶¹ However, the freedom to competition is tempered with “the principles of honesty, non-infringement upon the interests of the state, public interests, legitimate rights and interests of enterprises, consumers and compliance with the provisions of the law.”⁴⁶²

Malaysia Competition Act was enacted in 2010 and became effective in January 2012. Its stated purpose is “to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers.”⁴⁶³ The language of the law suggests that there is a hierarchical order of the purposes. The primary objectives of the economic goals are the promotion of economic development, and the promotion and protection of the process of competition while the secondary objective is the protection of consumer welfare.

With regards to Lao PDR, the Prime Minister’s *Decree No. 15 on Trade Competition* was adopted on 4 February 2004.⁴⁶⁴ It is the only non-comprehensive competition law statute since it only applies to monopolies and unfair competition. The *Decree* aims to “promote fair trade competition, protect the rights and legal interests of consumers and to encourage business activities in the Lao PDR to function efficiently in the market economy mechanism”.⁴⁶⁵ The *Decree* has never been enforced because the Trade Competition Commission, the authority in charge of its implementation and enforcement,⁴⁶⁶ has never been created.⁴⁶⁷

Countries with Sectoral Competition Law

Brunei Darussalam and Cambodia do not currently have a comprehensive national competition law. However, they have sector-specific regulations pertaining to competition. In the case of Brunei Darussalam, there is a sectoral regulation for the telecommunication

⁴⁵⁸ Ibid, N. B.

⁴⁵⁹ Vietnam Law on Competition, No.27/2004/QH11.

⁴⁶⁰ Ibid, art. 4 para. 1.

⁴⁶¹ Ibid.

⁴⁶² Ibid, art. 4 para. 2.

⁴⁶³ Malaysia Competition Act.

⁴⁶⁴ Decree No. 15/PMO on Trade Competition [2004].

⁴⁶⁵ Ibid, art. 1.

⁴⁶⁶ Ibid, art. 16.

⁴⁶⁷ Lim, Terence and Kway, Abigail, *ASEAN Competition Law* (McEwin, Robert Ian and Anandarajah, Kala eds., 2nd edn., LexisNexis 2012) chap. IV sec 1.

and info-communication industry.⁴⁶⁸ The *Telecommunications Order* set up a sectoral regulator called the Authority for Info-Communication Technology Industry in 2003 with the duty to, *inter alia*, “promote and maintain fair and efficient market conduct and effective competition between persons engaged in commercial activities connected with telecommunication technology in Brunei Darussalam”.⁴⁶⁹ In addition, the *Monopolies Act*,⁴⁷⁰ which came into force in 1932 to regulate the establishment of monopolies, allows His Majesty the Sultan and Yang Di-Pertuan to grant exclusive rights to designated persons or companies for certain activities. They have discretionary power to legally designate monopolies. According to the *Act*, only two types of monopoly rights can be granted: the manufacturing, selling, purchasing, and importing of firearms and ammunition and all kinds of defence equipment and armaments; and the collecting within and exporting from Brunei Darussalam the skins of crocodiles, pythons and monitor lizards.

Cambodia developed a draft comprehensive competition law and in 2010 the Minister of Commerce indicated that the draft competition law was almost finalised.⁴⁷¹ However, the Cambodian government intended to wait until 2011 to consider whether to implement such legislation, citing the danger of prejudicing domestic firms. Currently, there is still no development on the state of the draft competition law. The draft intended to exclude sectors regulated by sectoral laws such as the banking, the energy and the telecommunications sectors from its application. An example of Cambodia’s sectoral competition provisions is the *Electricity Law of 2001*⁴⁷² which aims to establish the principles for the establishment of competition wherever feasible within the electric power sector. The statute also establishes the Electricity Authority of Cambodia as the sole regulator of the electricity sector. At this stage, it is unclear whether the sectoral regulator’s power includes the regulation of competition in the electricity sector.

Countries with Recent Competition Law

Two recent countries to adopt competition law, mere months away from the introduction of the AEC at the end of 2015, are Myanmar and the Philippines. On 24 February 2015, Myanmar enacted its first comprehensive competition law.⁴⁷³ It was believed that Myanmar’s pursuance of competition law would pressure the remaining AMSs to follow suit.⁴⁷⁴ Only the Philippines responded to this call. The Myanmar competition law aims to “prevent the public interests from being harmful,” control unfair competition, prevent

⁴⁶⁸ The Telecommunications Order [2001].

⁴⁶⁹ Ibid.

⁴⁷⁰ The Monopolies Act [1932].

⁴⁷¹ Lim, Terence and Kway, Abigail, *ASEAN Competition Law* (McEwin, Robert Ian and Anandarajah, Kala eds., 2nd edn., LexisNexis 2012).

⁴⁷² The Electricity Law [2001].

⁴⁷³ Myanmar Competition Law.

⁴⁷⁴ Fruitman, David, *Myanmar’s New Competition Law: An Important First Step in the Right Direction* <<http://www.lexology.com/library/detail.aspx?g=c3be34e6-5c43-42ee-851c-5eab8a084072>>.

abuse of market power, and control agreements and plans that cause limitations on competition.⁴⁷⁵ The statute makes no attempt to identify public interests.

Five months after the enactment of Myanmar's competition law statute, the Philippines finally adopted its first comprehensive competition law.⁴⁷⁶ The statute recognises economic efficiency and the promotion of free and fair competition, the prevention of economic concentration, the protection of consumer welfare, the advancement of domestic and international trade, as well as economic development as the goals of competition law.⁴⁷⁷

In the case of the ASEAN, all the AMSs in possession of comprehensive competition law related statutes have set economic goals as the rationale for national competition laws. The Myanmar competition law stands out for its omission of economic efficiency among its economic goals. It follows that there are some difficulties in obtaining consensus on what are economic goals. There are various economic goals included in the AMSs' statutes, ranging from economic efficiency, consumer protection, free and fair competition, and economic development. It is noteworthy that Vietnam's definition of free competition is relatively limited.⁴⁷⁸ None of the AMSs have adopted the general goal of the promotion and protection of competition suggested in the *Guidelines I*.⁴⁷⁹ Furthermore, few AMSs' statutes contain the social aspect of the goals of competition law. Only Singapore, Lao PDR, Myanmar, and the Philippines include consumer welfare protection in their competition law objectives alongside the economic goals. Myanmar competition law is the only regime that highlights protection of public interest without defining it. These social goals are moved from competition policy objectives to "other policy objectives"⁴⁸⁰ in the *Guidelines I*. In addition, none of the AMSs have included regional integration in their goals of competition law although this is not uncommon. The blatant disregard of the common reference guide published by the ASEAN Secretariat meaningfully suggests that the AMSs are operating in a separate sphere from the ASEAN. While this is perhaps understandable in the case of the AMSs who enacted their national competition laws before the announcement of the creation of the AEC in 2003, it does not explain the cases of Singapore, Lao PDR, Vietnam, Malaysia, Myanmar, and the Philippines whose competition law was enacted in 2004, 2010, and 2015 respectively. Brunei Darussalam, Cambodia and Lao PDR are reportedly working to enact their respective comprehensive competition statutes.⁴⁸¹

⁴⁷⁵ Myanmar Competition Law, art. 3.

⁴⁷⁶ Philippines Competition Act, Republic Act No. 10667.

⁴⁷⁷ *Ibid*, sec. 2.

⁴⁷⁸ Vietnam Law on Competition, No.27/2004/QH11, art. 4 para. 2.

⁴⁷⁹ *Guidelines I*, art. 2.2.1.

⁴⁸⁰ *Ibid*, art. 2.2.3.

⁴⁸¹ Fruitman, David, *Myanmar's New Competition Law: An Important First Step in the Right Direction* <<http://www.lexology.com/library/detail.aspx?g=c3be34e6-5c43-42ee-851c-5eab8a084072>>.

3.2. The Diversity among the AMSs

There is considerable diversity among the AMSs relating to their respective economic and policy heritage, governance systems, legal institutions, stages of economic development, and exposure to or reliance on foreign trade and investments. While diversity among the AMSs is also present in other developing economies, what differentiates the AMSs from others is the diversified level of disparity exhibited in the region. This deep level of diversity contributes to the divergence in the AMSs' competition law enforcement and therefore renders the harmonisation process more difficult to accomplish. Eventually, it has the possibility to delay the ASEAN's development of regional competition policy. This section focuses only on the political system and economic development since it is in these areas that there is most diversification. It is also recognised that the political system and economic development have an impact on the implementation of competition law.

3.2.1. The Political Regime

Political characteristics such as the type of political regime, the electoral system and the quality of governance have a significance impact on the enactment and enforcement of competition law. Parakkal asserted that countries with a democratic political regime and a stable rule of law are more inclined to enact national competition law.⁴⁸² His theory aligns with that of Williams who has previously claimed that competition law is only effective in a "functioning democracy."⁴⁸³ According to Williams, a functioning democracy primarily encompasses a usable legislative instrument, competent and impartial administration of the law, and the ability to enforce. His definition goes beyond the inclusion of democracy in a country's Constitution. However, Dabbah maintained that the political constraints experienced by a state when enacting and implementing competition law was independent of the type of that state's political regime.⁴⁸⁴

There are a wide range of political regimes represented among the AMSs, from democracy to monarchy. Cambodia,⁴⁸⁵ Malaysia⁴⁸⁶ and Thailand⁴⁸⁷ pride themselves on their constitutional monarchy, while Brunei Darussalam has a system of Malay Islamic monarchy.⁴⁸⁸ Singapore is a parliamentary republic.⁴⁸⁹ The Philippines, Indonesia,⁴⁹⁰ and

⁴⁸² Parakkal, Raju, *Political Characteristics and Competition Law Enactment: A Cross-Country Empirical Analysis*, 56 *The Antitrust Bulletin* (2011).

⁴⁸³ Williams, Mark, *Competition Law in Thailand: Seeds of Success or Fated to Fail?*, 27 *World Competition* 459 (2004).

⁴⁸⁴ Dabbah, Maher M., *Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime*, 33 *World Competition* 457 (2010).

⁴⁸⁵ The Constitution of the Kingdom of Cambodia, art. 1.

⁴⁸⁶ The Federal Constitution of Malaysia, art. 1. Malaysia is a federal constitutional monarchy in which the head of State is the Yang di-Pertuan Agong and the head of government is the Prime Minister. The Yang di-Pertuan Agong is elected for a five-year term by and from the rulers of the nine states in Peninsular Malaysia which have retained their hereditary Malay royal family.

⁴⁸⁷ The Constitution of the Kingdom of Thailand, sec. 2.

⁴⁸⁸ The Constitution of Brunei Darussalam, art. 4.

most recently, Myanmar⁴⁹¹ are presidential republics. The political reform undergone in Myanmar seems to indicate the emergence of a liberal democracy but the reform could not erase the omnipresence of the military despite the self-abolition of the military junta. Regardless, the ASEAN has approved its progress by granting the chairmanship of the ASEAN to Myanmar in 2014.⁴⁹² Lao PDR⁴⁹³ and Vietnam⁴⁹⁴ are the two remaining socialist states in the region. Despite having enshrined the principle of democracy in their Constitution, the AMSs' state of democracy appears illusory and is marred by frequent political instability. For example, the legitimacy of the Myanmarian elections of 2010 was called into question.⁴⁹⁵ Thailand has continuously suffered from political instability. To date, it has enacted 17 constitutions and has intermittently reverted to a military junta – its current political state.

It is not the differences in political regimes that commentators fear the most. The AMSs are often criticised for their lack of good governance and rule-based systems.⁴⁹⁶ Corruption is widely recognised as attributing to the distortion of market efficiency and preventing the market from functioning properly.⁴⁹⁷ The issue of corruption is not limited to developing economies, but is also found in developed economies. The EU considers corruption to be a serious issue which needs to be addressed at both the EU and the member-state level.⁴⁹⁸

The political diversity within the Southeast Asian region is aggravated by the issue of corruption which in these countries is usually deeply embedded within the administrative system and becomes a major obstacle to any change or reform. It is common in Southeast Asia to have a strong relationship between the business and government sectors.⁴⁹⁹ This system is described as one of patronage where political leaders or the patrons serve the

⁴⁸⁹ The Constitution of the Republic of Singapore, art. 3.

⁴⁹⁰ The Constitution of the Republic of Indonesia, art. 4.

⁴⁹¹ Constitution of the Republic of the Union of Myanmar, art. 16.

⁴⁹² ASEAN Secretariat, *Myanmar Commences Role as ASEAN Chair; Hosts Foreign Ministers Meeting in Bagan* <<http://www.asean.org/news/asean-secretariat-news/item/myanmar-commences-role-as-asean-chair-hosts-foreign-ministers-meeting-in-bagan>>.

⁴⁹³ The Constitution of the Lao People's Democratic Republic [1991] art. 2.

⁴⁹⁴ The Constitution of the Socialist Republic of Vietnam [1992] art. 4.

⁴⁹⁵ Macfarquhar, Neil, 'U.N. Doubts Fairness of Election in Myanmar' *The New York Times* (21 October 2010).

⁴⁹⁶ See, generally, Thanadsillapakul, Lawan, 'The Harmonization of ASEAN: Competition Laws and Policy from an Economic Integration Perspective' in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012); Williams, Mark, *Competition Law in Thailand: Seeds of Success or Fated to Fail?*, 27 *World Competition* 459 (2004).

⁴⁹⁷ See, generally, Fox, Eleanor M., *Economic Development, Poverty and Antitrust: The Other Path*, 13 *Sw. J. L. & Trade Am.* 211 (2007). (The OECD has also organised a Global Forum on Competition focusing on fighting corruption and promoting competition on 27-28 February 2014.)

⁴⁹⁸ OECD, *Fighting Corruption and Promoting Competition: Contribution from the European Union* (2014). As such, the fight against corruption is regarded as an integral part of the EU. However, in the field of the EU competition policy, no specific policy initiatives have been developed in order to target this particular issue.

⁴⁹⁹ Thanitcul, R. Ian McEwin and Sakda, 'Thailand' in Williams, Mark (ed), *The Political Economy of Competition Law in Asia* (Cheltenham, Edward Elgar Publishing 2013).

interest of their financial supporters or the clients.⁵⁰⁰ This system is attributed to the historical situation whereby many businessmen in this area are of Chinese descent. To avoid resentment of their cultural differences in a foreign land that would obstruct their business, they turned to indirect political influence to smooth their business endeavours.⁵⁰¹ In this climate of cronyism, the government is inevitably implicated in the management of its local economy. Unquestionably, it is possible that the government may willingly participate in the market without the encouragement of a third-party. Historically, the Singaporean government invested through government-linked companies in numerous sectors that the private sector was unwilling or unable to enter.⁵⁰² These companies later grew considerably and consequently contribute to anti-competition problems in Singapore's economy. It is necessary that the role of the government in the local economy be curbed⁵⁰³ regardless of how difficult the task may be as many governmental interventions have become part of a cultural practice. Governmental interventions can impede the emergence of a viable private sector in the local economy which rests on, among other things, competition. At the same time, the government may exhibit anti-competition behaviour by favouring the participation of certain foreign firms in the local economy. Furthermore, there could be direct participation of the government in an area where privatisation has emerged; thus the government is in direct competition with the private sector.

Transparency International rates countries and territories according to how corrupt their public sector is perceived to be, using the Corruption Perceptions Index. Within the ASEAN, Singapore ranked at number 7 worldwide and is the best ranked country in the region. Myanmar and Cambodia are among the lowest rated with both ranked at 156.⁵⁰⁴ The majority of the AMSs are rated low on this list. Conscious of the corruption problem, many AMSs adopted an ambitious law and/or enforcement agency in an attempt to tackle this issue directly. For instance, Vietnam adopted a comprehensive anti-corruption law in 2009 which established the Anti-Corruption Agency while Indonesia appointed the Indonesian Anti-Corruption Commission (Komisi Pemberantasan Korupsi).⁵⁰⁵ Despite these efforts, corruption remains a concern,⁵⁰⁶ suggesting that more concrete actions are needed in order to obtain the intended effect of the law.

⁵⁰⁰ Eisenstadt, S. N. and Roniger, Louis, *Patron-Client Relations as a Model of Structuring Social Exchange*, 22 *Comparative Studies in Society and History* 42 (1980).

⁵⁰¹ Thanitcul, R. Ian McEwin and Sakda, 'Thailand' in Williams, Mark (ed), *The Political Economy of Competition Law in Asia* (Cheltenham, Edward Elgar Publishing 2013).

⁵⁰² OECD, *Fighting Corruption and Promoting Competition: Contribution from Singapore* (2014).

⁵⁰³ Dabbah, Maher M., *Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime*, 33 *World Competition* 457 (2010).

⁵⁰⁴ Transparency International, *Corruption Perceptions Index 2014*

<<http://www.transparency.org/cpi2014/results>>. (The information on Brunei Darussalam is not available)

⁵⁰⁵ Ningrum, Natasya Sirait, 'Indonesia' in Williams, Mark (ed), *The Political Economy of Competition Law in Asia* (Edward Elgar Publishing 2013).

⁵⁰⁶ Cheong, May Fong, *Competition Policy and Law and ASEAN's Economic Integration Agenda*

<<http://www.clmr.unsw.edu.au/article/risk/competition-policy-and-law-and-aseans-economic-integration-agenda>>.

3.2.2. Diversity in Economic Conditions

“As far as market structure and market culture are concerned, ASEAN is ten-tiered, not two.”⁵⁰⁷ The issue of the AMSs’ economic diversity was briefly addressed in Chapter 1. The majority of the AMSs are small and developing market economies with GDP per capita averages of USD 6,000 – 1,200.⁵⁰⁸ Applying the IMF classification, Singapore is the only advanced economy in the region with a reported GDP per capita of above USD 40,000. Among these developing economies, Cambodia, Lao PDR, and Myanmar are classed as low-income developing countries.⁵⁰⁹ Generally, small economic markets tend to limit competition.⁵¹⁰ This is inherent in their natural condition where monopolies or oligopolies can easily emerge. This situation contributes to the need to regulate the conduct of players within these economies. Gals was confident that even in monopolistic or oligopolistic markets, competition policy can “significantly improve market performance by reducing the opportunities and incentives for firms to abuse their market power.”⁵¹¹ There are also differences in the economic structures among the AMSs. The nature of the economy in Vietnam, as defined by its Constitution, is a socialist-oriented market economy.⁵¹² It is the country’s “attempt to balance its communist heritage of centralised planning with increasing private participation.”⁵¹³ Brunei is a small energy-rich country, while most of the AMSs are heavily dependent on imported energy and commodity exports.⁵¹⁴ The economic structure of Thailand, Indonesia and the Philippines is a mixture of agricultural, industrial, and commercial activities. Singapore, with its restriction on natural resources, focuses more on its commercial economy. There is more economic competition among the AMSs than complementary trade, as geographical and technological similarities lead to similar exports of natural resources and labour-intensive manufacturing.⁵¹⁵ The AMSs are in competition for the extra-ASEAN markets. The governments of the AMSs are also renowned for interfering in the economy of the country. The governments of both Malaysia and Singapore, in particular, play a significant role in the management of the economy, whether fully or partially, through state-owned enterprises and unofficial government-linked companies.⁵¹⁶ In Singapore, which is a strong free market advocate, it is quite surprising to find its government playing an active role in the country’s economic development. In Myanmar, the military government has the

⁵⁰⁷ Thant, Khin Ohn, *Competition Policy and Economic Growth in ASEAN Countries: a Myanmar’s Perspective* (The ASEAN Conference on Fair Competition Law and Policy 2003).

⁵⁰⁸ *World Economic Outlook Database*.

⁵⁰⁹ *World Economic Outlook Database*, 147-152.

⁵¹⁰ Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003).

⁵¹¹ *Ibid.*

⁵¹² The Constitution of the Socialist Republic of Vietnam, art. 15.

⁵¹³ Fruitman, David, ‘Vietnam’ in Williams, Mark (ed), *The Political Economy of Competition Law in Asia* (Edward Elgar Publishing 2013).

⁵¹⁴ Inama, Stefano and Sim, Edmund W., *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile* (Cambridge University Press 2015) 21.

⁵¹⁵ Chia, Siow Yue and Plummer, Michael G., *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions* (Cambridge University Press 2015).

⁵¹⁶ Cheong, May Fong and Lee, Yin Harn, ‘Malaysia and Singapore’ in Williams, Mark (ed), *The Political Economy of Competition Law in Asia* (Edward Elgar Publishing 2013).

majority stakeholder positions in all of the major industrial corporations of the country. An oligarchic structure is prominent in countries such as the Philippines⁵¹⁷ and Thailand⁵¹⁸ where the majority of businesses are controlled by conglomerates with strong ties to politicians. The oligarchs in these countries seem to be protected and sustained by imperfect regulations.

Because of the governmental intervention in the economy and the lack of effective and efficient corruption-free regulatory and juridical infrastructure, Haley predicted that the existing competition laws and those being planned in the Asia Pacific Economic Cooperation (APEC) countries are “almost certain to fail.”⁵¹⁹ Instead of promoting and protecting competition, these competition laws are mere regulatory tools that are more likely to be manipulated in favour of politically-favoured firms and industries. Consequently, competition laws enacted under these economic circumstances are poised to create even more regulatory barriers to the entry to market. Regardless of the diversity in the economic conditions of the AMSs, Drexl admitted that the implementation of a common competition policy does not require similar levels of economic development in the participating states.⁵²⁰ The concrete application of the rules to the individual cases is more important.

3.2.3. The ASEAN Way

The diversity among the AMSs can be resolved through the willingness to commit to the ASEAN’s cause. However, the much-needed political will is deflected by the ASEAN’s traditional mode of dispute resolution, often termed as the ASEAN Way. This is the fundamental principle of the ASEAN and has its origin from when the idea of a loosely connected organisation was first conceived. The ASEAN’s origin would explain the AMSs’ traditional obsession with sovereignty and a strong predilection for decentralised decision-making.⁵²¹ Former ASEAN Secretary General Ong Keng Yong explained that “the ASEAN founding fathers wanted the ASEAN to be an organisation with minimal legal institutionalisation because to them, ASEAN was first and foremost a diplomatic instrument for confidence-building in a time when member countries’ common concern was containing communist China.”⁵²² The fact that the ASEAN Secretariat wasn’t created

⁵¹⁷ Williams, Mark and Jalit, Ruby Ann S., ‘The Philippines’ in Williams, Mark (ed), *The Political Economy of Competition Law in Asia* (Edward Elgar Publishing 2013).

⁵¹⁸ Thanitcul, R. Ian McEwin and Sakda, ‘Thailand’ in Williams, Mark (ed), *The Political Economy of Competition Law in Asia* (Cheltenham, Edward Elgar Publishing 2013).

⁵¹⁹ Haley, John O., *Competition Law for the Asia-Pacific Economic Cooperation Community: Designing Shoes for Many Sizes*, 1 Wash. U. Global Stud. L. Rev. 1 (2002).

⁵²⁰ Drexl, Josef, ‘Economic Integration and Competition Law in Developing Countries’ in Drexl, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

⁵²¹ Roberts, Christopher B., *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Routledge 2012) 178.

⁵²² Ong, Keng Yong, *ASEAN and the 3 L’s: Leaders, Laymen and Lawyers*

<<http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries->

until 1976 exemplifies the informal ASEAN Way that was deliberately embraced from its beginning.⁵²³ The ASEAN Way is the method employed when dealing with situations of conflict within the region. This ideal consists of:

- a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- b. The right of every State to lead its national existence free from external interference, subversion or coercion;
- c. Non-interference in the internal affairs of one another;
- d. Settlement of differences or disputes by peaceful means;
- e. Renunciation of the threat or use of force;
- f. Effective cooperation among themselves.⁵²⁴

A recent trend in legalisation has emerged within the ASEAN. The organisation has subsequently evolved from a loose political organisation based solely on the ASEAN Way to a more legalistic framework based on regulations and a dispute settlement mechanism.⁵²⁵ This development has continued with the new *ASEAN Charter*. The *ASEAN Charter* serves as a firm foundation for the ASEAN Community by conferring a legal personality to the ASEAN for the first time and providing it with an institutional framework. It also codifies the ASEAN norms and values, and at the same time sets clear objectives for the organisation. The *ASEAN Charter* is a legally binding agreement between the ten AMSs. The principle of the ASEAN Way has been reaffirmed in the *ASEAN Charter* which now includes reliance on peaceful settlement of disputes, non-interference in the internal affairs of the AMSs, and enhanced consultation on matters seriously affecting the common interest of the ASEAN.⁵²⁶ With regard to the language used in the *ASEAN Charter*, the ASEAN Way resembles the process of regional interactions and cooperation based on discreteness, informality, consensus building and non-confrontational bargaining styles that contrast with the adversarial posturing, majority vote and other legalistic decision-making procedures in other multilateral organisations.⁵²⁷ This low level of legalisation is not a unique attribute of the ASEAN but rather a shared feature common in the larger Asia Pacific region.⁵²⁸

general-of-asean/item/asean-and-the-3-l-s-leaders-laymen-and-lawyers-by-he-ong-keng-yong-secretary-general-of-asean>.

⁵²³ Inama, Stefano and Sim, Edmund W., *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile* (Cambridge University Press 2015) 19.

⁵²⁴ Treaty of Amity and Cooperation in Southeast Asia [1976] art. 2.

⁵²⁵ Davidson, Paul J., *The ASEAN Way and the Role of Law in ASEAN Economic Cooperation*, 8 S.Y.B.I. L. 165 (2004).

⁵²⁶ The ASEAN Charter, art. 2.2.

⁵²⁷ Acharya, Amitav, 'Europe and Asia: Reflections on a Tale of Two Regionalisms' in Fort, Bertrand and Webber, Douglas (eds), *Regional Integration in East Asia and Europe: Convergence or Divergence?* (Routledge 2006).

⁵²⁸ Kahler, Miles, *Legalization as Strategy: The Asia-Pacific Case*, 54 *International Organization* 549-571 (2000).

Economic integration combined with the desire to better attract foreign investment are the principal reasons transforming the ASEAN into a more legalised organisation.⁵²⁹ Legalisation has become even more urgent since the ASEAN is aiming at building a single market. Nonetheless, some doubts have arisen about whether the current “weak legalisation”⁵³⁰ in the ASEAN is the right platform from which to launch a regional integration project. Another reason behind the replacement of the traditional ASEAN Way with a legalised approach comes from the need for market regulation. The financial crisis in 1997 convinced East Asian countries to move away from a relationship-based approach to conducting business and creating wealth to one that is more rule-based and market oriented.⁵³¹ This is applicable in the context of the current global economic crisis where there have been calls for better regulation of the market.⁵³² Furthermore, Narine predicted that the ASEAN’s future viability depends on how the ASEAN and the AMSs manage the economic challenges posed by intra-regional growth and globalisation.⁵³³

In the context of competition law, as the ASEAN is not a supranational organisation, there is no regional institution or any other mechanism to enforce or resolve potential disputes related to transnational competition rules. As affirmed by the *ASEAN Charter*, the ASEAN is simply an intergovernmental organisation, founded on the principles of equal sovereignty of all the AMSs and non-interference in the AMSs’ internal affairs.⁵³⁴ As Ewing-Chow commented, “[w]hile the *ASEAN Charter* does take the important step of conferring legal personality to ASEAN, it does not sufficiently address the legally important elements of rule-making, monitoring and enforcement for ASEAN.”⁵³⁵ Although the *ASEAN Charter* envisages a committee of permanent representatives based in Jakarta, who would be appointed to ASEAN and hold the rank of an Ambassador, this committee will not be the primary decision-making body. Instead, the ASEAN Summit continues to be the main forum for decision-making. Decisions at all levels within the organisation will continue to be made by consultation and consensus,⁵³⁶ thus continuing the organisation’s adherence to the ASEAN Way. The ASEAN Secretary General and the ASEAN Secretariat have been given greater responsibility to monitor compliance and facilitate the implementation of the AEC.⁵³⁷

⁵²⁹ Davidson, Paul J., *The ASEAN Way and the Role of Law in ASEAN Economic Cooperation*, 8 S.Y.B.I. L. 165 (2004).

⁵³⁰ Ewing-Chow, Michael, *Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?*, 12 S.Y.B.I. L. 255 (2008).

⁵³¹ ASEAN Secretariat, *Reforms and Integration in East Asia Could Strengthen Regional Stability* <<http://www.asean.org/archive/newdata/content1.txt>>.

⁵³² Kokkoris, Ioannis and Olivares-Caminal, Rodrigo, *Antitrust Law amidst Financial Crises* (Cambridge University Press 2010) 19.

⁵³³ Narine, Shaun, *Explaining ASEAN: Regionalism in Southeast Asia* (Lynne Rienner Publishers 2002).

⁵³⁴ The ASEAN Charter, art. 2.2. & 3.

⁵³⁵ Ewing-Chow, Michael, *Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?*, 12 S.Y.B.I. L. 255 (2008).

⁵³⁶ The ASEAN Charter. art. 7, 12 & 20.

⁵³⁷ *Ibid*, art. 11.

In such a context where no supranational body or dispute resolution mechanism has been established in the region, adopting uniform and central competition rules is not feasible. Even if the AMSs were in agreement on a common set of rules, the interpretation and application of these rules would still vary according to the AMS. It is not surprising, then, that the AMSs prefer a non-binding set of regional guidelines on competition policy to a binding agreement. Thus, the ASEAN harmonisation approach can be regarded as an appropriate step that takes into account the current stage of the ASEAN integration. As the ASEAN moves towards further integration, it is plausible to expect an increasing number of binding agreements. As the level of integration grows, the binding character of liberalising agreements becomes more important, and as the levels of legal obligation and the precision of the rules increase, delegation of rule interpretation and dispute adjudication is often observed.⁵³⁸ Until that time, the current approach taken by the ASEAN towards the harmonisation of competition law and policy is more feasible.

There have been several calls to replace the traditional ASEAN Way with a more formal form of cooperation to better adjust to the new ASEAN goal of economic integration.⁵³⁹ The current ASEAN Way has been criticised for its non-resolution of disputes.⁵⁴⁰ Strong partnerships or formal links between national competition agencies through various cooperation channels such as the AEGC, the ICN or the OECD were proposed, particularly in the area of merger review and transnational cartel investigation⁵⁴¹ but the ASEAN Way has been defended because of its significant past contribution to regional security and economic development. It represents a necessary foundation for the ASEAN's past *modus operandi* due to the strategic, political, economic, and socio-cultural diversity of the countries in Southeast Asia.⁵⁴² Admittedly, the ASEAN Way did not achieve such feats alone. It was argued that the primary contributing factor was the economic growth and the associated performance legitimacy⁵⁴³ such growth delivers that represented the key foundation to the security of both the region and its governments.⁵⁴⁴

Some commentators have remained hopeful about the future of the ASEAN Way. "The measures taken by the *Charter* may not go as far as some critics would like. But on the whole, the *Charter* helps ASEAN move from an almost purely political relationship

⁵³⁸ Kahler, Miles, *Legalization as Strategy: The Asia-Pacific Case*, 54 *International Organization* 549-571 (2000).

⁵³⁹ See, for example, Williams, Megan R., *ASEAN: Do Progress and Effectiveness Require a Judiciary?* 30 *Suffolk Transnat'l L. Rev.* 433 (2007); Beeson, Mark, *ASEAN's Ways: Still Fit for Purpose?*, 22 *Cambridge Review of International Affairs* 37 (2009).

⁵⁴⁰ Williams, Megan R., *ASEAN: Do Progress and Effectiveness Require a Judiciary?* 30 *Suffolk Transnat'l L. Rev.* 433 (2007).

⁵⁴¹ Global Competition Review, *ACCC's Sims Pushes for More Regional Cooperation* <<http://www.globalcompetitionreview.com/news/article/31471/acccs-sims-pushes-regional-cooperation>>.

⁵⁴² Roberts, Christopher B., *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Routledge 2012) 70.

⁵⁴³ Acharya, Amitav, *Transnational Production and Security: Southeast Asia's "Growth Triangles"*, 17 *Contemporary Southeast Asia* 173 (1995). (coined the term "performance legitimacy")

⁵⁴⁴ Roberts, Christopher B., *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Routledge 2012) 70.

towards relationships in which there are legitimate expectations that arise from repeated interactions, shared principles and purposes, and norms, as well as stronger regional processes and institutions that will foster compliance by the member countries to their promises and obligations.”⁵⁴⁵ It is believed that, over time, as the ASEAN moves towards further legalisation, the ASEAN Way will no longer be a constraint in adopting a binding agreement on competition policy in the region.⁵⁴⁶ These optimistic views are in contrast to those of Shenoy who was convinced that the creation of a set of uniform rules was not feasible and that, given the political, legal and economic diversity in the region, it would be too simplistic to assume a common market and common rules will emerge naturally.⁵⁴⁷ Therefore, further regulations and mechanisms reflecting deeper integration within the organisation need to be in place first to ensure their forced emergence. He offered his opinion early in 1987 when the organisation was still a purely political one. However it would appear that many things, including the ASEAN Way and the diversity of the AMSs, remain unchanged.

In reality, a transformation of the ASEAN Way is unlikely to occur in the near future since the principle is embedded in the *ASEAN Charter* as early as in Article 2. Its placement articulates the importance of the ASEAN Way doctrine to the organisation. In its own way, the ASEAN Way is the stumbling block preventing the ASEAN from moving forward with fruitful cooperation in order to attain the desired ambition of regional integration.

3.3. Conclusion

The ASEAN ambition of creating a highly competitive region that is fully integrated with the global economy is laudable but the task ahead is colossal. The uncertainty in achieving this aspiration started from the very beginning when the AMSs communally ignored the goals of competition policy advocated by the *Guidelines I* which are the promotion and protection of competition.⁵⁴⁸ The AMSs prefer instead a wide range of economic goals such as economic efficiency, consumer protection, free and fair competition, and economic development. Moreover, some national statutes contain the social goals of competition law, such as consumer welfare protection, when they are relegated to the status of other policy objectives by the *Guidelines I*.⁵⁴⁹ This chapter identifies the discrepancies in the political systems and the economic development, along with the deeply rooted ASEAN Way as the principal challenges to establishing the ASEAN regional competition policy. Since the ASEAN is a collection of contrasts and disparities in many areas, “[t]he immediate

⁵⁴⁵ Tay, Simon S. C., *The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment*, 12 S.Y.B.I. L. 151 (2008).

⁵⁴⁶ Ly, Luu Huong, *Regional Harmonization of Competition Law and Policy: An ASEAN Approach*, 2 Asian J. Int. Law 291 (2012).

⁵⁴⁷ Shenoy, George T. L., *The Emergence of a Legal Framework for Economic Policy in ASEAN*, 29 Malaya L. Rev. (1987).

⁵⁴⁸ *Guidelines I*, art. 2.2.1.

⁵⁴⁹ *Ibid*, art. 2.2.3.

implication of this regional diversity is that there is no such thing as a ‘one size fits all’.⁵⁵⁰ Consequently, it is not surprising that the AMSs would seek to implement different national competition laws and policies. However, markedly different national competition laws could adversely affect the overall progress of ASEAN competition law development. Furthermore, it is difficult to imagine how the ASEAN would achieve its goal of economic integration through the ASEAN Way without the fundamental support of a harmonised competition law.⁵⁵¹ An integrated single market cannot be achieved through mere political cooperation, let alone without the necessary central institution.

It is evident that the issues analysed in this chapter need to be addressed in the development of the ASEAN competition law for the benefit of the continual pursuit of regional economic integration. If they are not overcome or minimised, they possess the ability to hinder the establishment of the ASEAN single market since competition policy occupies a central place at the foundation of the AEC.

⁵⁵⁰ Abad, Anthony Amunategui, ‘Competition Law and Policy in the Framework of ASEAN in Competition Policy and Regional Integration’ in Drexler, Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

⁵⁵¹ Vyas, Jaimini, ‘Les Accords de Libre-Echange en Asie: Evaluation de la Possibilité d’une Uniformisation des Droits’ in Quézel-Ambrunaz, Christophe (ed), *Les Défis de l’Harmonisation Européenne du Droit des Contrats* (Université de Savoie 2012).

Chapter 4 The ASEAN's Approach to Regulatory Design

The previous chapter identified the objectives of the ASEAN competition policy as well as potential challenges that the ASEAN would face while establishing a construct for the implementation of the aforementioned policy. This chapter will build upon that discussion and further investigate the actual approach the ASEAN has taken regarding its competition policy goals. At this stage, it is prudent to question which competition law would be most suitable for the ASEAN. There are generally three accepted models.⁵⁵² The first model is the formulation of competition law based on its own vision distinct from that of the developed economies.⁵⁵³ Gal, in particular, was a strong advocate for this model, suggesting that developing economies sustain a different market reality from that of developed ones because of the smallness of their market which are often plagued with high level of concentrations.⁵⁵⁴ It follows that competition rules that flourish in big economies would struggle to find enforcement in small market economies. Yet, the proposal of such a model usually begins with the examination of current existing competition law regimes, especially those belonging to developed economies. This practice suggests that in reality, the formulation of developing economies' competition law model is at best, merely an adaptation of competition law from matured regimes. The restriction in resources, both financial and technical, within developing economies further exacerbates their chance of developing an originally expressed law tailored to the specificities of those economies. It appears that no competition law is entirely tailor-made for a developing economy. However, it is not impossible properly to adjust existing laws to correspond to the special considerations of small market economies.⁵⁵⁵ The challenge to adopting this second model would lie in understanding when foreign law is appropriate for the host country. This condition is crucial in light of the law's acceptance of legitimacy by the people. At the other end of the spectrum is the adoption of a universal consensus-based competition law.⁵⁵⁶ Admittedly, this movement has weakened considerably since the abandonment of the *Draft International Antitrust Code*⁵⁵⁷ and does not seem to have recovered its

⁵⁵² Shahein, Heba, 'Designing Competition Laws in New Jurisdictions: Three Models to Follow' in Whish, Richard and Townley, Christopher (eds), *New Competition Jurisdiction: Shaping Policies and Building Institutions* (Edward Elgar Publishing 2012). (Employs the same distinctions using a different language to describe the three models: "cut and paste" model, "contextualised" approach, and "tailor-made" model.)

⁵⁵³ Singh, Ajit, *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions* (UNCTAD/GDS/MDPB/G24/18, 2002) 15.

⁵⁵⁴ See, in particular, Gal, Michal S., *Size Does Matter: the Effects of Market Size on Optimal Competition Policy*, 74 S. Cal. L. Rev. 1437 (2001); Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003).

⁵⁵⁵ See, in particular, Kovacic, William E., *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DePaul L. Rev. 1197 (1995).

⁵⁵⁶ See, for example, Guzman, Andrew T., *The Case for International Antitrust*, 22 Berkeley J. Int'l Law 355 (2004); Delrahim, Makan, *The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property*, 13 Geo. Mason L. Rev. 259 (2005); Steuer, Richard M., *The Simplicity of Antitrust Law*, 14 U. Pa. J. Bus. L. 543 (2012).

⁵⁵⁷ *Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (reprint)*, 64 Antitrust & Trade Reg. Rep. 1628 (1993).

momentum since.⁵⁵⁸ Fox argued that there is nothing wrong in travelling on a path well-paved and well-travelled especially since reinventing a new path can prove difficult and costly.⁵⁵⁹ This is especially true in the light of developing economies' lack of resources and experience to adequately manage these complex issues.

This chapter will concentrate on the ASEAN's efforts to establish a regional framework for competition law. There are currently four appropriate documents produced by the ASEAN. The *Best Practices*⁵⁶⁰ was the first to be introduced in 2008. As the name implies, the aim of the *Best Practices* was to study best international practices for introducing and implementing competition policy. The authors generally use affirmative words such as "recommend" to ensure that the document is suggesting a certain position or direction. The *Handbook on Competition Policy and Law for Business*⁵⁶¹ illustrates competition law and policy and related legislations in each of the AMS and is addressed primarily to interested foreign business. Lastly, there are the two *Guidelines*⁵⁶² written under the auspices of the ASEAN Secretariat. These efforts have been mostly warmly welcomed because they are expected to assist in the development of the region's competition law and policy framework.⁵⁶³ On the other hand, they have been criticised for the absence of well-established specifications and a lack of clarity.⁵⁶⁴ Both *Guidelines* contain a double message to the AMSs: on the one hand, they are encouraged to introduce or reform an efficient competition law based on essential competition law principles and on the other hand, to establish clear competition rules. The clarity of the competition law is crucial in the case of developing economies which do not have sufficient resources to handle a heavy work load in their competition agencies. The *Guidelines I* is identified as a common reference guide without any binding power over the AMSs. The language used in the *Guidelines I* is less persuasive than in the *Best Practices* and does not demand any form of commitment from the AMSs regarding competition law and policy except to introduce national competition laws before the unveiling of the AEC in 2015. The words often employed are; "may," "could," and "can" while "should" is rarely used. Despite its name, the *Guidelines I* simply collate the already available knowledge on general competition law practices and institutional building. In this endeavour, at least, the *Guidelines I* are extremely successful since the final product is highly educative. The *Guidelines II* document was introduced two years after the introduction of the *Guidelines I* and was intended to complement the oft-cited *Guidelines I*. The arrangement of both documents is starkly different. While the *Guidelines I* uses chapters and articles, these traits are absent

⁵⁵⁸ Interview with Anne K. Bingaman, 8 Antitrust 8 (1993). As seen in Gerber, David J., *Global Competition: Law, Markets and Globalisation* (Oxford University Press 2010) 103.

⁵⁵⁹ Fox, Eleanor M., *Economic Development, Poverty and Antitrust: The Other Path*, 13 Sw. J. L. & Trade Am. 211 (2007).

⁵⁶⁰ *Best Practices*.

⁵⁶¹ ASEAN Secretariat, *Handbook on Competition Policy and Law for Business* (2010); ASEAN Secretariat, *Handbook on Competition Policy and Law for Business 2013* (2013).

⁵⁶² *Guidelines I; Guidelines II*.

⁵⁶³ Ly, Luu Huong, *Regional Harmonization of Competition Law and Policy: An ASEAN Approach*, 2 Asian J. Int. Law 291 (2012).

⁵⁶⁴ Yon-Courtin, Stéphanie, *ASEAN : L'ASEAN Publie des Lignes Directrices en Matière de Concurrence*, 4 Revue Concurrences 238 (2010).

from the *Guidelines II*, hinting that they were developed by different participating authors.⁵⁶⁵ The purpose of the *Guidelines II* is to guide the AMSs in building core competencies in the field of competition policy with a focus on how best to develop a competition law enforcement mechanism. The focal point is on competition authority attributes and competencies. Indubitably, both *Guidelines* are well researched drawing from both the AMSs and existing competition regimes' experiences. However, building an ASEAN-specific legal framework does not appear to be their focal subject matter.

This chapter will examine the approach taken by the ASEAN to achieve regional economic integration with competition law and policy as one of the principal mechanisms. It is mainly concerned with the substantive rules; discussion on the institutional aspect will be presented in Chapter 5. Many of the substantive rules are covered by *Guidelines I*; *Guidelines II* does not delve much into this area, preferring instead to focus on institutional development. This chapter is organised to reflect the organisation of the *Guidelines I*. It covers the application of competition law, prohibitions on anticompetitive agreements, abuse of dominant position and anticompetitive mergers. It will further examine the proposed resolution to the challenges in establishing competition law facing the AMSs before concluding with an analysis of the regional approach to competition law.

4.1. The Prevalence of Competition Advocacy

Perhaps the area that the ASEAN has had most success and which it readily embraced is that of competition advocacy. In the first instance, the *Guidelines I* consider competition advocacy as “an effective means for achieving the objectives of competition policy by educating the businesses and hence creating a culture of compliance.”⁵⁶⁶ This remark is later repeated in the *Guidelines II* which maintain that competition advocacy is “a fundamental tool to develop a workable competition law system.”⁵⁶⁷ Yet, in the same document, competition advocacy's importance is reduced to “a necessary complement to [the] enforcement activities.”⁵⁶⁸

Both documents are developed to aid the AMSs in how best to utilise advocacy programmes to help raise awareness and acceptance, as well as further the effectiveness of competition law enforcement. They detail each step an AMS has to take to ensure an effective advocacy scheme, starting from identifying the challenges, the objectives, and the stakeholders as well as the tools at hand before constructing a strategy. This is followed by

⁵⁶⁵ The *Guidelines I* were produced by InWent Capacity Building International whose project was funded by the Foreign Office of the Federal Republic of Germany. France's l'Autorité de la Concurrence is also documented as having participated. The *Guidelines II* were produced with the support of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) for its capacity building for the ASEAN Secretariat project. The project was also funded by the Foreign Office of the Federal Republic of Germany. In addition, the *Guidelines II* subcontractor is FratiniVergano – European Lawyers.⁵⁶⁵

⁵⁶⁶ *Guidelines I*, art. 9.1.1.

⁵⁶⁷ *Guidelines II*, 51.

⁵⁶⁸ *Ibid.*

an assessment of the results of competition advocacy. Coincidentally, it is only in the area of competition advocacy that ASEAN superiority over its AMSs is evident as all the AMSs are required to be cognizant of all the ASEAN-specific advocacy programmes.⁵⁶⁹

While the *Guidelines I* refrain from defining competition advocacy, the *Guidelines II* give a negative definition, describing it as “the range of non-enforcement activities which promote a competitive environment within an AMS.”⁵⁷⁰ In other words, competition advocacy is everything that is not covered under enforcement activities. This definition borrows from a commonly accepted definition given by the ICN. The ICN describes competition advocacy as “those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.”⁵⁷¹ The formulation of this definition encompasses both the goal and the function of competition advocacy. It follows that the goal of advocacy is to promote a competitive environment rather than promoting the application of competition law. To achieve this goal, competition agency will both persuade public authorities not to adopt anticompetitive measures and work to increase the public’s awareness of market competition.

Even though competition authorities from around the world may disagree over substantive and procedural issues, competition advocacy remains the one undisputed topic.⁵⁷² This is especially true when discussing the benefits of competition advocacy. Success in building a competition culture has obvious benefits for enforcement: the business sector may more readily comply voluntarily with the competition law; the business sector and the public may more willingly cooperate with enforcement actions, especially in the process of fact-finding; and policy makers may more enthusiastically support the mission of the competition agency.⁵⁷³ Competition advocacy helps solve the problem of consumers’ collective action by acting within the political system to advocate for regulations that do not restrict competition unless there is a compelling consumer protection rationale for imposing such costs on citizens.⁵⁷⁴ Furthermore, the Mexican experience shows that competition advocacy could generate a crucial political movement in support of major reform in competition law.⁵⁷⁵ Admittedly, competition advocacy is more cost-effective than enforcement for dismantling state-imposed barriers to competition.⁵⁷⁶ The ASEAN

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid.

⁵⁷¹ ICN, *Advocacy and Competition Policy Report* (2002) 25.

⁵⁷² Stucke, Maurice E., *Better Competition Advocacy*, 82 St. John's L. Rev. 951 (2008).

⁵⁷³ Clark, John W., *Competition Advocacy: Challenges for Developing Countries*, 6 OECD Journal: Competition Law and Policy 69 (2005).

⁵⁷⁴ Cooper, James C., Pautler, Paul and Zywicki, Todd J., *The Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust Law Journal 1091 (2005).

⁵⁷⁵ ABA, *Around the World in 80 Minutes (or So): An Update from Key Enforcement Agencies*, 12 Antitrust Source 1 (2013).

⁵⁷⁶ Cooper, James C., Pautler, Paul and Zywicki, Todd J., *The Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust Law Journal 1091 (2005).

believes that the AMSs could benefit from competition advocacy as it could help them achieve the objectives of competition policy.⁵⁷⁷

If competition advocacy has long been underestimated by developed economies,⁵⁷⁸ such is not the case in developing ones.⁵⁷⁹ For instance, in the US, competition advocacy is considered to be a mere alternative to the regulation of markets.⁵⁸⁰ It has been argued that competition advocacy is an essential precondition for the work of the new competition authority.⁵⁸¹ This is because developing economies tend to lack the necessary competition culture.⁵⁸² The economic policies in these countries are undergoing fundamental changes: markets are becoming more open; new government and regulatory institutions are being formed; trade is assuming greater influence; and state-owned enterprises are being privatised. Competition policy should occupy a central role in this transition process, but it is difficult for a new competition agency to acquire the influence and the skills needed for this purpose. The transition to a market economy is usually marred by difficult structural adjustments, significant social dislocation and other transition problems which have impeded the realisation of the expected gains from liberalisation.⁵⁸³ The new authority's knowledge of internal market structures is usually not strong enough for competition enforcement to be implemented from the very beginning.⁵⁸⁴ Lewis predicted that without the initial phase of modifying a hostile environment in a country, the competition authority will not be successful in its enforcement.⁵⁸⁵ Moreover, competition advocacy could help dispel misunderstandings surrounding the concept of competition. This idea is especially useful for countries that have recently adopted market economies. Therefore, their focus should first be on building a competition culture which is an activity that does not require extensive knowledge for preparing to apply actual enforcement. It is noteworthy that some authors maintained that some developing economies might more usefully deploy their resources to competition advocacy rather than adopting their own competition rules.⁵⁸⁶

⁵⁷⁷ *Guidelines I*, art. 9.1.1.

⁵⁷⁸ Botta, Marco, *Fostering Competition Culture in the Emerging Economies: The Brazilian Experience*, 32 *World Competition* 609 (2009).

⁵⁷⁹ Rodriguez, A. E. and Coate, Malcolm B., *Competition Policy in the Transition Economies: The Role of Competition Advocacy*, 23 *Brook. J. Int'l L.* 365 (1997); Clark, John W., *Competition Advocacy: Challenges for Developing Countries*, 6 *OECD Journal: Competition Law and Policy* 69 (2005).

⁵⁸⁰ Cooper, James C., Pautler, Paul and Zywicki, Todd J., *The Theory and Practice of Competition Advocacy at the FTC*, 72 *Antitrust Law Journal* 1091 (2005).

⁵⁸¹ Botta, Marco, *Fostering Competition Culture in the Emerging Economies: The Brazilian Experience*, 32 *World Competition* 609 (2009).

⁵⁸² ICN, *Advocacy and Competition Policy Report* (2002) 35.

⁵⁸³ Rodriguez, A. E. and Coate, Malcolm B., *Competition Policy in the Transition Economies: The Role of Competition Advocacy*, 23 *Brook. J. Int'l L.* 365 (1997).

⁵⁸⁴ Nikomborirak, Deunden, *The Political Economy of Competition Law: The Case of Thailand*, 26 *Nw. J. Int'l L. & Bus.* 597 (2006).

⁵⁸⁵ Lewis, David, 'Harmonization and its Limits' in Hawk, Barry E. (ed), *International Antitrust Law and Policy* (Fordham Competition Law Institute 2004).

⁵⁸⁶ Rodriguez, A. E. and Coate, Malcolm B., *Competition Policy in the Transition Economies: The Role of Competition Advocacy*, 23 *Brook. J. Int'l L.* 365 (1997).

The ICN definition of competition advocacy pointed to government bodies as the prime authors of anticompetitive conduct. This position is supported by many authors.⁵⁸⁷ However, Stucke argued that competition is a dynamic interplay among government institutions, private individuals, and informal norms.⁵⁸⁸ It follows that advocating for competition should not be limited to simply targeting anticompetitive government restraints. In contrast to the ICN position, the ASEAN does not single out a particular entity, preferring instead to target a wider range of stakeholders including the national competition authority, the government, other public authorities, the judiciary, the business sector, civil society, academia and the media.⁵⁸⁹

According to the ICN, advocacy lies exclusively in the hands of the competition authority, thus giving the competition authority the dual role of both competition enforcement and advocacy.⁵⁹⁰ Botta contested this position and argued that in developing economies where the concept of competition has been newly introduced, the activities of competition enforcement and advocacy involving other government bodies should be carried out by separate institutions. This is because the enforcement function is better performed by a fully independent institution while the function of competition advocacy is better performed by a government agency.⁵⁹¹ Nonetheless, the benefits of the competition authority assuming the dual role is that it can promote itself and its activities. The *Guidelines II* agree with this and state that advocacy should primarily be entrusted to the competition authority since it is best placed to identify and design solutions to competition problems.⁵⁹² However, *Guidelines II* stress that the authority is not the only actor for competition advocacy. It can be performed by other institutions in cooperation with or independently of the competition authority.

In the past, it was noted that beyond suggesting an active participation in advisory efforts, few recommendations actually provided more substantive guidance.⁵⁹³ This omission was later corrected, most notably by the ICN. Nowadays, there is no shortage of examples of competition advocacy. The publication of relevant documents is the most common instrument of competition advocacy with regards to public opinion since transparency is always appreciated by civil society. The agency may publish its decisions, the guidelines related to the enforcement of the competition act, market studies, the speeches of its senior officials and regular press releases and newsletters concerning its enforcement activities. The communication may target certain stakeholders. For instance, the US has a tradition of communicating letters from the FTC staff or the full Commission to interested

⁵⁸⁷ Whish, Richard and Bailey, David, *Competition Law* (7th edn., Oxford University Press 2012) 25.

⁵⁸⁸ Stucke, Maurice E., *Better Competition Advocacy*, 82 St. John's L. Rev. 951 (2008).

⁵⁸⁹ *Guidelines II*, 59-66.

⁵⁹⁰ ICN, *Advocacy and Competition Policy Report* (2002) 25.

⁵⁹¹ Botta, Marco, *Fostering Competition Culture in the Emerging Economies: The Brazilian Experience*, 32 World Competition 609 (2009).

⁵⁹² *Guidelines II*, 53.

⁵⁹³ Rodriguez, A. E. and Coate, Malcolm B., *Competition Policy in the Transition Economies: The Role of Competition Advocacy*, 23 Brook. J. Int'l L. 365 (1997).

regulators.⁵⁹⁴ The communication could also consist of formal comments and *amicus curiae* briefs. An updated website of the national competition agency where relevant documents are published could facilitate their easy access by the public. Competition advocacy is not restricted to the publication of documents – seminars, conferences and workshops may connect competition agency to relevant stakeholders. Stucke⁵⁹⁵ expanded the list. He believed competition advocacy can be achieved indirectly through the rule of law, an adaptive political system, a vibrant market place, ethical, social and moral norms, and informed antitrust enforcement advocacy. In some countries where competition authorities hold ministerial status, such as Korea or Thailand, the authorities can directly influence the formulation of industrial policies. The UNCTAD concurred and added that, especially in the absence of legal compulsion, it is important for authorities to be proactive and intervene as much as they can to give insights and views on competition implications to government bodies and the public at large.⁵⁹⁶ In the light of the UNCTAD's own practice of peers reviewing members' competition law, competition advocacy should also include regular reviews of both industrial and competition policies.

The ASEAN have made an explicit list to encourage the AMS to develop an advocacy programme that specifically targets each stakeholder:

- Regular internal training programmes are most adapted to the competition authority itself;
- Advice on regulations that could potentially hamper competition to executive, legislature and sectoral regulators, producing market studies, cross-government communication and educating public authorities and legislature on matters concerning competition policy should be reserved to the government and other public authorities;
- Training activities and support activities such as *amicus curiae* briefs or interventions for the judiciary and public prosecutors;
- [...] Awareness raising campaigns [for the business sector] with focus on newly liberalised sectors where the most serious competition offences are more likely to occur. The purpose in this scenario is to allow each business to continue with the development of its own internal compliance programme;
- Educational campaign is most suitable for the civil society. The ASEAN encourages the AMSs to be as creative as possible citing Singapore's animation ad campaign informing consumers of the benefit of a sound competition policy. It is equally important that the competition authority maintains an up-to-date official website informing the public of its activities as well as providing a contacting point to the public to present their feedback or file a complaint;
- Cooperative platforms between the academia and the competition authority, design specific university courses on competition law,

⁵⁹⁴ Cooper, James C., Pautler, Paul and Zywicki, Todd J., *The Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust Law Journal 1091 (2005).

⁵⁹⁵ Stucke, Maurice E., *Better Competition Advocacy*, 82 St. John's L. Rev. 951 (2008).

⁵⁹⁶ UNCTAD, *The Role of Competition Advocacy, Merger Control and the Effective Enforcement of Law in Times of Economic Trouble* (TD/RBP/CONF.7/6 2010).

promoting academic publications on the subject, organising conferences and specialised events are examples given regarding the field of academia. The ASEAN urges its AMSs to cooperate with the academia since it is a privileged channel for building up specialised competition law knowledge. The ASEAN set an overtly ambitious aim by suggesting that the AMSs consider establishing university departments dedicated to competition law and economics; and

- [...] A productive relation[ship] with [the media who the *Guidelines II* recognise as having a crucial role in spreading the competition authority advocacy programmes to key targets].⁵⁹⁷

Despite the varying forms competition advocacy could take, the use of persuasion is a shared characteristic of them all. Conscious of this fact, the ASEAN is actively engaged in advocacy initiatives in the AMSs through the AEGC which organised conferences and workshops destined for the AMSs officials and national competition authorities. The most notable event is the yearly organisation of the ASEAN Competition Conference. The AMSs also readily embrace the concept of competition advocacy; Singapore developed a short internet clip broadcasted in 2012 educating the general public on competition law and its necessity. Similarly, Thailand periodically organises seminars for the interested business sector and the education sector on its national competition law.

Regardless of the attractiveness of the competition advocacy campaign, the question remains whether effective competition advocacy can exist independently from actual enforcement. Clark⁵⁹⁸ claimed that competition advocacy can effectively take place only when three prerequisites are satisfied: a significant degree of independence, sufficient financial and human resources and credibility as an effective and impartial agency. In addition, the credibility of an agency cannot be obtained by advocacy alone, but must be enhanced by success in enforcing competition law. It is improbable that emerging economies would be able to combine these three conditions. Accordingly, some authors argued that during the first years of its existence, the newly established competition authority should focus its efforts on projects of competition advocacy rather than the enforcement of the legislation.⁵⁹⁹ Nonetheless, it is not enough to simply inform the public of the competition authorities' activities and potential capabilities. The authority has to be able to persuade the public that its enforcement activities will bring a direct benefit to the final consumers.⁶⁰⁰ The ASEAN understands that "advocacy actions are effective only where the [competition authority] has built a reputation through a credible enforcement record."⁶⁰¹ Yet, in the same document the ASEAN contradicts its initial position. It admits that in some cases, prior successful enforcement is not a prerequisite to successful

⁵⁹⁷ *Guidelines II*, 59-66.

⁵⁹⁸ Clark, John W., *Competition Advocacy: Challenges for Developing Countries*, 6 OECD Journal: Competition Law and Policy 69 (2005).

⁵⁹⁹ Rodriguez, A. E. and Coate, Malcolm B., *Competition Policy in the Transition Economies: The Role of Competition Advocacy*, 23 Brook. J. Int'l L. 365 (1997).

⁶⁰⁰ Botta, Marco, *Fostering Competition Culture in the Emerging Economies: The Brazilian Experience*, 32 World Competition 609 (2009).

⁶⁰¹ *Guidelines II*, 53.

competition advocacy. The *Guidelines II* refer to South Africa's experience of starting its advocacy scheme "without significant prior enforcement experience"⁶⁰². Despite this, it still managed to obtain a positive impact resulting in trained procurement officials and positive input for the draft legislation. In contrast, Ramburuth,⁶⁰³ a South African Competition Commissioner, shared that South Africa did not prioritise advocacy in the first instance, preferring instead to prioritise enforcement in order to develop the credibility of the agency and its legitimacy among governmental institutions and the general public.

Another questionable area of competition advocacy lies in its assessment. It appears that there is no single reliable way to assess the real impact of competition advocacy. Indeed, the value of competition advocacy should be measured by the degree to which comments altered regulatory outcomes and the value to consumers of those improved outcomes.⁶⁰⁴ Admittedly, both criteria are impossible to measure with certainty. The most commonly used means is in the form of questionnaires. The ASEAN willingly refers to the ICN and the OECD for their assessment tools.⁶⁰⁵

4.2. A Descriptive Regional Framework on Substantive Competition Law

In 2010, Dabbah noticed that a proper ASEAN's competition law and policy framework had yet to emerge.⁶⁰⁶ Since then the ASEAN has produced a number of documents and both organised and participated in various activities in the hope of creating its own competition law framework. Outwardly, the ASEAN gives the impression of adhering to all the accepted provisions of competition law.

4.2.1. Contrasting Narratives of the Scope of Competition Law

To understand the reach of the competition law application, defining 'undertaking' is crucial. At first glance, it might appear that the *Guidelines I* opt for a broad and general definition of an 'undertaking' claiming that competition law applies to "all businesses engaged in commercial economic activities in all economic sectors, including State-owned enterprises having effect within the members' territory, unless exempted by law."⁶⁰⁷ The *Guidelines I* further explain that the term includes:

⁶⁰² Ibid, 70.

⁶⁰³ ABA, *Around the World in 80 Minutes (or So): An Update from Key Enforcement Agencies*, 12 Antitrust Source 1 (2013).

⁶⁰⁴ Cooper, James C., Pautler, Paul and Zywicki, Todd J., *The Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust Law Journal 1091 (2005).

⁶⁰⁵ In particular, ICN, *Report on Assessment of ICN Members' Requirements and Recommendations on Further ICN Work on Competition Advocacy* (the 8th Annual Conference of the ICN 2009); OECD, *Evaluation of the Actions and Resources of the Competition Authorities* (DAF/COMP(2005)30 2005).

⁶⁰⁶ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010) 394.

⁶⁰⁷ *Guidelines I*, art. 3.1.2.

[A]ny person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, cooperatives, societies, business chambers, trade associations and non-profit making organisations, whatever their legal and ownership status (foreign or local, government or nongovernment), and the way in which they are financed.⁶⁰⁸

This formulation shifts the focus from the organisation of an entity to its activity. The ASEAN seems to be more concerned with the functional approach than the institutional approach. It is reminiscent of the EU's competition law where the term is defined by case law as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed."⁶⁰⁹

The functional approach relies heavily on the concept of economic activity which the *Guidelines I* refer to as "any activity that could be performed in return for payment and normally, but not necessarily, with the objective of making a profit."⁶¹⁰ In contrast, non-economic activity or public interest activity, that is, is any activity that could not be performed for payment and without the objective of making a profit, would escape the application of competition law. This definition is precariously narrow since it reduces economic activity to pecuniary interest and thus widens the public/private divide.⁶¹¹ Notwithstanding the language used to demonstrate the ASEAN's fixation on the pecuniary aspect of economic activity, the interpretation of the term is borrowed from EU law. In comparison, EU law's definition of economic trade applies regardless of whether or not the activity is profit making.⁶¹² Supplementary indicators include the offering of goods or services on the market,⁶¹³ the bearing of the financial risks attached to the performance of the economic activities⁶¹⁴ and where that activity could, at least in principle, be carried on by a private undertaking in order to make profits.⁶¹⁵

In addition, the *Guidelines I* later introduced an even broader and non-exhaustive list of exemptions and exclusions from the application of competition law. The long list includes:

⁶⁰⁸ Ibid, art. 3.2.1.4.

⁶⁰⁹ *Höfner and Elser v. Macroton GmbH* (Case 41/90) [1991] ECR I-1979 para. 21.; *Poucet and Pistre v. Assurances Générales de France* (Cases 159 & 160/91) [1993] ECR I-637 para. 17.; *Fédération Française des Sociétés d'Assurance v. Ministry of Agriculture and Fisheries* (Case 244/94) [1995] ECR I-4013 para. 14.

⁶¹⁰ *Guidelines I*, art. 3.1.2.

⁶¹¹ For more information on the public and private divide see, Odudu, Okeoghene, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press 2006) 47.

⁶¹² *Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (1998 Football World Cup Finals)* [2000] OJ L5/55 para. 65.

⁶¹³ *Commission v. Italy* (Case 118/85) [1987] ECR 2599 para. 7.

⁶¹⁴ *Wouters, Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* (Case 309/99) [2002] ECR I-1577 para. 48.

⁶¹⁵ *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (Case 67/96) [1999] ECR I-5751, Jacobs AG para. 311.

- The Government, statutory bodies or any person acting on their behalf. For example, Government officials and statutory bodies exercising prerogatives arising from their public powers or acting for the fulfilment of public service objectives, or any persons acting on their behalf, may be excluded from the prohibitions. These exemptions apply insofar as the Government activities are connected with the exercise of sovereign power;⁶¹⁶
- Certain agreements and conduct which have significant countervailing benefits, such as contributing to or improving the production or distribution of goods and services, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. The exemptions may be allowed only to the extent that is appropriate and indispensable to reach their intended aims, and should not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question;⁶¹⁷
- Specific industries or activities includes strategic and national interest, security, public, economic and/or social considerations;⁶¹⁸
- Block exemptions granted to research and development cooperation and intellectual property rights contracts;⁶¹⁹ and
- Small and medium-sized enterprises (SMEs).⁶²⁰

While most of the list exemplifies the idea of entities performing public interest functions, the inclusion of the SMEs is quite peculiar. It is possible that the ASEAN is simply trying to protect the SMEs since this was one of the principal concerns expressed by the AMSs, as discussed in Chapter 3.

Eventually, the *Guidelines II* directly contradicted the *Guidelines I* and extended the list of limitations to state-owned enterprises, while admitting that the inclusion of state-owned enterprises in the general application of competition law would be better.⁶²¹ The reason for this reversal lies in the historical context of Southeast Asian countries. It is possible that the ASEAN changed its tone on this matter in order to address the AMSs' concern. Historically, the AMSs' government has played a leading role in economic activity through the construction of necessary infrastructures because of its public nature and economies of scale and scope.⁶²² The exclusion of the state as an economic actor to which competition law applies is detrimental to the success of the enforcement rate of the law. Not only does it greatly diminish the domain of competition law, but it also invites cronyism and exploitation in the market. Excluding the state from the domain of competition law will inevitably lead to interest groups shifting their anticompetitive conduct through government protection. Instead of eliminating it, the anticompetitive behaviour will simply

⁶¹⁶ *Guidelines I*, art. 3.5.4.

⁶¹⁷ *Ibid*, art. 3.5.3.

⁶¹⁸ *Ibid*, art. 3.5.1.

⁶¹⁹ *Ibid*, art. 3.5.6.

⁶²⁰ *Ibid*, art. 3.5.5.

⁶²¹ *Guidelines II*, 27.

⁶²² Teo, Chadwick, *Competition Policy and Economic Growth* (The ASEAN Conference on Fair Competition Law and Policy 2003).

change form. Consequently, competition law may cause inefficiencies that are worse than the allocative losses that it was designed to counteract.⁶²³ This will render the adoption of competition law obsolete.

It remains unclear which vision prevails since both documents are mere guidelines with no binding power. The lack of a cohesive understanding of the scope of competition law indicates that the ASEAN approach to substantive competition law is heading towards an uncertain start.

4.2.2. The Prohibition of Anticompetitive Agreements

This prohibition is of particular importance in the light of developing economies' natural market conditions which tend to facilitate collusive agreements.⁶²⁴ The ASEAN is consciously aware of this necessity. The *Guidelines I* assert that the "AMSs should consider prohibiting horizontal and vertical agreements between undertakings that prevent, distort or restrict competition in the AMSs' territory, unless otherwise exempted."⁶²⁵ In analysing the anticompetitive agreements, it is imperative to first consider the definition of the term before progressing to an assessment of the agreement.

This section will discuss the meaning of the term 'agreement' as intended by the *Guidelines I*. Agreements must contain two elements: the willingness to agree and the restriction of competition in the market.

4.2.2.1. The Willingness to Agree

The term "agreement" has a broad definition. It is described as:

Both legally enforceable and non-enforceable agreements, whether written or oral; it also includes so-called gentlemen's agreements. An agreement may be reached via a physical meeting of the parties or through an exchange of letters or telephone calls, or by any other means. All that is required is that parties arrive at a consensus on the actions each party will, or will not, take.⁶²⁶

The only prerequisite of the term "agreement" is an occurrence of wills between undertakings regardless of their form or content. This is a near adaptation of settled EU case law.⁶²⁷

⁶²³ Rodriguez, A. E. and Williams, Mark D., *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C.J. Int'l L. & Com. Reg. 209 209 (1994).

⁶²⁴ Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003) 168.

⁶²⁵ *Guidelines I*, art. 3.2.1.

⁶²⁶ *Ibid*, art. 3.2.1.3.

⁶²⁷ *Bayer AG v. Commission* (Case T-41/96) [2000] ECR II-3383 para. 69.

The concept of agreement is further expanded to encompass concerted practices. In this context, concerted practice covers “any form of coordination or implicit understanding or arrangement between undertakings, but which do not reach the stage where an agreement properly so called has been reached or concluded.”⁶²⁸ Similarly to the EU case law,⁶²⁹ this liberal concept is seemingly designed to include all forms of coordination between undertakings that might escape the literal interpretation of the term ‘agreements’. In the case of the ASEAN, whose AMSs largely comprise developing economies with relatively small market economies, the necessity of a broad definition is even more significant. Not only does it need to conform to the hybrid and flexible nature of both global and local business, but it needs to compensate for the difficulty in obtaining the evidence of actual and tacit collusive agreements.

4.2.2.2. The Restriction to the Competition Test

The mere existence of an agreement is not always indicative of an anticompetitive characteristic. Agreements need to be put under the restriction to competition test. The *Guidelines I* explain that:

The terms ‘prevent,’ ‘distort’ or ‘restrict’ refer, respectively, to the elimination of existing or potential competitive activities, the artificial alteration of competitive conditions in favour of the parties of the agreement, and the reduction of competitive activities. They are meant to include all situations where competitive conditions are adversely affected by the existence of the anticompetitive agreement.⁶³⁰

Regarding the evaluation of the agreements, the *Guidelines I* suggest that:

[The] AMSs should evaluate the agreement by reference to its object and/or its effects where possible. [The] AMSs may decide that an agreement infringes the law only if it has as its object or effect the appreciable prevention, distortion or restriction of competition. [The] AMSs may consider identifying specific ‘hardcore restrictions,’ which will always be considered as having an appreciable adverse effect on competition (*e.g.*, price fixing, bid-rigging, market sharing, limiting or controlling production or investment), which need to be treated as *per se* illegal⁶³¹

By indicating that the evaluation made to the agreements should be done with reference to their object and/or their effect the appreciable prevention, distortion or restriction of competition, the *Guidelines I* bear a close resemblance to Article 101(1) of the *TFEU*. Generally, the evaluation can be distinguished by two different classifications: the *per se* rule and the rule of reason.

⁶²⁸ *Guidelines I*, art. 3.2.5.

⁶²⁹ *ICI v. Commission* (Case 48/69) [1972] ECR 619 para. 64.

⁶³⁰ *Guidelines I*, art. 3.2.1.5.

⁶³¹ *Ibid.*, art. 3.2.2.

First, there is global agreement that cartels are bad.⁶³² All competition laws prohibit horizontal collaboration outright without allowing any reasonable defences⁶³³ since it is assumed that this type of agreement outweighs the few possible procompetitive justifications.⁶³⁴ The ASEAN is no stranger to this attitude and hard-core restrictions are prohibited as well under the *per se* rule. The *Guidelines I* identify price fixing, bid-rigging, market sharing, limiting or controlling production or investment as examples in this category. They further clarify that:

‘Price fixing’ involves fixing either the price itself or the components of a price such as a discount, establishing the amount or percentage by which prices are to be increased, or establishing a range outside of which prices are not to move.

‘Bid-rigging’ includes cover bidding to assist an undertaking in winning the tender. An essential feature of the tender system is that tenderers prepare and submit bids independently.

‘Market sharing’ involves agreements to share markets, whether by territory, type or size of customer, or in some other ways.

‘Limiting or controlling production or investment’ involves agreements which limit output or control production, by fixing production levels or setting quotas, or agreements which deal with structural overcapacity or coordinate future investment plans.⁶³⁵

Gal believed that the clear and strict prohibition of hard-core cartels is especially important for small economies in which cartelistic behaviour is widespread owing to underlying market conditions that are relatively more conducive to collusion.⁶³⁶ Her advice was not heeded by the ASEAN which excludes vertical agreements from this category and also remains silent on the matter of the burden of proof. Vertical agreements commonly contain price (*e.g.* minimum or maximum resale price maintenance) and non-price restraints (*e.g.* exclusive territorial or customer arrangements, exclusive dealings, tie-ins, selective distribution, and quantity forcing).⁶³⁷ They are generally efficient and thus procompetitive.⁶³⁸ Therefore, there is some justification for excluding vertical agreements from hard-core restrictions. The *Best Practices*, which form the basis of the *Guidelines I*, seem to concur with this position and warn that refusal to do so would create a cumbersome provision and result in welfare reduction.⁶³⁹ In addition, it was established that setting the burden-of-proof thresholds too high could result in difficulties with

⁶³² Fox, Eleanor M. and Crane, Daniel A., *Global Issues in Antitrust and Competition Law* (West 2010) 5.

⁶³³ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 87.

⁶³⁴ Sheth, Manisha M., *Formulating Antitrust Policy in Emerging Economies*, 86 *Geo. L. J.* 451 (1997).

⁶³⁵ *Guidelines I*, art. 3.2.2.

⁶³⁶ Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003) 170.

⁶³⁷ OECD, *Trade and Competition Policies for Tomorrow* (OECD Publishing 1999) 43.

⁶³⁸ Godek, Paul E., *A Chicago-School Approach to Antitrust for Developing Countries*, 43 *The Antitrust Bulletin* 261 (1998).

⁶³⁹ *Best Practices*, 3.

prosecuting hard-core cartels.⁶⁴⁰ Limiting the competition authority's power to prosecuting hard-core cartels only in the presence of hard evidence such as written agreements between undertakings would render hard-core cartels hard to detect and subsequently prosecute. This is due to the fact that tacit collusion in developing economies is easier to establish because of the oligopolistic structure of their market.⁶⁴¹ Moreover, communication between undertakings is easier and typically not in written form. For this reason, the *Best Practices* recommend that the standard of proof for collusion in the case of *per se* prohibition should be especially high.⁶⁴² Yet, this specific consideration is not included in the *Guidelines I*.

Secondly, the rule of reason is often considered the exception to the *per se* rule. However, the rule of reason analysis remains necessary in order to limit too literal an interpretation of the broad language used in the law. Such a method of interpretation could cause harm to the process of competition by eliminating efficiency. The rule of reason analysis is also included in the *Guidelines I*. They provide that:⁶⁴³

With the exclusion of the hardcore restrictions which are treated as *per se* illegal, AMSs may decide to analyse the agreements by “rule of reason” (*e.g.*, via market share thresholds and efficiency considerations) and safe harbour provisions (*e.g.*, appreciability test). For example, the AMSs may decide that an agreement by undertakings, which exceeds a certain percentage of any relevant market affected by the agreement, will have an appreciable effect on competition.

The inclusion of the market share threshold within the rule of reason test is done without any further recommendation on how to determine the aforementioned threshold. The efficiency consideration could be included under the rule of reason test as well, especially given the constant pressure to allow some exceptions to the general prohibitions for agreements with procompetitive effect, such as achieving minimum efficient scale and lowering costs to a level that an undertaking acting alone can never achieve. Gal considered this exception crucial for small market economies.⁶⁴⁴ The ASEAN is in agreement with her view and provides that:

AMSs may also set up a procedure to consider granting exemptions or exclusions to certain agreements and conduct which have significant countervailing benefits, such as contributing to or improving the production or distribution of goods and services, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. The exemptions may be allowed only to the extent that is appropriate and indispensable to reach their intended aims, and should not afford the

⁶⁴⁰ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 88.

⁶⁴¹ Sheth, Manisha M., *Formulating Antitrust Policy in Emerging Economies*, 86 *Geo. L. J.* 451 (1997).

⁶⁴² *Best Practices*, 3.

⁶⁴³ *Guidelines I*, art. 3.2.3.

⁶⁴⁴ Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003) 162.

undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.⁶⁴⁵

Essentially, the *Guidelines I* illustrate agreements with countervailing benefits, such as contributing to or improving the production or distribution of goods and services, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Nonetheless, there is a limit to this exception. The *Guidelines I* warn that the exemptions should only be allowed to the extent that is appropriate and indispensable to reach their intended aims and should not eliminate competition in respect of a substantial part of the goods or services in question.

4.2.3. The Prohibition of Abuse of Dominant Position

Competition law also prohibits behaviours by a single undertaking. These behaviours are sometimes described as unilateral conducts. If competition laws are in agreement regarding the prohibition of anticompetitive agreements, the same could not be said with regard to abuse of dominant position. There are disparities, well documented by the ICN, in how abuse of dominance is treated in different jurisdictions.⁶⁴⁶ The report speculated that the divergence in competition law practices, in particular between the US and the EU, was due to different theoretical economic frameworks. The findings from this report corroborate Gal's findings that the size of the market does not contribute to a divergence in how prohibition of abuse of dominant position is practiced.⁶⁴⁷ According to her, both small and large economies suffer from abuse of dominance in a similar way but to a more intense degree in countries with small economies. The intensity is possibly due to the natural condition of a small market economy where the levels of concentration tends to be high in both upstream and downstream markets. This naturally erects barriers to market entry. It is precisely this natural condition of small market economies that makes erasing the abuse of dominant position more challenging for developing economies. If the suffering is identical, developing economies find it more difficult to alleviate the pain.

The *Guidelines I* confirm that the AMSs should consider prohibiting the abuse of a dominant position.⁶⁴⁸ Whether an undertaking holds a dominant position is a crucial prerequisite to categorising the abuse.

⁶⁴⁵ *Guidelines I*, art. 3.5.3.

⁶⁴⁶ See, in particular, ICN, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies* (2007).

⁶⁴⁷ Gal, Michal S., *Size Does Matter: the Effects of Market Size on Optimal Competition Policy*, 74 S. Cal. L. Rev. 1437 (2001).

⁶⁴⁸ *Guidelines I*, art. 3.3.1.

4.2.3.1. The Definition of Dominant Position

The *Guidelines I* clarify that:

“Dominant position” refers to a situation of market power, where an undertaking, either individually or together with other undertakings, is in a position to unilaterally affect the competition parameters in the relevant market for a good(s) or service(s), *e.g.*, able to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels.⁶⁴⁹

The language chosen by the ASEAN signify that dominant position is not exclusively held by a single undertaking but can be shared between several undertakings.

The first step in determining whether an undertaking holds a dominant position is to identify the relevant market. Failure to do so could result in the non-enforcement of competition law.⁶⁵⁰ Curiously, information about relevant markets do not appear in the *Guidelines I* under the provision of abuse of dominant position, forcing observers and interested parties to refer back to the definition of relevant market as it appears under the prohibition of anticompetitive agreements. The relevant market is described there as “the product range and the geographic area where competition takes place between undertakings.”⁶⁵¹ This formulation covers both the product and the geographical market. Relevant market is commonly determined through means of the test of substitutability in both large and small economies.

The second step is to analyse the market power held by the undertaking. In the case of a monopoly, it can be challenging to analyse the market power of an undertaking. The ASEAN does not suggest ways to assess market dominance assessment; it leaves the decision-making power entirely in the hands of its AMSs. The *Guidelines I*⁶⁵² makes slight reference to market share and then only as a mere possibility. The ASEAN’s silence is understandable as there is no single formulation to assess market dominance.⁶⁵³ However, most jurisdictions rely on market share as the main indicator of market power.⁶⁵⁴ While this method has often been criticised for its high inaccuracy,⁶⁵⁵ the pragmatic benefits gained from it are considerable. The loss of technical accuracy is more than compensated

⁶⁴⁹ Ibid, art. 3.3.1.1.

⁶⁵⁰ This occurred in the EU case law, see, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* (Case 6/72) [1973] ECR 215.

⁶⁵¹ *Guidelines I*, art. 3.2.3.2.

⁶⁵² Ibid, art. 3.3.1.1.

⁶⁵³ Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003) 68.

⁶⁵⁴ See, for example, Hay, George A., *Market Power in Antitrust*, 60 *Antitrust L.J.* 807 (1991); *Hoffmann-La Roche & Co. AG v. Commission* (Case 85/76) [1979] ECR 461.

⁶⁵⁵ Baker, Jonathan B. and Bresnahan, Timothy F., *Estimating the Residual Demand Curve Facing a Single Firm*, 6 *International Journal of Industrial Organization* 283 (1988); Vickers, John, *Market Power in Competition Case*, 2 *European Law Journal* 8 (2006).

for by the gain in administrative convenience and the reduction of litigation costs,⁶⁵⁶ thus reinforcing the appeal of the market share criterion. Incidentally, developing economies prefer using the criterion of market share as proof of dominance; assessing evidence from a set of complex economic factors requires high capability and experience on the part of the national competition authority.⁶⁵⁷ However, because of the questionable accuracy of the market share criterion, other indicators should be used in conjunction with market share; for example, the ease of access to the market.

Unsurprisingly, the ASEAN does not provide any guidance relative to the market share threshold. Emerging economies were advised to use a lower market share threshold than that of developed economies because small economies have higher barriers to entry to the market but fewer constraints placed upon undertakings which have gained entry to potentially be abusive.⁶⁵⁸ Therefore, the market share necessary to infer dominance in a relevant market is lower. Regrettably, the *Guidelines I* have missed the opportunity to encourage a lower threshold of market share to the AMSs.

4.2.3.2. The Classification of Abuse

The possession of dominant position in the relevant market in itself is not a violation of competition law unless it is accompanied by abuse. On the definition of “abuse,” the *Guidelines I* describe it as follow:

“Abuse” of a dominant position occurs where the dominant enterprise, either individually or together with other undertakings, exploits its dominant position in the relevant market or excludes competitors and harms the competition process. It is prudent to consider the actual or potential impact of the conduct on competition, instead of treating certain conducts by dominant enterprises as automatically abusive.⁶⁵⁹

According to this description, there are two types of abuse of dominant position: exploitative and exclusionary abuses. Exploitative behaviours of an undertaking may cause harm to consumer directly while exclusionary conducts affect market structure. In this regard, the ASEAN elects the same distinction as that of the CJEU.⁶⁶⁰

To illustrate the abuse of dominant position, the *Guidelines I* present a non-exhaustive list of abusive conduct encompassing:

⁶⁵⁶ Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003) 61.

⁶⁵⁷ Fox, Eleanor M., *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 Int'l Law 151 (2009).

⁶⁵⁸ Sheth, Manisha M., *Formulating Antitrust Policy in Emerging Economies*, 86 Geo. L. J. 451 (1997).

⁶⁵⁹ *Guidelines I*, art. 3.3.1.2.

⁶⁶⁰ *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, para. 21.

Exploitative behaviour towards consumers, customers and/or competitors (*e.g.*, excessive or unfair purchase or sales prices or other unfair trading conditions, tying);

Exclusionary behaviour towards competitors (*e.g.*, predatory pricing by an undertaking which deliberately incurs losses in the short run by setting prices so low that it forces one or more undertakings out of the market, so as to be able to charge higher prices in the longer run; margin squeeze);

Discriminatory behaviour (*e.g.*, applying dissimilar pricing or conditions to equivalent transactions and vice-versa);

Limiting production, markets or technical development to the prejudice of consumers (*e.g.*, restricting output or illegitimate refusal to supply, restricting access to/use of/ development of a new technology).⁶⁶¹

The *Guidelines II* later reduced this list to only exploitative behaviour and exclusionary behaviour.⁶⁶² There appears to be no explanation for this reduction.

The *Guidelines I* further inform that “it is prudent to consider the actual or potential impact of the conduct on competition, instead of treating certain conducts by dominant enterprises as automatically abusive.”⁶⁶³ Evidently, the ASEAN is embracing both the form- and the effect-based analysis to ensure the effectiveness of competition law. It is not enough to confine enforcement of abuse of dominant position only to the actual impacts. The competition authority should be able to prevent potential anticompetitive conduct before it presents.

4.2.4. The Merger Control

The merger control is one of the most important competition rules, as reflected in the *Guidelines I*. A merger occurs when independent undertakings combine into one. There are two categories of merger. A horizontal merger involves undertakings that are actual or potential competitors, while a vertical merger involves undertakings at different levels of the production chain. There are generally two main concerns with mergers.⁶⁶⁴ The first concern is that a horizontal merger may result in substantial market power, creating unilateral anticompetitive effects. The second is that mergers can reduce the number of competitors, resulting in the formation of a cooperative oligopoly. Merger control can then be seen as a natural extension of the prohibition of abuse of dominant position and anticompetitive agreements. The merger control operates under the assumption that a pre-emptive review of a merger is both less costly and less complicated than attempting to deconcentrate an anticompetitive merger that has already been realised.

This section will first examine the ASEAN’s definition of mergers before examining the organisation of its control.

⁶⁶¹ *Guidelines I*, art. 3.3.2.

⁶⁶² *Guidelines II*, 19.

⁶⁶³ *Guidelines I*, art. 3.3.1.2.

⁶⁶⁴ Furse, Mark, *Antitrust Law in China, Korea and Vietnam* (Oxford University Press 2009) 53.

4.2.4.1. The Definition of Merger

The ASEAN chooses the term “merger” to encompass the full extent of the concentrations of undertakings including: regrouping mergers, acquisitions, takeovers, and joint ventures. The *Guidelines I* explain that:

“Mergers” refers to situations where two or more undertakings, previously independent of one another, join together. This definition includes transactions whereby two companies legally merge into one (“mergers”), one firm takes sole control of the whole or part of another (“acquisitions” or “takeovers”), two or more firms acquire joint control over another firm (“joint ventures”) and other transactions, whereby one or more undertakings acquire control over one or more undertakings, such as interlocking directorates.⁶⁶⁵

In essence, a merger occurs when previously independent undertakings are transformed into a single new entity irrespective of the precise nature and language of the concentration. In this regard, the *Guidelines I* broadly paraphrased Article 3 of the *EUMR*.⁶⁶⁶ For the purpose of this section and to avoid confusion, the term “merger” will be used to describe all types of concentrations of undertakings.

4.2.4.2. The Organisation of the Merger Control

The merger control is especially important for developing economies which typically have small market economies. As mergers reduce the number of competitors and increase the market share of the merged entities, the result will be to increase any concentration already present in the market.⁶⁶⁷ However, the increased concentration could also help achieve efficiencies that were unattainable pre-merger.

This section will analyse the assessment of the merger control as well as how the national competition authorities exercise their powers regarding the merger control.

The Appraisal of Merger

The *Guidelines I* indicate that mergers should be appraised on their economic effect. The “AMSs may consider prohibiting mergers that lead to a substantial lessening of competition or would significantly impede effective competition in the relevant market or in a substantial part of it, unless otherwise exempted.”⁶⁶⁸ Accordingly, the analysis of the impact of mergers must be examined from three different perspectives: an analysis of the

⁶⁶⁵ *Guidelines I*, art. 3.4.1.1.

⁶⁶⁶ *EUMR*.

⁶⁶⁷ Malinauskaite, Jurgita, *Efficiency Tests in the Merger Control Regimes of the Baltic Countries: Myth or Reality*, 18 *International Company and Commercial Law Review* 136 (2007).

⁶⁶⁸ *Guidelines I*, art. 3.4.1.

structure of the market before the merger, an analysis of the potential effect of the merger on the structure of the market, and an analysis of the impact of the structural changes on the functioning of the market.

Interestingly, the *Guidelines I* have abandoned the *Best Practices*' recommendation of a dominance test.⁶⁶⁹ The opinion expressed in *Best Practices* is that the substantial reduction of the competition test is unsuitable for new competition law authorities who might not be able to handle the informational and analytical demands crucial to the use of this test. The *Guidelines I* opt instead for a combining of both the US antitrust law which uses the term "substantially to lessen competition"⁶⁷⁰ [*hereinafter* the SLC test] and the EU competition law which prefers the term "significantly impede effective competition"⁶⁷¹ [*hereinafter* the SIEC test]. The inclusion of the US term is undoubtedly because the US introduced the first merger control in the world.⁶⁷² Under Section 7 of the *Clayton Act*,⁶⁷³ the appraisal criterion is whether a merger will result in a substantial lessening of competition. *The Horizontal Merger Guidelines of 1992*⁶⁷⁴ later reiterate *the SLC test* and emphasise that *the SLC test* takes into consideration the competitive effect of merger and the resulting changes in the competitive equilibrium. The other party is the EU law which has shifted the focus of its merger control to *the SIEC test*. In this respect, the scope of application of the test is no longer limited to a consideration of dominant position. The focal point is now on the potential effect of the merger. In this respect, the merger control could be extended to oligopolistic markets. While observers agreed that *the SIEC* and *the SLC tests* have some striking similarities,⁶⁷⁵ this is unsurprising. The adoption of the new EU test was considered to be a mere reorganisation of the original test of market dominance⁶⁷⁶ partly to more resemble *the SLC test*.⁶⁷⁷ It would appear that the change in the wording of the test does not completely alter the appraisal criteria in the merger control law⁶⁷⁸ and the similarities between *the SIEC* and *the SLC test* remain, rendering the ASEAN's repetition of both tests redundant.

⁶⁶⁹ *Best Practices*, 3.

⁶⁷⁰ The Clayton Act, 15 U.S.C. §§ 12-27, 29 U.S.C. §§52-53 [2006].

⁶⁷¹ *EUMR*, art. 2(2). The previous criterion of dominant position has been reduced to a mere example of significant impedance of effective competition. However, dominant position has not completely been erased from the *EUMR*. It still appears on the regulation as a prime indication of concentration between undertakings incompatible with the common market. See article 2(3) of the *EUMR*.

⁶⁷² Hinds, Anna-Louise, *The New EC Merger Regulation – The More Things Change the More They Stay the Same?*, 17 *European Business Law Review* 1693 (2006).

⁶⁷³ The Clayton Act.

⁶⁷⁴ US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (1992 revised 1997).

⁶⁷⁵ Egge, Michael G., *The New EC Merger Regulation: Recipe for Profound Change or More of the Same?* (IBA 8th Annual Competition Conference 2004); Selvam, Vijay S.V., *The EC Merger Control Impasse: Is there a Solution to this Predicament*, 25 *ECLR* 52 (2004).

⁶⁷⁶ Council Regulation (EC) No 4064/89 on the Control of Concentrations between Undertakings.

⁶⁷⁷ Jones, Alison and Sufrin, Brenda, *EU Competition Law: Text, Cases, and Materials* (5th edn., Oxford University Press 2014) 1182.

⁶⁷⁸ Volcker, Sven B., *Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control*, 25 *ECLR* 395 (2004).

It is impossible for the appraisal of mergers not to include an efficiency defence since mergers may improve efficiency or other socio-political goals. Such a defence would exempt mergers that substantially reduce the competition or significantly impede effective competition in the relevant market as this could result in economies of scale. Put another way, competition authorities need to do a trade-off between strict regulations and efficiency. The latter is of more importance since it offers greater social gains in terms of economic growth and eventual consumer welfare. In practice, however, this balancing approach is harder to execute. The difficulties have to do with the analysis of the potential efficiency that mergers could bring. Moreover, the balancing approach of the efficiency defence is not without flaws. It is inherently vague, giving competition authorities a large margin of flexibility and discretion in their analysis of mergers.⁶⁷⁹ This flexibility would inevitably threaten legal certainty. The efficiency test can also be burdensome for the competition authorities of newly developed competition law regimes who often lack the necessary experience and resources to prove efficiency.⁶⁸⁰

The balancing approach figured in the *Guidelines I* which disclose that:

AMSs may also set up a procedure to consider granting exemptions or exclusions to certain agreements and conduct which have significant countervailing benefits, such as contributing to or improving the production or distribution of goods and services, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. The exemptions may be allowed only to the extent that is appropriate and indispensable to reach their intended aims, and should not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.⁶⁸¹

It is unclear whether the ASEAN has taken into consideration the difficulties of analysing efficiency gains with the crippling lack of resources within the AMSs when including the efficiency defence. Excluding the efficiency test from the merger control provisions is not unheard of. In fact, the Baltic countries, recognising the insurmountable difficulty this task would pose for their inexperienced authorities, decided to exclude the balancing approach from their competition laws.⁶⁸² Gal, however, was in favour of the inclusion of the balancing approach, stating that by adopting a rigid merger policy, developing economies may hamper the international competitiveness of domestic undertakings.⁶⁸³ In other words, she supported overlooking the possibility of an increase of concentration in small market economy if this would eventually help firms at the international level. It is all a matter of policy choice in the hands of the national competition authorities and, by

⁶⁷⁹ Lowe, Philip, *The Substantive Standard for Merger Control, and the Treatment of Efficiencies in Merger Analysis: an EU Perspective* (Fordham Annual Antitrust Conference 2002).

⁶⁸⁰ Malinauskaite, Jurgita, *Efficiency Tests in the Merger Control Regimes of the Baltic Countries: Myth or Reality*, 18 *International Company and Commercial Law Review* 136 (2007).

⁶⁸¹ *Guidelines I*, art. 3.5.3.

⁶⁸² Malinauskaite, Jurgita, *Efficiency Tests in the Merger Control Regimes of the Baltic Countries: Myth or Reality*, 18 *International Company and Commercial Law Review* 136 (2007).

⁶⁸³ Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003) 201.

extension, the national government. Gal's suggestion seems to add another cumbersome criterion to the consideration of the efficiency defence.

The Control Exercised by the National Competition Authority

The ASEAN cannot support the existence of a central mechanism in charge of handling mergers with a regional dimension. Therefore, the task is exclusively under the discretion of each AMS's national competition authority. The merger control relies largely on structural metrics to establish a presumption of anticompetitive pricing emerging.⁶⁸⁴ The control can be either structural or behavioural. Structural control is a one-time measure that seeks to restore or maintain the competitive structure of the market.⁶⁸⁵ Since by nature, mergers affect the structure of the relevant market, it has been widely acknowledged that the control should also be structural, such as divestiture of a stand-alone business.⁶⁸⁶ It is no coincidence that the most common form of structural remedy is divestiture.⁶⁸⁷ On the other hand, behavioural control is an ongoing measure that seeks to regulate or contain the behaviours of the concerned undertaking.⁶⁸⁸ It may include promises by the parties to abstain from certain commercial behaviour.⁶⁸⁹ It has been suggested that structural control might be of limited effectiveness in small market economies and behavioural commitments should be used instead as a more viable alternative.⁶⁹⁰ Nonetheless, behavioural control must be exercised cautiously by new competition authorities, since their unpreparedness or lack of expertise in the implementation of a behavioural remedy could jeopardise the effectiveness of the chosen remedy.⁶⁹¹

The *Guidelines I* advise the AMSs to equip their national competition authorities with the power to decide, notwithstanding the power to authorise the merger, "to stop the merger or, as part of the clearance, impose conditions on or require commitments from the merging enterprises to address any competition concerns arising from the merger."⁶⁹² In this way, the national competition authorities exercise three distinctive powers: the power of pure and simple authorisation; the power of conditional authorisation; and the power of refusal. These contain both structural and behavioural remedies. The three powers are a straightforward reiteration of Articles 8 (1), (2) and (3) of the *EUMR*. It would seem that

⁶⁸⁴ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 90.

⁶⁸⁵ Competition Commission, *Merger Remedies: Competition Commission Guidelines* (2008).

⁶⁸⁶ Svetlicinii, Alexandr and Lugenberg, Külliki, *Merger Remedies in a Small Market Economy: the Estonian Experience* ECLR 475-481 (2012).

⁶⁸⁷ Commission Notice on Remedies Acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 [2001] 2001/C 68/03 para. 13.

⁶⁸⁸ *Merger Remedies: Competition Commission Guidelines*

⁶⁸⁹ *Commission Decision of 13 October 1999 Declaring a Concentration to be Compatible with the Common Market and the EEA Agreement (Telia/Telenor)* [1999] COMP/M.1439.

⁶⁹⁰ Gal, Michal S., *Size Does Matter: the Effects of Market Size on Optimal Competition Policy*, 74 S. Cal. L. Rev. 1437 (2001).

⁶⁹¹ Svetlicinii, Alexandr and Lugenberg, Külliki, *Merger Remedies in a Small Market Economy: the Estonian Experience* ECLR 475-481 (2012).

⁶⁹² *Guidelines I*, art. 3.4.4.

the ASEAN readily applies the pre-merger control regimes, following the examples of most competition law jurisdictions in the world.⁶⁹³ There is no mention of the possibility of post-merger control whereby the competition authority controls a merger transaction after its conclusion in the *Guidelines I*. Only a few regimes use this method because of significant legal uncertainty for the undertakings concerned and the high cost of untangling merged undertaking should the transaction reveals to be anticompetitive.⁶⁹⁴

The pre-merger notification process has been identified as a crucial component of the pre-merger control exercised by the national competition authorities.⁶⁹⁵ It is important to include a pre-merger notification system into a jurisdiction, not least because the majority of merger control regimes have it⁶⁹⁶ but also because obtaining the competition authority clearance to proceed with the merger before its realisation could lessen the business cost. The pre-merger notification system can be divided into two categories: mandatory and voluntary notifications. The mandatory notification system is the most commonly used. In this instance, undertakings concerned must notify the competition authority prior to the completion of the merger in question when certain criteria are met. The criteria often constitute worldwide or national turnover threshold. In a voluntary notification system, undertakings are not obliged to notify the competition authority of their merger plan. However, they face the risk of *post-merger* investigation by the competition authority. This method can be difficult and costly to implement since it involves undoing the already merged undertaking.

With regard to the ASEAN approach, the *Guidelines I* do not decide between voluntary or mandatory notification, leaving the choice instead to respective AMSs.

A specific procedure may be established by which the competition regulatory body is tasked to assess mergers, following a (voluntary or mandatory) notification by the merging undertakings, or otherwise following a complaint or by their own motion. [For this purpose], “Mandatory notification” prevents the undertakings from implementing the transaction until they have received merger clearance from the competition regulatory body. This helps to avoid a situation where anti-competitive mergers have to subsequently be subject to difficult and costly de-concentration measures imposed by the competition regulatory body. “Voluntary notification” allows businesses to do their own merger self-assessment, to decide if they should notify the competition regulatory body to clear the merger. It helps to reduce business costs while not impeding

⁶⁹³ Paas-Mohando, Katri, *Choice of Merger Notification System for Small Economies*, 34 ECLR 548-553 (2013).

⁶⁹⁴ Paas-Mohando, Katri, *Choice of Merger Notification System for Small Economies*, 34 ECLR 548-553 (2013). (identified Russia and Korea as the regimes which uses post-merger notification system for certain merger transactions)

⁶⁹⁵ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 90.

⁶⁹⁶ Paas-Mohando, Katri, *Choice of Merger Notification System for Small Economies*, 34 ECLR 548-553 (2013).

competition regulatory body's authority to investigate any merger which raises competition concerns.⁶⁹⁷

Before deciding on this important matter, the AMSs should first take into consideration the high cost of imposing mandatory notification as well as their competition authority's ability to process notified merger plans within the legal time limit. Nonetheless, the Australian experience has proven that the outcomes of both mandatory and voluntary notifications do not substantially differ since most notified merger cases do not raise competition concerns.⁶⁹⁸ On the other hand, voluntary notification leads to substantial lessening of the cost for both the competition authority and the undertakings concerned.⁶⁹⁹ It was further suggested that since most mergers do not raise any competition concerns, it would be more cost effective, especially for small market economies, to favour the voluntary notification system provided that it is accompanied by the proper design of the deterrent mechanisms and enforcement measures.⁷⁰⁰

The mandatory merger notification is usually triggered by the size of the sale or assets of the firms involved in transaction, the size of the combined market shares of the merger participants, or the size of the pre-acquisition market share of any one party.⁷⁰¹ Authorities do not need to be notified of any mergers that fall below the level of the threshold. Generally, because the calculation of an undertaking's market share is subject to more manipulation than that of the transaction size and thus prone to more mistakes, most competition regimes resort to the transaction size threshold.⁷⁰² When adopting a merger threshold, new competition law regimes need to be aware of the resources available to their competition authorities. If the threshold is set too low, there is the chance that the agency would be inundated with reviewable cases, including those with no conceivable competition significance, without the means to properly enforce the merger assessment. In contrast, establishing an excessively high threshold is deemed to be the only appropriate measure for newly installed competition agencies on which to focus their limited resources.⁷⁰³

In the case of the ASEAN,

[The] AMSs may establish that only mergers above a given threshold shall (or may) be notified to – and approved by – the competition regulatory

⁶⁹⁷ *Guidelines I*, art. 3.4.2.

⁶⁹⁸ Choe, Chongwoo and Shekhar, Chander, *Compulsory or Voluntary Pre-merger Notification?: A Theoretical and Empirical Analysis* (2006) <<http://www.iss.u-tokyo.ac.jp/~matsumur/CCNote68.pdf>>.

⁶⁹⁹ *Ibid.*

⁷⁰⁰ Paas-Mohando, Katri, *Choice of Merger Notification System for Small Economies*, 34 ECLR 548-553 (2013).

⁷⁰¹ Kovacic, William E., *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. Cin. L. Rev. 1075 (1998).

⁷⁰² Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 90.

⁷⁰³ Kovacic, William E., *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. Cin. L. Rev. 1075 (1998).

body. Thresholds may refer, for instance, to the (national and/or worldwide) turnover of the merging parties in the last completed financial year, market shares of the parties or a combination of both criteria. Thresholds may be adjusted when necessary to take account, for example, of increases in the GDP deflator index. AMSs may also consider introducing a standstill provision by which mergers, which are subject to the competition regulatory body evaluation, cannot be implemented before they are approved.⁷⁰⁴

Accordingly, the thresholds may be fixed according to national and/or worldwide turnover of the merging parties in the last completed financial year, and the market shares of the parties or a combination of both criteria. Inexplicably, the more reliable criterion of transaction size is not included in this case. However, the *Guidelines I* admit that the threshold may also be adjusted when necessary; for example, in order to take into account, but not limited to, the increase in the GDP deflator index.

4.3. The Resolution of Previously Identified Challenges

Chapter 3 has identified the vast differences, notably in economic development and structure, politics and degrees of development, between the AMSs and the ASEAN Way as the main challenges faced by the ASEAN in its pursuit of regional economic integration with competition law and policy as one of the principal mechanisms. This section aims to examine the recognition of these challenges by the ASEAN as well as its proposals to overcome them. Throughout the document, The *Guidelines I* recognises a number of challenges such as the different stages of competition policy development among the AMSs,⁷⁰⁵ and the problematic access to necessary resources, notably financial and human resources.⁷⁰⁶ The *Guidelines II* recognise the challenges faced by the ASEAN in a dedicated section:

- Perceived conflicts with other policy objectives (e.g. employment, promotion of “national champions”) and resistance from “vested interests”;
- Lack of good governance, in particular due to the strong links between the worlds of politics and business. Such actual or perceived contact gives the public and the business community little faith that the law will be applied free of corruption and in accordance with the rule of law;
- Tension with sector-specific regulators;
- Resources and capacity constraints and limited indigenous expertise in CPL. The [competition authority's] staff and the judiciary have very limited training in competition law and economics (in particular, few staff and fewer judges have any competition-specific university training). Also the [competition authority's] staff and the judiciary have a rigid, literal approach to interpreting and applying the law, divorced from the law's goals. Investigators, managers, commissioners with no legal training or inexperienced lawyers lack a sense of the dynamic

⁷⁰⁴ *Guidelines I*, art. 3.4.3.

⁷⁰⁵ *Ibid*, art. 1.3.1.

⁷⁰⁶ *Ibid*, art. 4.2.2.

nature of the law. Judges avoid the substantive issues and stick to the procedural issues only;

- Lack of political will and independence;
- An under-developed judicial system.⁷⁰⁷

While the ASEAN Way is never explicitly mentioned in any documents formulated by the ASEAN, its presence is unavoidable especially in light of the reluctance to properly guide or dictate the path to the AMSs. Indeed both the *Guidelines I* and the *Guidelines II* have repeatedly reminded the AMSs of their non-binding character.⁷⁰⁸ In contrast, the concern over the SMEs which have previously been identified as an important part of the AMSs' economy is curiously missing from these texts.

This section will focus on the three primary challenges: the difficulties in designing a competition law and policy framework for the AMSs with deeply rooted varying characteristics; resource restrictions; and foreign influences.

4.3.1. Accommodating the Differences within the ASEAN

In Chapter 3, details were given about the considerable diversity among AMSs in terms of their respective economic and political heritage, governance systems, legal institutions, stages of economic development, and exposure to or reliance on foreign trade and investments. As it has been recognised that political and economic regimes have a crucial impact on the implementation of competition law, it is understandable that both *Guidelines* have taken them into account. The *Guidelines II*, in particular, have exhibited a remarkable understanding of the economic, social and political situation within the region. For instance, they acknowledge the existence of an informal economy and an oligarchy and emphasise that the AMSs should take these factors into consideration when drafting a realistic national competition law.⁷⁰⁹ They also refer to the small economies of many AMSs. The *Guidelines II* question whether this issue has an effect on competition law in general before concluding that the size of the economy does not affect the economic analysis of competition law.⁷¹⁰ However, this analysis does not take into account other characteristics of small economies, such as the concentration of business actors and the difficulty in accessing the market, which would have an impact on the economic analysis of competition law. Most importantly, however, the different stages of competition policy development in the region are included in the *Guidelines I*.⁷¹¹

In this respect, the ASEAN has exhibited an unequivocal awareness of the imbalance in the development of different areas and respect the differing capabilities of each member. Indeed, the ASEAN affirms that the AMSs “should consider and choose what best suits

⁷⁰⁷ *Guidelines II*, 43.

⁷⁰⁸ *Guidelines I*, Preface; *Guidelines II*, Introduction.

⁷⁰⁹ *Guidelines II*, 13-14.

⁷¹⁰ *Ibid*, 29.

⁷¹¹ *Guidelines I*, art. 1.3.1.

their particular characteristics and needs.”⁷¹² It denies the one-size-fits-all approach and favours a tailor-made competition law in accordance with specific situations. There is a legitimate concern about whether the ASEAN’s approach to competition law and policy would, rather than harmonising existing and in-development competition regimes, actually increase the differences among the AMSs. Nevertheless, when considering the differences among the AMSs and their ability to adopt competition law, it is almost impossible to formulate a central model appropriate for all the AMSs. By encouraging the AMSs’ liberty in adopting their own vision of competition law, the ASEAN has opted for the most prudent and realistic approach. In this context, the broad and often ambiguous terminology in both *Guidelines* is necessary to accommodate the differences. Accordingly, the only expectation is the adherence to international standards of competition law. It is worth reiterating that the expectation is not absolute because all AMSs have the freedom to adopt their own vision of competition law and policy.

4.3.2. Overcoming Resource Restriction

There is no shortage of issues related to resource restrictions in this region. The issues, recorded in both *Guidelines*, include financial restrictions and qualified human resources.⁷¹³ The financial issue, being the most pressing, requires resolution as soon as the competition authority is established.⁷¹⁴ The budget for the authority usually derives from the state’s government which can lead to doubts about the competition authority’s independence. However, reliance on the ministerial budget could significantly alleviate financial concerns⁷¹⁵ and can be a justifiable temporary compromise. In addition, the ASEAN proposes that:

[...] The [competition authority] also draws from an independent source of financing. It can be done, for example, by introducing procedural fees, such as filing fees for notifications (*e.g.* for merger clearance or exemptions). Fees should be set at a level corresponding to the average costs of the authority handling a particular category of matter, in order to minimise the risks of distorting effects on the [competition authority’s] priorities. Additionally, the [competition authority] could be granted a share of the fines imposed.⁷¹⁶

The *Guidelines II* publish an extensive list of recommendations to the AMSs to overcome the challenge of the shortage of qualified human resources.⁷¹⁷ The *Guidelines I* also stress the importance of optimising available resources. For this purpose, the competition authority should be allowed to:

⁷¹² *Guidelines II*, 5.

⁷¹³ See, in particular, *Guidelines I*, art. 4.2.2; *Guidelines II*, 38-40.

⁷¹⁴ *Guidelines II*, 38.

⁷¹⁵ Botta, Marco, *Fostering Competition Culture in the Emerging Economies: The Brazilian Experience*, 32 World Competition 609 (2009).

⁷¹⁶ *Guidelines II*, 38.

⁷¹⁷ *Ibid*, 39.

Introduce “prioritisation criteria” to determine in an objective and consistent manner which investigations are to be pursued with priority. The priorities may remain confidential to the competition regulatory body or made public through annual plans or the annual report of the competition regulatory body, specifying industries or sectors, as well as types of conduct that are of particular interest.⁷¹⁸

These criteria should reflect the time and resources at the national competition authority disposal.⁷¹⁹ Therefore, the work requirement must be proportionate to these resources. For instance, *per se* infringement cases with serious impact on relevant market should be made a priority. While complex cases that require cross-border investigation and international cooperation might present too big a hurdle. Similarly, a case that can be brought through private enforcement might not be worth pursuing by national competition authority with resource restriction issue. Most importantly, prioritisation criteria should not lead to *de facto* exemptions which would unnecessarily restrict the scope of enforcement of the authority.

4.3.3. Optimising Foreign Influences

It is noteworthy that the ASEAN readily embraced the concept of foreign help when drafting national competition law.⁷²⁰ Moreover, it has admitted to borrowing from the AMSs’ experiences and international best practices.⁷²¹ Although both *Guidelines* liberally reference the experiences of its AMSs by name, the *Guidelines I* are more reluctant to cite their international sources. Foreign origins have never been explicitly identified, perhaps in an attempt to further establish an authentic ASEAN vision of competition law and policy. In contrast, the *Guidelines II* acknowledge foreign influences and their role in introducing competition law and advising decision makers in matters regarding competition law. They give ample examples of foreign practices in the field of competition law, ranging from mature regimes such as the EU and the US to newer regimes like India, Jamaica and Armenia.

The ASEAN’s action of importing foreign rules is not unique. Competition law is often based on the experience of other countries.⁷²² Dabbah noted that this has not always been the case since most mature competition law regimes have had a chance to enact and adapt their own competition rules before adapting these in light of international agreements.⁷²³ The same pattern has not applied to many of new competition law jurisdictions. Fox and Padilla named this trend “the follower phenomenon.” This phenomenon includes

⁷¹⁸ *Guidelines I*, art. 4.2.1.

⁷¹⁹ *Guidelines I*, art. 4.2.2.

⁷²⁰ *Guidelines II*, 17.

⁷²¹ *Guidelines I*, Foreword.

⁷²² Gal, Michal S., *The ‘Cut and Paste’ of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, 9 *European Journal of Law Reform* (2007).

⁷²³ Dabbah, Maher M., *Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime*, 33 *World Competition* 457 (2010).

transplanting a foreign rule to imitating a foreign law's interpretation. The transplantation may be partial or complete. The follower phenomenon is not recent. Gal confirmed that "transplants were and still are, a major form of legal development."⁷²⁴

The motivation behind the adoption of competition law based on foreign experiences varies and there is no shortage of incentives for introducing foreign ideas. Generally, the motivation is the desire to save costs, both financial and institutional. Developing new competition law jurisdiction entirely internally will be a lengthy and costly process. In a resource-restricted jurisdiction, this would be simply impossible. Further, importing a successful concept could help ease the acceptance of the law in the host country,⁷²⁵ thus alleviating the burden on the competition advocacy programme. Nonetheless, the successful implementation of competition law abroad does not guarantee it would also be beneficial to the follower jurisdiction. Commentators warn that the latter needs to proceed with caution in order to obtain successful transplantation.⁷²⁶ In this context, success is presumed when the recently transplanted competition law receives optimal implementation locally. The newly enacted law may not be applicable unless the special characteristics of the host state, such as the socioeconomic conditions, are effectively addressed. Furthermore, even if all the conditions for the successful transplant of the law are met, there is still the possibility that the law may be misapplied or applied differently from its foreign version. While this scenario is not desirable, especially in light of the process of the harmonisation of competition law, it can be justified when considering the special characteristics of the state in question.

Pitfalls when foreign laws are transplanted are more likely to occur if there has been much foreign pressure to adopt the laws. There is no evidence to indicate that this scenario applies to the ASEAN. It is likely that the choice to adopt foreign experiences is made voluntarily, thus implying that the ASEAN is aware of the potential benefits and pitfalls that could transpire. This awareness would explain why the ASEAN limits itself to simply following the universal consensus-based competition law and repeatedly suggests that AMSs take their special characteristics into consideration when designing national competition laws, even when its ultimate goal is to support regional economic integration.

Notwithstanding the study of foreign experiences, the ASEAN accepts two forms of foreign help: intellectual and financial resources.

⁷²⁴ Gal, Michal S., *The 'Cut and Paste' of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, 9 *European Journal of Law Reform* (2007).

⁷²⁵ Fox, Eleanor M. and Padilla, A. Jorge, *The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy*, 76 *Antitrust L.J.* 899 (2010).

⁷²⁶ See, in particular, Gal, Michal S., *The 'Cut and Paste' of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, 9 *European Journal of Law Reform* (2007); Fox, Eleanor M. and Padilla, A. Jorge, *The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy*, 76 *Antitrust L.J.* 899 (2010).

4.3.3.1. Technical Assistance

Fox argued that developed economies have a duty of cooperation to aid developing economies in their efforts to combat international anticompetitive practices since developing economies lack the necessary resources and enforcement reach to treat them.⁷²⁷ This duty of cooperation is due to the anticompetitive conduct being concocted in developed economies but taking place in developing economies since developing economies' tools to combat international anticompetitive conduct are often inadequate. However, Fox's proposed solution is to extend developed economies' jurisdiction so as to make hard-core export cartels illegal. Her suggestion of extra-territoriality of established competition jurisdiction is not necessarily the best. Dabbah supported the concept of duty of cooperation on the part of developed economies.⁷²⁸ He admitted that the lack of support from international organisations could be detrimental to the success of competition law enforcement in new jurisdictions. In this respect at least, the ASEAN does not appear to be lacking.

Lee divided technical assistance given to countries into two categories: the OECD model and the UNCTAD model.⁷²⁹ The difference between the OECD and the UNCTAD lies firstly in their membership. The UNCTAD has broad and universal membership and includes most of the member states of the UN, while the OECD is usually considered the "club of rich nations"⁷³⁰ because of its inclusion of thirty-four of the most industrialised economies of the world. Despite its best efforts in adding more diversity to its composition, the OECD is still heavily criticised limiting its membership to developed economies only.⁷³¹ Despite this difference, both organisations pursue the same activity – the convergence of competition law standards.

In the area of competition law and policy, the OECD is best known for its *Recommendations and Best Practices*.⁷³² Many competition authorities, even from non-OECD members, use these works as highly authoritative sources in the field of competition law. Among the different OECD publications in the field of competition law, the most influential is the *Recommendation Concerning Effective Action against Hard Core Cartels*,

⁷²⁷ Fox, Eleanor M., *Economic Development, Poverty and Antitrust: The Other Path*, 13 Sw. J. L. & Trade Am. 211 (2007).

⁷²⁸ Dabbah, Maher M., *Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime*, 33 World Competition 457 (2010).

⁷²⁹ Lee, Cassey, 'Model Competition Laws' in Cook, Paul, Fabella, Raul and Lee, Cassey (eds), *Competitive Advantage and Competition Policy in Developing Countries* (Edward Elgar Publishing 2007). (In his analysis, he used the OECD 1999 and UNCTAD 2003 model.)

⁷³⁰ Botta, Marco, 'Competition Policy: the EU and Global Networks' in Falkner, Gerda and Müller, Patrick (eds), *EU Policies in a Global Perspective : Shaping or Taking International Regimes?* (Routledge 2014).

⁷³¹ Gerber, David J., *The Extraterritorial Application of German Antitrust Law*, 77 American Journal of International Law (1983).

⁷³² Fox, Eleanor M. and Crane, Daniel A., *Global Issues in Antitrust and Competition Law* (West 2010) 535.

published in 1998.⁷³³ Using this *Recommendation*, the OECD is working on obtaining substantive soft harmonisation in the field of hard-core cartels. The OECD's emphasis on fighting hard-core cartels is because the conduct of cartels is unambiguously harmful and countries unanimously condemn them. The OECD activities are not limited to hard-core cartels. It also deals with a variety of issues of competition law and policy including mergers, cooperation between competition authorities and member states and fighting bid-rigging.⁷³⁴ Equally important to the *Recommendations and Best Practices* is the OECD work on cooperation between the competition authorities of its member states. The OECD has created an important competition forum as part of its Competition Committee called the Global Forum on Competition (GFC). This forum allows the OECD to further widen its policy dialogue to include non-OECD members. Today the GFC unites more than 100 competition authorities around the world.⁷³⁵ It is intended to be a forum where the OECD members' convergence experience can be shared with non-members and at the same time, non-members' concerns can be heard. Another key function of the OECD in the field of competition law is to conduct peer reviews of national competition laws and policies. Through the peer reviews, the OECD can evaluate competition law regimes around the world and recommend how best to increase each one's effectiveness. In practice, this means that countries are free to submit their competition law regimes to OECD scrutiny but are under no obligation to implement the recommendations made in the review. Nonetheless, countries are encouraged to make legitimate domestic changes. The reviews are a useful convergence mechanism; newly established authorities can use them to lobby the government of its country to amend the competition law.⁷³⁶ In other words, what the peer review lacks in binding obligation is compensated for by peer pressure.

The UNCTAD entered the field of competition law and policy in 1973 when it began its negotiation on the control of restrictive business practices. Since the nature of the UNCTAD's work already centred on trade policy, its expansion to the field of competition law should not be regarded as surprising but rather a natural progression as the Conference develops. It aims to facilitate a more efficient and equitable globalised economy through enhancing competitiveness and economic growth in developing economies by spreading a competition-based culture and elevating consumer welfare. The UNCTAD has produced some notable contributions to the field of global competition law over the years. Perhaps its best known work is the *The United Nations Set of Principles and Rules on Competition*,⁷³⁷ more commonly known as *the UNCTAD Code* or *the UNCTAD Set*. Notwithstanding its nature as a multilateral agreement, *the UNCTAD Code* is generally regarded as a code of conduct on competition policy that aims to provide developing

⁷³³ OECD, *Recommendation of the Council concerning Effective Action Against Hard Core Cartels* (C(98)35/FINAL, 25 March 1998).

⁷³⁴ See, in particular, OECD, *Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade* (C(95)130/FINAL, 1995); OECD, *Recommendation on Fighting Bid Rigging in Public Procurement* (C(2012)115 - C(2012)115/CORR1 2012).

⁷³⁵ OECD, *Global Forum on Competition* <<http://www.oecd.org/competition/globalforum/>>.

⁷³⁶ Botta, Marco, 'Competition Policy: the EU and Global Networks' in Falkner, Gerda and Müller, Patrick (eds), *EU Policies in a Global Perspective : Shaping or Taking International Regimes?* (Routledge 2014).

⁷³⁷ *The United Nations Set of Principles and Rules on Competition*. [hereinafter the UNCTAD Code]

countries with equitable rules to protect them from anticompetitive harm.⁷³⁸ It also recognizes the development dimension of competition law and policy and provides a framework for international operation and exchange of best practices.⁷³⁹ When examining the text, it is evident that *the UNCTAD Code* is a compromise of different interests. *The UNCTAD Code*'s substantive provisions contain basic competition law principles generally consistent with the western concept of anticompetitive conduct. *The UNCTAD Code* has a two-tiered structure of rules and principles addressed both to countries and firms and contains classic competition law provisions. Nevertheless, the effects of *the UNCTAD Code* are extremely limited for two main reasons. Firstly, in the eyes of developed economies, in particular the US, *the UNCTAD Code* represents a populist conception of competition law which contrasts with the prevailing economic efficiency rationale.⁷⁴⁰ As a consequence, developed economies tend to disregard *the UNCTAD Code* although the part of *the UNCTAD Code* that overlaps with their conception of efficient competition law continues to be cited approvingly. Secondly, the absence of a clear and legally binding effect reduces the political importance of *the UNCTAD Code*. Beside *the UNCTAD Code*, the UNCTAD has contributed to the globalisation of competition law through other measures such as *the Model Law on Competition*⁷⁴¹ which is based on *the UNCTAD Code*. This was adopted to give member states a source of reference when drafting or amending domestic competition laws.

The UNCTAD also provides capacity building and technical assistance to developing economies and economies in transition which seek to implement competition law and policy in their jurisdictions. In this, the UNCTAD works closely with national competition authorities, competition experts and development partners such as the OECD and the ICN.

Finally, the UNCTAD also has a peer review system similar to that of the OECD. The peer reviews are voluntary which means that countries are free to submit their competition law regimes for review; the recommendations made are not mandatory. The peer reviews are conducted by different competition experts to provide an objective assessment of the competition law regime for the purpose of identifying its shortcomings and proposing suggestions as well as technical assistance when needed. The UNCTAD peer review exercise is unique in terms of its development perspective and rich experience in working with developing economies.

Although there is no supporting evidence attesting to direct involvement of the OECD and the UNCTAD in capacity building and technical assistance within ASEAN, the *Best Practices* cite the OECD recommendations and the *Guidelines II* mention both the OECD and the UNCTAD body of work, in particular the *UNCTAD Model Law*, as their sources of competition law recommendations and best practices. Moreover, the ASEAN has received

⁷³⁸ Ibid, Sec. A(5).

⁷³⁹ Ibid, Set. D.

⁷⁴⁰ Lianos, Ioannis, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 Tul. J. Int'l & Comp. L. 415 (2007).

⁷⁴¹ UNCTAD, *The Model Law on Competition* (TD/RBP/CONF.7/8, 2010). [Hereinafter Model Law]

direct aid from some foreign nations; for instance, the *Guidelines I* was produced by InWent Capacity Building International while the *Guidelines II* was produced with the support of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) for its capacity building for the ASEAN Secretariat project. Both projects were funded by the Foreign Office of the Federal Republic of Germany. In addition to the direct help, the ASEAN also receives technical assistance from the ASEAN-Australia Development Cooperation Programme Phase II and the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA). Both programmes have offered ample technical assistance as evidenced by the frequent organisation of capacity-building workshops and conferences in the region.⁷⁴²

4.3.3.2. Financial Assistance

The financial assistance provided to the ASEAN is essential for its initiative in developing its competition law and policy framework since the AMSs' contribution is minimal. In 2013, the member states' contribution only accounted for USD 16.2 million.⁷⁴³ This covered little more than the ASEAN Secretariat's operational costs. Consequently, the ASEAN is currently not financially self-reliant and foreign financial contributions are more-or-less imperative. For example, the ASEAN–Australia Development Cooperation Programme Phase II, which was launched in 2009 and is expected to last until 2019, has offered a budget of AUD57 million (roughly USD 44.7 million).⁷⁴⁴ Given the lack of public transparency regarding financial expenditure within the ASEAN structure, it is impossible to determine how much has been distributed to the development of the ASEAN competition law and policy projects.

4.4. Conclusion

This chapter has examined the ASEAN's approach to substantive competition law. It has revealed that most of the work has concentrated on supporting the installation of national competition laws. To this effect, the ASEAN's contribution is in the form of various conferences and publications aimed at connecting the AMSs with global attitudes to competition law. It has always been mindful of both its own limitations, in particular the absence of a centralised organ with allocated power necessary to impose a model, as well as differing AMSs' specificities. This was translated into an offering of collections of traditional and globally accepted competition rules that could be adapted according to each AMS's needs. The ASEAN seems more preoccupied with gaining acceptance and inviting more participation from its own AMSs. It is now an opportune time to question whether

⁷⁴² ASEAN, *ASEAN Annual Report 2013-2014* (July 2014) 4.

⁷⁴³ Dosch, Jörn, *The ASEAN Economic Community: The Status of Implementation, Challenges and Bottlenecks* (CARI 2013) 13. (The calculation is based on the principle of equal annual contributions under The ASEAN Charter, art. 30.2.)

⁷⁴⁴ *ASEAN Annual Report 2013-2014*, 4.

the approach taken will lead the ASEAN to its ambitious goal of harmonising competition law to complement imminent regional economic integration.

In this respect, the process of soft harmonisation as a non-binding multilateralism which relies on the power of persuasion, as described in Chapter 2, most resembles the ASEAN's effort in competition law and policy thus far. It responds well to the ASEAN's inherent limitations and ambition. The ASEAN has never proposed a framework unique to its vision; it is instead content with gathering accepted up-to-date best practices in the field of competition law and policy accompanied by a large margin of discretion that the AMSs' competition authorities could enjoy. At the same time, it inherits all the shortcomings of soft harmonisation. The AMSs are free, and to a certain degree encouraged, to neglect the ASEAN's approach as assembled in the *Guidelines* in favour of their own particular necessities or situations. In the end, one is left to wonder whether the path of soft harmonisation chosen by the ASEAN does not further widen the divergence between members instead of bridging it.

By electing the soft harmonisation approach with respect to the competition regulatory design to pursue its economic integration goal, the ASEAN has retained its uniqueness in comparison with other regional experiences. It is the only regional organisation with an integration goal not to undertake a unified and centralised approach to substantive design. Conversely, it more resembles the NAFTA's free trade approach.

Chapter 5 The ASEAN's Approach to Institutional Building

“Jurisdictions need sound and thoughtful institutional design that will best help advance their competition law and policy.”⁷⁴⁵ Yet, the subject of institutional design is often relegated to “a relatively obscure corner”⁷⁴⁶ with more attention paid to substantive policy development. Kovacic argued that “if theory is not grounded in the engineering of effective institutions, it will not work in practice.”⁷⁴⁷ Put differently, if the construction of an institutional structure for competition is not appropriate to house substantive interiors, the entire policy could collapse. In his influential work, North defined “institutions” as “the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interactions.”⁷⁴⁸ In the competition law context, however, institutional design often covers the systems, structures, processes and procedures of competition law enforcement and application and competition policy advocacy.⁷⁴⁹ This chapter elects to follow this description.

Chapter 4 explained the ASEAN's approach to substantive competition law through the process of soft harmonisation. This chapter now turns to the analysis of the ASEAN institutional framework in which is housed the process of regional harmonisation. The ASEAN guidance in the field of institutional building appears more developed than that of the substantive law. Indeed, the *Guidelines I* introduce the concept of institutional building that is impressively expanded in the *Guidelines II*, including suggestions on institutional design, attributes and competencies, core values and organisational structure. If the ASEAN refrains from entering into details regarding substantive law, such restraint is not present in its institutional building recommendations. It is evident that the issue of substantive law and institutional design do not receive equal treatment. Such a cautious approach regarding substantive law is inexplicable since both the area of substantive law and institutional construction involve a high degree of national choice placed under the discretion of the AMSs.

Bakhom and Molestina identified five factors that influence the design of regional competition structures: “the number of states and the level of integration of the regional market; the fluidity of trade between member states; the respective institutional capacities of the member states and the Union; the existence or lack of a competition culture in the member states; and the time dimension.”⁷⁵⁰ As discussed in Chapter 1, the ASEAN is a

⁷⁴⁵ Fox, Eleanor M., *Antitrust and Institutions: Design and Change*, 41 Loy. U. Chi. L. J. 473 (2010).

⁷⁴⁶ Schuck, Peter H., *Is a Competent Federal Government Becoming Oxy-moronic?*, 77 George Washington L. Rev. 973 (2009).

⁷⁴⁷ Kovacic, William E., *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 Mich. L. Rev. 1019 (2012).

⁷⁴⁸ North, Douglas Cecil, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 3.

⁷⁴⁹ Fox, Eleanor M., *Antitrust and Institutions: Design and Change*, 41 Loy. U. Chi. L. J. 473 (2010).

⁷⁵⁰ Bakhom, Mor and Molestina, Julia, ‘Institutional Coherence and Effectiveness of a Regional Competition Policy: the Case of the West African Economic and Monetary Union (WAEMU)’ in Drexl,

regional organisation composed of ten neighbouring states in Southeast Asia with the ambitious goal of economic integration. The current level of trade between the AMSs is not high but it is believed that market integration could help its fluidity. The competition culture of the AMSs is not firmly established with only seven AMSs having a competition law regime, with varying degrees of efficacy in its enforcement. Furthermore, the institutional capacities of the ASEAN are fragile due to the principle of non-interference between the AMSs, which lies at the heart of the organisation, and the lack of a centralised mechanism. Since the ASEAN cannot support the existence of a central mechanism in charge of handling regional competition law issues, the task is therefore exclusively under the discretion of each AMS's competition authority. Facing its limitations, the ASEAN endeavours instead to support each AMS in its establishment and modernisation of a national competition institution. The only regional competition structure available to the ASEAN is the AEGC which, as the name would suggest, is merely a network of national competition authorities. Despite having an ambitious goal of introducing a single market that fully integrates all the AMSs, the ASEAN is deprived of centralised decision-making ability. Consequently, in its current state it is legally impossible to have a regional authority in charge of competition law. In relation to the inevitable regional issues of competition law that are bound to emerge during the regional economic integration, the ASEAN resorts to extra-territoriality and regional cooperation.

5.1. The ASEAN's Model for National Competition Authority

Fox compared the design of a competition institution to that of a house. She reflected that:

Good institutional design is a critical component of good competition policy and competition law enforcement. The design of the institutions is like the design of a house: it must facilitate life within the house. Good institutional design takes account of the family's values and empowers life within its walls. Designs cannot be conjured in the abstract; they must fit the family that lives in the house, its aspirations, possibilities, and practical limits. Therefore, the good architect lives with the family before conceptualizing the design.⁷⁵¹

It follows that the design of a competition structure must not be undertaken in the abstract and must take into consideration the specificities, the goals, the capacities and the restrictions of the country or the region. In other words, it is the context that shapes the design of the institution. Consequently, the perfect internationally agreed template for competition institutional design does not exist. The ASEAN demonstrates its awareness of this aspect when it declares that "[...] there is no one-size-fits-all answer and the optimal solution must be coherent with the country's general legal framework and regulatory history. The solution can vary from country to country and even across industries within

Josef et al. (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012).

⁷⁵¹ Fox, Eleanor M., *Antitrust and Institutions: Design and Change*, 41 Loy. U. Chi. L. J. 473 (2010).

the same country.”⁷⁵² Furthermore, many new competition jurisdictions faced daunting challenges in building the institutional foundations for successful implementation.⁷⁵³ The challenges are fuelled principally by resource restrictions, namely the financial investment by the state, limited knowledge, lack of personnel and lack of experience. In this regard, the ASEAN faces similar challenges to many developing economies in their construction of a regional framework on substantive competition law.

This section will begin with an analysis of the necessary considerations for the adoption of an institutional framework since the choices made at this stage would unequivocally influence the outcome of the institutional model.

5.1.1. Necessary Considerations for an Effective Institutional Framework

It is important to reflect first on what are the qualities and attributes that a competition authority should possess before proceeding to the appropriate design of institution as envisioned by the ASEAN. Generally, the values include independence, accountability, expertise, transparency, due regard for confidentiality, efficiency, due process, and predictability.⁷⁵⁴ The *Guidelines I* state that the responsibilities of the competition agency are: to implement and enforce national competition law; to interpret and elaborate; to advocate; to provide advice; and to act as the representative of the country in international competition matters.⁷⁵⁵ The *Guidelines II* further state that in order to carry out these responsibilities, it is fundamental for a competition agency to possess the following attributes and competencies: independence; accountability; fairness; transparency; confidentiality; effective powers; influence; resources; and cooperation skills.⁷⁵⁶ Among these, independence is given an apparent priority. What is noteworthy in this institutional building section is the ASEAN’s adoption of a firmer language. The term “should” is used deliberately when discussing the attributes of national competition authorities.

5.1.1.1. The Prevalence of Independence

There is widespread agreement that the principle of independence is at the core of competition authorities.⁷⁵⁷ However, jurisdictions often differ in their formulation of independence. Khemani and Dutz suggested that competition agencies should be insulated

⁷⁵² *Guidelines II*, 31.

⁷⁵³ Kovacic, William E., *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 Am. Soc’y Int’l. Proc. 309 (2003).

⁷⁵⁴ Trebilcock, Michael J. and Iacobucci, Edward M., *Designing Competition Law Institutions*, 25 World Competition 261 (2002).

⁷⁵⁵ *Guidelines I*, art. 4.1.1.

⁷⁵⁶ *Guidelines II*, 36.

⁷⁵⁷ UNCTAD, *The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy* (TD/RBP/CONF.7/3 2010).

from “political and budgetary interference.”⁷⁵⁸ A competition authority is therefore independent when it can exercise its decision making power free from the influences of elected and non-elected officials or subjects under their competition law enforcement. It is believed that there is a direct correlation between an agency’s independence and its improvement in enforcement.⁷⁵⁹ It follows that independence merely serves to ensure objective functionality and effectiveness of a competition authority. Objectivity in this context could lead in turn to legal certainty in the competition enforcement of the agency.

The principle of independence in a competition agency is highly regarded by the ASEAN as evidenced by the fact that it is the most developed consideration in both *Guidelines*. The ASEAN categorises independence in two interlinked forms: financial and administrative independence. The *Guidelines I* suggest that the AMSs’ competition regulatory body should be equipped with the necessary resources and legal powers to carry out their responsibilities.⁷⁶⁰ In addition, the determination of the budget of the competition regulatory body should be free from political interference. The proposed method in achieving financial independence is to separate the competition authority's budget from other governmental functions and make it transparent to the public.⁷⁶¹ In practice, however, financial independence is but an illusion. Even with the separation, the competition agency’s budget is still generally controlled by the legislature which possesses the power to alter it if it is dissatisfied with the performance of the agency. The competition agency could resort to self-generated income, for example through the fees for merger notification, but it is susceptible to economic growth (“[a]mid a recession, the filings and the funding diminish dramatically”).⁷⁶² Hence, this method of assuring income might not be sufficiently reliable to sustain the agency. The other form of independence is administrative. The *Guidelines I* suggest that the AMSs accord the competition authority as much administrative independence as necessary and as possible in order to avoid the political influence.⁷⁶³ In order to achieve this aim, the *Guidelines I* recommend the appointment of independent commission members in charge of the competition regulatory body with a fixed term of reasonable duration without the possibility of being dismissed. How the appointment is made is left to the discretion of the AMSs. In contrast, the World Bank has a more restrictive view of autonomy since it delimits the notion to independence in regards to the government.⁷⁶⁴ This means that members of the competition agency should be appointed by a committee or the parliament instead of the head of state. Until

⁷⁵⁸ Khemani, R. Shyam and Dutz, Mark A., ‘The Instruments of Competition Policy and Their Relevance for Economic Development’ in Frischtak, Claudio R. (ed), *Regularities Policies and Reform: A Comparative Perspective* (World Bank 1995).

⁷⁵⁹ Ma, Tay-Cheng, *Competition Authority Independence, Antitrust Effectiveness, and Institutions*, 30 Int'l Rev. L. & Econ. 22 (2010).

⁷⁶⁰ *Guidelines I*, art. 4.1.3.

⁷⁶¹ *Ibid*, art. 4.3.3.

⁷⁶² Kovacic, William E. and Hyman, David A., *Competition Agency Design: What's on the Menu?*, 8 European Competition Journal 527 (2012).

⁷⁶³ *Guidelines I*, art. 4.3.3.

⁷⁶⁴ World Bank, *World Development Report 2002: Building Institutions for Markets* (Oxford University Press 2002) 142.

then, it seemed that the ASEAN broadly followed agreement by consensus on the principle of independence.

Two years later the *Guidelines II* adopted a sterner position than the *Guidelines I*. The *Guidelines II* boldly announced that “[t]o be effective, a [competition authority] should be independent. Especially it should be free from both political and business influence.”⁷⁶⁵ In this regard, they developed a check-list as follows:

- The [competition authority] should be a distinct statutory authority, free from day-to-day ministerial control;
- There should be an appointment according to well-defined professional criteria and with the involvement of both the executive and the legislative branches of the government;
- Any Head (or equivalent) and members of the adjudicating body should be appointed for a fixed-term, with a prohibition on their removal except for clearly pre-defined due cause with the appropriate judicial review;
- The term periods of the members of the (collegiate) adjudicating body should be staggered (i.e. arranged in alternating or overlapping time periods);
- The [competition authority] should have an adequate and reliable source of funding;
- There should be adequate salary levels (e.g. through an exemption from civil service salary limits);
- The executive should be prevented from overturning the [competition agency’s] decisions, or limiting the [competition authority’s] power, unless as set out in clearly pre-defined exceptional instances.⁷⁶⁶

On the other hand, the case for independence is not as straightforward for developing economies with a newly adopted competition law culture. Botta contested that in a country where competition law has been transplanted into an environment where the concept of competition was previously unknown, a competition authority without any link to other ministerial bodies is in danger of becoming an isolated institution, incapable of enforcing the competition statutes.⁷⁶⁷ Being part of an influential Ministry can help boost the agency authority and aid in its actual enforcement against both private entities and other governmental bodies. The temporary inclusion of a competition authority within an influential Ministry is therefore a more attractive option for most of the AMSs during the early stages of competition enforcement.

Ideally, the competition authority should be independent of both political and financial pressure, but remain accountable for the exercise of its powers and expenditure of public resources.⁷⁶⁸ Accountability can be achieved in various ways. It can be exhibited through

⁷⁶⁵ *Guidelines II*, 36.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ Botta, Marco, *Fostering Competition Culture in the Emerging Economies: The Brazilian Experience*, 32 *World Competition* 609 (2009).

⁷⁶⁸ Kovacic, William E. and Hyman, David A., *Competition Agency Design: What's on the Menu?*, 8 *European Competition Journal* 527 (2012).

judicial review, the public control of financial resources, direct nomination to the agency by executive branch or legislature or through the transparency of the agency. The choices made regarding accountability will inevitably affect the degree of independence of the authority.

According to the ASEAN, a competition authority should be accountable to the government and/or the legislator, the public and the business community.⁷⁶⁹ In this regard, an agency is held accountable for its decisions by every stakeholder. The *Guidelines II* give a comprehensive list describing measures that a competition authority could undertake in order to ensure its accountability:

The competition law and [competition agency's] statutes should be published, clearly specifying the [agency's] duties, responsibilities, rights and obligations;

Judicial review of the [competition authority's] decisions should be ensured [...];

The [competition authority] should be requested to publish annual reports on its activities and establish a formal review of its performance by independent auditors, and/or an oversight committee of the legislature;

Rules should be established for the removal of board members if they show evidence of misconduct or incompetence;

All interested parties should be allowed to make submissions to the [competition authority] on matters under review;

The [competition authority] should be mandated to publish its reasoned decisions.⁷⁷⁰

The viability of the judicial review as a means to increase a competition authority's accountability merits closer analysis. "It is widely held that independent judicial review of the decisions of competition authorities, whether through the regular courts or through administrative tribunals, is desirable for the sake of the fairness and integrity of the decision-making process."⁷⁷¹ Its importance is reflected in the inclusion of the right to appeal the competition agency's actions to the nation's judiciary by every competition law, at least as prescribed within its procedures.⁷⁷²

The *Guidelines I* recognise the role of the judiciary in the enforcement of competition law. The document proposes that the AMSs include both direct access to the judicial authority and the judicial review of administrative decisions in the enforcement process.⁷⁷³ Regarding the judicial review, the *Guidelines I* give the AMSs two possible models: either an administrative appeal independent of the competition regulatory body or a common

⁷⁶⁹ *Guidelines II*, 36.

⁷⁷⁰ *Ibid*, 37.

⁷⁷¹ UNCTAD, *Independence and Accountability of Competition Authorities* (TD/B/COM.2/CLP/67 2008).

⁷⁷² Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 113.

⁷⁷³ *Guidelines I*, art. 7.1.4.

judicial authority.⁷⁷⁴ The AMSs could choose to put the entire set of the competition authority's decisions under judicial review, or reserve it for substantive law or procedural law.⁷⁷⁵ The *Guidelines II* later contradicted this suggestion. They insist that it is crucial to introduce some limits to the judicial review to allow some degree of deference to the competition authority's decisions.⁷⁷⁶ It is suggested that the appeal be confined to a consideration of the law, including a review of the procedures. The judicial review is intended to prevent the court from substituting the competition authority's decisions or undermining them. The role of the judiciary is simply to ascertain whether the competition authority has abused its discretionary power. In this context, the judge must accept the facts as found by the authority.

There are some lingering doubts about whether the judiciary in developing economies is capable of employing proper economic analyses of the underlying competition principles or an understanding of the business practices that may have arisen in the case.⁷⁷⁷ The complexity of business practices challenged by the competition authority in the practice of competition law demands considerable experience as well as some sophistication in- and knowledge of economics. Moreover, in newly developed competition regimes with few enforcement decisions, it is impossible for the judiciary to refer to past case law and therefore a challenge for the judiciary to pass a precise and accurate competition law-related judgement. Rodriguez and Menon proposed overcoming the lack of expertise by relying on the adversarial court procedure where independent competition law experts are invited to give testimony.⁷⁷⁸ The testimony is especially useful when experts disagree, thus providing the judiciary with well-rounded information.

5.1.1.2. Other Considerations

The *Guidelines I* also recognise fairness, equality, transparency, consistency, non-discriminatory treatment under the law,⁷⁷⁹ confidentiality of commercially sensitive information and details of an individual's private affairs,⁷⁸⁰ and due process⁷⁸¹ among the second-tiered values. With the exception of equality, the *Guidelines II* repeat all considerations given in the previous list.⁷⁸² Among the secondary considerations, transparency is prominent. Kovacic underlined the importance of maintenance and public disclosure of a comprehensive and informative database on competition law

⁷⁷⁴ Ibid, art. 4.3.2.

⁷⁷⁵ Ibid, art. 7.1.4.2.

⁷⁷⁶ *Guidelines II*, 42.

⁷⁷⁷ Sheth, Manisha M., *Formulating Antitrust Policy in Emerging Economies*, 86 Geo. L. J. 451 (1997).

⁷⁷⁸ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 113.

⁷⁷⁹ *Guidelines I*, art. 3.1.3.

⁷⁸⁰ Ibid, art. 6.4.

⁷⁸¹ Ibid, chap. 7.

⁷⁸² *Guidelines II*, 36.

enforcement.⁷⁸³ Transparency encompasses enforcement standards and procedures and the broader issue of the decision-making framework of the agency on various substantive antitrust issues.⁷⁸⁴ This type of transparency could help inform the public of on-going investigation, leading to better participation by the public and interested parties in the enforcement. By communicating detailed and useful information about the enforcement system, the competition authority could ensure better legal certainty. Nonetheless, limiting administrative discretion might be more feasible in a culture that has rules promoting transparency, fairness and suppression of corruption in public administration.⁷⁸⁵ Many new and developing jurisdictions might not have such rules. Furthermore, an attempt at increased transparency could negatively impact on already scarce financial resources of the agency. However, the potential benefits of increased transparency, including greater predictability and accountability, for the agency should outweigh its cost.⁷⁸⁶

Transparency in the administration of competition law enforcement will always be in tension with confidentiality. Transparency includes the release of confidential information used by the competition agency in its case analysis, even if the analysis does not result in a decision.⁷⁸⁷ Much of the information provided by involved parties, competitors, suppliers and customers to the competition authority is of the sensitive nature. Making this type of information publicly available might damage their legitimate commercial interest affect the parties' cooperation in future cases.

It appears that each consideration interacts and sometimes contradicts the other. The trade-off of values is unavoidable. The balance of values is “a quintessential polycentric and highly contestable exercise”⁷⁸⁸ in which there is not a singular model combination. Jurisdictions can simply make their choices dependent on the context surrounding their competition policy at the time. In this regard, the AMSs must proceed cautiously with their balancing of considerations relevant to the adoption of a national competition institution by taking into consideration the local political and economic context upon which the competition institution is to be constructed. Only then will the likelihood of achieving an effective institutional framework for the AMSs be possible.

⁷⁸³ Kovacic, William E., *Achieving Better Practices in the Design of Competition Policy Institutions*, 50 *The Antitrust Bulletin* 511 (2005).

⁷⁸⁴ Nannes, John M., *Transparency in Federal Antitrust Enforcement Decisions: A Reaction to Professor Grimes*, 51 *Buff. L. Rev.* 1017 (2003).

⁷⁸⁵ Kovacic, William E., *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 *Brook. J. Int'l L.* 403 (1997).

⁷⁸⁶ Sokol, D. Daniel, *Designing Antitrust Agencies for More Effective Outcomes: What Antitrust Can Learn from Restaurant Guides*, 41 *Loyola University Chicago Law Journal* 578 (2010).

⁷⁸⁷ Coate, Malcolm B., *Theory Meets Practice: Barriers to Entry in Merger Analysis* <

⁷⁸⁸ Trebilcock, Michael J. and Iacobucci, Edward M., *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 *Loy. U. Chi. L.J.* 455 (2010).

5.1.2. Institutional Models

From the outset it is essential to understand that the perfect model of competition law institution does not exist. Although there is a striking diversity in the design of competition institutions,⁷⁸⁹ there are three accepted referential models: the bifurcated judicial model, the bifurcated agency model and the integrated agency model.⁷⁹⁰ These models are based on how the three principal functions of competition enforcement (investigation, enforcement and adjudication) are arranged. However, the differences in experience do not necessarily imply significant differences in practical outcomes. The ASEAN readily adopts the three models⁷⁹¹ but exhibits its preference for the integrated agency model.

5.1.2.1. The Bifurcated Judicial Model

Under the bifurcated judicial model, the investigative and enforcement authorities are separated.⁷⁹² In addition, they must bring formal complaints before the court for remedial relief. The recourse to the judiciary helps elevate the accountability of this model while at the same time draws attention to its lack of expertise in the field of competition law. The model relies heavily on an effective judicial system. Thus, it would not be suitable for countries whose court is perceived to be “corrupt and undependable.”⁷⁹³ The bifurcated judicial model is particularly suitable for criminal offences since it ensures adequate standards of due process. While this model could strike a reasonable balance between transparency and respect of confidentiality, it will result in a higher cost of administrative process which might ultimately affect its efficiency. This model existed in Canada until the competition law reform in 1976 but continued with criminal matters under the Canada Competition Act⁷⁹⁴ as the Bureau of Competition Policy.⁷⁹⁵ It is currently the model followed by the US Department of Justice’s Antitrust Division (DOJ). When initiating enforcement proceedings, the DOJ relies on federal courts to substantiate its views of the US antitrust policy.⁷⁹⁶ While the Antitrust division can bring both criminal and civil cases before the court, only civil cases can be subjected to judicial appeal. It is noteworthy that in the US the bifurcated judicial model is accompanied by an integrated agency model in the

⁷⁸⁹ The OECD thoroughly chronicles the different models adopted by countries in the OECD, *Countries Review of Competition Law*

<<http://www.oecd.org/regreform/sectors/countryreviews/competitionpolicyframeworks.htm>>.

⁷⁹⁰ Trebilcock, Michael J. and Iacobucci, Edward M., *Designing Competition Law Institutions*, 25 World Competition 261 (2002).

⁷⁹¹ *Guidelines II*, 31.

⁷⁹² Trebilcock, Michael J. and Iacobucci, Edward M., *Designing Competition Law Institutions*, 25 World Competition 261 (2002).

⁷⁹³ Rodriguez, A. E. and Menon, Ashok, *The Limits of Competition Policy the Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International 2010) 113.

⁷⁹⁴ Canada Competition Act (R.S.C., 1985, c. C-34.) [1985].

⁷⁹⁵ Doern, G. Bruce and Wilks, Stephen, *Comparative Competition Policy: National Institutions in a Global Market* (Oxford University Press 1996) 75.

⁷⁹⁶ *Ibid*, 47.

form of the US Federal Trade Commission and is complemented by an established system of private enforcement.⁷⁹⁷

Intriguingly, the ASEAN refers to the bifurcated judicial model as the adversarial judicial model. It is possible that the notion “adversarial” conveys the separation of organs and powers. According to the ASEAN, “[t]he adversarial judicial model requires the separation of the investigative and enforcement functions (entrusted to a specialised agency) and the adjudicating powers (entrusted to the law courts).”⁷⁹⁸ The *Guidelines II* subsequently discarded this model attesting that it was not suitable for the AMSs whose limited resources are better allocated to a united institution.⁷⁹⁹ (Thailand is the only member adopting this model)

5.1.2.2. The Bifurcated Agency Model

The bifurcated agency model separates investigative and enforcement functions from the adjudicating function.⁸⁰⁰ Separated specialised investigative and enforcement agencies bring competition complaint before separate specialised adjudicative agencies. This model relies on the division of agencies. On the surface, this model is designed to achieve a reasonable balance of the numerous values identified earlier in this chapter.⁸⁰¹ It ensures a high level of independence in the performance of the adjudicative function while ensuring some degree of accountability through the judicial appeal process. The proceedings are transparent with a reasonable degree of respect of confidentiality. However, as seen from the Canadian experience, the bifurcated agency model has failed to meet expectations.⁸⁰² First, a disappointing number of cases have been brought to the Competition Tribunal partly because of the preference for compliance over the enforcement approach by both the firms and the competition agencies.⁸⁰³ It is possible this is to avoid high enforcement costs, both temporal and monetary, and the legal uncertainty compared with the compliance approach. Second, it would seem that the Competition Tribunal is dominated by judicial members, thus undermining its own motive of a specialized adjudicative agency.⁸⁰⁴

As in the case of the bifurcated judicial model, the ASEAN elects to use the term “adversarial agency model”. However, the *Guidelines II* do not recommend the adversarial

⁷⁹⁷ Ibid, 48.

⁷⁹⁸ *Guidelines II*, 31.

⁷⁹⁹ Ibid, 32.

⁸⁰⁰ Trebilcock, Michael J. and Iacobucci, Edward M., *Designing Competition Law Institutions*, 25 World Competition 261 (2002).

⁸⁰¹ Trebilcock, Michael J. and Iacobucci, Edward M., *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 Loy. U. Chi. L.J. 455 (2010).

⁸⁰² Doern, G. Bruce and Wilks, Stephen, *Comparative Competition Policy: National Institutions in a Global Market* (Oxford University Press 1996) 77.

⁸⁰³ Trebilcock, Michael J. and Iacobucci, Edward M., *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 Loy. U. Chi. L.J. 455 (2010).

⁸⁰⁴ Doern, G. Bruce and Wilks, Stephen, *Comparative Competition Policy: National Institutions in a Global Market* (Oxford University Press 1996) 77.

agency model.⁸⁰⁵ The bifurcated models are not the preferred alternatives by competition law experts and Fox confirmed that “wise designers would not design such a two-headed system from scratch.”⁸⁰⁶ (Vietnam follows this model with the Vietnam Competition Authority undertaking the investigation role and the Vietnam Competition Council undertaking the enforcement task)

5.1.2.3. The Integrated Agency Model

With the integrated agency model, a single agency incorporates all the functions of investigation, enforcement and adjudication.⁸⁰⁷ This model offers a higher level of expertise since agency officials and commissioners are involved in all aspects of competition law on a daily basis. Naturally, this leads to more consistency throughout the process of competition proceedings. The agency undertakes the policy-making function through the adoption of guidelines and referential notices. The integrated agency model also yields a high level of accountability through its multi-member composition. Nonetheless, the integrated agency model has the potential to show partiality since all the competition law-related functions are concentrated in a single agency. This concern can easily be mitigated through the judicial review. The best known examples of this model are the US FTC⁸⁰⁸ and the EU Competition Commission.⁸⁰⁹

The *Guidelines II* evidently favour this model, referring to it as the “inquisitorial model.”⁸¹⁰ The document draws attention to the fact that for competition law to be effective within a reasonable time, the AMSs need to efficiently allocate their limited resources to a single integrated organ.⁸¹¹ Furthermore, since this is the model selected by more experienced competition regimes, the ASEAN felt reassured in travelling this path.⁸¹² (Most member states: Indonesia, Malaysia, Myanmar, the Philippines, and Singapore, adopt this model)

⁸⁰⁵ *Guidelines II*, 32.

⁸⁰⁶ Fox, Eleanor M., *Antitrust and Institutions: Design and Change*, 41 Loy. U. Chi. L. J. 473 (2010).

⁸⁰⁷ Trebilcock, Michael J. and Iacobucci, Edward M., *Designing Competition Law Institutions*, 25 World Competition 261 (2002).

⁸⁰⁸ First, Harry, Fox, Eleanor M. and Hemli, Daniel E., ‘The United States: The Competition Law System and the Country's Norm’ in Fox, Eleanor M. and Trebilcock, Michael J. (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2012).

⁸⁰⁹ Lianos, Ioannis and Andreangeli, Arianna, ‘The European Union: The Competition Law System and the Country's Norm’ in Fox, Eleanor M. and Trebilcock, Michael J. (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2012).

⁸¹⁰ *Guidelines II*, 32.

⁸¹¹ *Ibid*, 15.

⁸¹² *Ibid*, 32.

5.2. The ASEAN Expert Group on Competition (AEGC)

The ASEAN leaders endorsed the idea of a platform in 2014 which the *Blueprint* later established. This platform was intended to be a network of authorities or agencies to serve on a forum to discuss and coordinate competition policies⁸¹³ as at the time there was no official ASEAN body for cooperative work on competition policy. Thus, the AEGC was established and serves as a network for authorities to exchange experience and institutional norms on relevant competition subjects. With the establishment of the AEGC, the ASEAN gained its first and only regional competition institution.

A foreign observer regarded the AEGC as a cooperation channel similar to the ICN and the OECD.⁸¹⁴ The similarity with competition networks like the ICN is easily observed since the AEGC shares the same composition consisting of competition authorities and the same mission of harmonisation of competition laws with the network forum. What is striking in this case is the omission of other forms of regional organisation, especially those with an economic integration structure, suggesting that the structure and role of the AEGC is not regarded as being regional cooperation. Furthermore, the OECD has been strongly criticised for its restrictive membership; membership is reserved for developed economies⁸¹⁵ and its design does not include the intention to cooperate in the field of international competition law.⁸¹⁶ A comparison of the AEGC with the OECD is thus inappropriate. This section will instead draw a comparison with other regional cooperation organisations and the network dynamic.

5.2.1. Other Regional Cooperation Organisations

Small and developing economies stand to benefit the most from regional cooperation, in particular with regard to the convergence of competition law.⁸¹⁷ They tend to have scarce resources and little experience in competition law enforcement. Therefore, they are rarely in a position to make credible threats to deter anticompetitive conduct, especially from foreign companies. Pooling resources at a regional level could help to resolve this issue. In addition, regional cooperation could enlarge the scope of competence in the enforcement of competition law since restraints on competition would no longer be restricted to one nation but would tend to expand across borders. Lastly, regional cooperation could give

⁸¹³ *The Blueprint*, 18.

⁸¹⁴ The chairman of Australia's Competition and Consumer Commission's, Rod Sim, speech at the inaugural GCR Asia Law Leaders conference can be found at Global Competition Review, *ACCC's Sims Pushes for More Regional Cooperation* <<http://www.globalcompetitionreview.com/news/article/31471/acccs-sims-pushes-regional-cooperation>>.

⁸¹⁵ Gerber, David J., *Global Competition: Law, Markets and Globalisation* (Oxford University Press 2010) 88.

⁸¹⁶ Jalabert-Doury, Nathalie *Les Instruments de Coopération Plurilatéraux et Multilatéraux de Soft Law Élaborés par l'OCDE* (Mondialisation et Droit de la Concurrence, Acte de Colloque des 14 et 15 juin 2007).

⁸¹⁷ Gal, Michal S., *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 *Fordham Int'l L.J.* 1 (2009).

developing economies an appropriate forum to analyse and consider successful regimes' experiences of competition law enforcement. Considering its many benefits, there has been no shortage of regionalisation efforts amongst small and developing jurisdictions.⁸¹⁸

The organisation and the function of regional competition law at the global level were discussed in Chapter 2 and do not merit repeating in this chapter. What should be retained here is the need for regional economic integration and for organisations to establish a centralised organ and either a unified or harmonised body of competition rules. For instance, the WAEMU and the COMESA both employ the centralised approach with provisions for substantive competition law and a centralised organ capable of monitoring and investigating intra-regional competition-related cases. The MERCOSUR, on the other hand, prefers the harmonisation approach of substantive competition law with two regional competition institutions composed of national representatives and national competition authorities. The Andean Community adopts a unique downloading approach based on the possible transfer of the regional substantive competition rules to national norms. This model also has a centralised organ capable of competition law enforcement when the regional dimension is present.

5.2.2. Networks in Competition Law

The term “network” is often understood as “informal institutions linking actors across national boundaries and carrying on various aspects of global governance in new and informal ways.”⁸¹⁹ Networking can cover various areas including administrative networks and judicial networks.⁸²⁰ In its trans-governmental form, networking allows national officials to interact directly with their foreign counterparts without the supervision or mandate of the state. They are not representative of the state and therefore would not engage in formal negotiation. The general trait of a network is to create a platform for discussion and the exchange of experiences between members. Examining network forums of competition law, such as the ICN and the ECN, at this stage is crucial to better understand the AEGC in both its architecture and its function.

5.2.2.1. The International Competition Network (ICN)

The most notable form of networking in relation to competition law is the ICN. This was founded in 2001 by 16 competition authorities from 14 jurisdictions who believed in the potential of a global forum where competition authorities from different jurisdictions could

⁸¹⁸ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010) 366.

⁸¹⁹ Slaughter, Anne-Marie and Zaring, David, *Networking Goes International: An Update*, 2 Annual Review of Law and Social Science 211 (2006).

⁸²⁰ Slaughter, Anne-Marie, *A Global Community of Courts*, 44 Harv. Int'l L.J. 191 (2003).

develop and promote methods to address common competition issues.⁸²¹ The ICN membership has grown to over 100 competition authorities from numerous jurisdictions.⁸²² Its membership is not exclusively reserved to competition authorities but also includes non-governmental advisors who play an essential part, especially within the working group whose works includes recommendations and guidelines.⁸²³ If the ICN has no secretariat, its policy and agenda-setting are conducted by a steering group which makes recommendations to the ICN, to be adopted on members' votes.⁸²⁴

The ICN was established to fill the void left by the WTO when it failed to include competition issues in its agenda.⁸²⁵ The competition authorities sought a global forum that would unite developed and developing economies to discuss practical solutions to their common issues. Their wish was granted in 2000 when the US International Competition Policy Advisory Committee (ICPAC) issued a report recommending, amongst other suggestions, the creation of a Global Competition Initiative (GCI).⁸²⁶ The GCI was meant to be a voluntary forum, without the power to make binding obligations or the power of adjudication, where competition authorities could discuss and explore their competition law experiences and competition issues in the hope of creating close cooperation that could eventually lead to harmonisation.⁸²⁷ The proposal came unexpectedly since at the time the US was pursuing aggressive extra-territoriality doctrine.⁸²⁸ The *ICPAC Report* received a warm welcome especially from its European counterpart.⁸²⁹ Arguably, it was the joint support from the US and the EU that made the concept of the GCI possible. Eventually, the term "global" was dropped to avoid offending the anti-globalisation movement and replaced with the "International Competition Network" as it has come to be known.⁸³⁰ The

⁸²¹ Fingleton, John, *The International Competition Network: Building on Success*, 6 Competition L. Int'l 5 (2010).

⁸²² ICN, *ICN Statement of Achievements 2001-2012* (the 11th Annual Conference of the ICN 2012). (recorded 123 competition authorities from 108 jurisdictions in 2012).

⁸²³ Fox, Eleanor M. and Trebilcock, Michael J., 'Introduction: The GAL Competition Project: The Global Convergence of Process Norm' in Fox, Eleanor M. and Trebilcock, Michael J. (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2012) 39.

⁸²⁴ *Ibid.*

⁸²⁵ The principal cited cause for the failure of the global governance of competition law within the WTO is the high degree of divergence of the law of different countries. See, Melamed, A. Douglas, 'Promoting Sound Antitrust Enforcement in the Global Economy' in Hawk, Barry E. (ed), *International Antitrust Law & Policy* (Juris Publishing 2001).

⁸²⁶ US Department of Justice, Antitrust Division, *Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust* (2000). [*hereinafter* ICPAC Report]

⁸²⁷ John, Ian G. and Gray, Joshua B., *The International Competition Network: A Decennial Perspective*, 26 Antitrust 54 (2011).

⁸²⁸ See, *Hartford Fire Ins. Co. V. California* [1993] 509 U.S. 764. [*Hereinafter* Hartford Fire]. (The US Supreme Court was divided and delivered a 5-4 judgment. The majority led by Justice Souter held that the Sherman Act applies to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.")

⁸²⁹ Hollman, Hugh M. and Kovacic, William E., *International Competition Network: Its Past, Current and Future Role*, 20 Minn. J. Int'l L. 274 (2011).

⁸³⁰ Damtoft, Russell W. and Flanagan, Ronan, *The Development of International Networks in Antitrust*, 43 The International Lawyer 137 (2009).

term “network” was chosen to underline the importance of close and regular cooperation between different competition authorities, organisations and related non-governmental advisors.

The aim of the ICN is to create a worldwide information platform for all competition authorities and is built around inclusive participation and transparency.⁸³¹ It provides competition authorities with an informal venue to specialise in competition law for maintaining regular contact and addressing practical competition concerns. The members learn from other competition jurisdictions’ experiences as well as offering their own experience on competition issues. The informal dialogue between authorities could serve in establishing general consensus and convergence in the global competition community. An exchange of information with respect to specific cases does not take place and only non-confidential information is shared. The ICN functions through working groups concentrating on offering practical solutions to specific global competition issues. It has studied a variety of competition issues including advocacy, agency effectiveness, cartels, mergers and unilateral conduct. The recommendations of the working groups are then presented at the annual conference where they are debated and usually adopted by the members. While the ICN recommendations are not legally binding on its members’ jurisdictions they have a certain persuasive power to convince competition authorities to implement them in their national competition laws. Fox deduced that the ICN’s recommendations are highly regarded as “soft obligations” since they are the product of experts in the focused issues.⁸³²

The ICN is an undoubted success.⁸³³ Despite its restrictive characteristics, the ICN has, impressively, succeeded in providing a blueprint or a reference to different national competition authorities to adopt or adapt their domestic laws. Its success is in part due to the composition of the working groups which consist of experts in relevant areas who work on challenges and propose feasible solutions. The wide adoption of the *Guiding Principles*⁸³⁴ and *Recommended Practices for Merger Notification Procedures*⁸³⁵ bears testimony to the ICN’s success. Motta corroborated the ICN involvement with the development of competition policy in developing economies.⁸³⁶ Nations’ implementation and use of the ICN’s work have harmonised the global merger process, reduced costs,

⁸³¹ Fox, Eleanor M., *A Report on the First Annual Conference of The International Competition Network* (2002).

⁸³² Fox, Eleanor M., *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 Int’l Law 151 (2009).

⁸³³ See, e.g., *ibid.*; Hollman, Hugh M. and Kovacic, William E., *International Competition Network: Its Past, Current and Future Role*, 20 Minn. J. Int’l L. 274 (2011); Lugard, Paul, ‘The ICN at Ten: Origins, Accomplishments and Aspirations’ in Lugard, Paul (ed), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Hart Publishing 2011).

⁸³⁴ ICN, *Guiding Principles for Merger Notification and Review Procedures* <<http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf>>.

⁸³⁵ ICN, *Recommended Practices for Merger Notification Procedures* <<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>>.

⁸³⁶ Motta, Eduardo Perez, ‘The Role of the International Competition Network (ICN) in the Promotion of Competition in Developing Countries: The Case of Mexico’ in Lugard, Paul (ed), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Hart Publishing 2011).

facilitated the merger process and eliminated eventual conflicts.⁸³⁷ In essence, the existence of the ICN “strengthens incentives for jurisdictions to seek convergence because convergence allows for deeper and broader cooperation.”⁸³⁸ Accordingly, the ICN participates in the harmonisation process of competition law.

The ICN’s strength is also its weakness. Participation depends solely on the willingness of the competition authorities. The level of participation from non-core members, especially those from developing competition regimes, is predictably limited by the lack of funds, time, expertise and sometimes language restrictions.⁸³⁹ Resource-restricted countries can rarely participate in the discussion and the development of recommendations. Consequently, even with the inclusive agenda of the ICN, underrepresentation from developing economies is still in effect. The ICN is aware of this situation and encourages better involvement from non-active members.⁸⁴⁰ Another disadvantage of the ICN is the absence of a reliable method of assessment on the influence of the ICN on the implementation or adaptation of domestic competition law or enforcement. The most common method of assessment is the questionnaires completed by participating members.

5.2.2.2. The European Competition Network (ECN)

It is impossible to examine network of competition authorities without mentioning the ECN since it is renowned within the regional integration structure. The ECN is credited with offering a direct response to the changing realities of the EU, particularly in terms of the increasing diversity among member states. A renewed approach is needed to address the variety of local contexts.⁸⁴¹ *Regulation 1/2003* abolished the centralised individual exemption regime in the enforcement of Article 101 *TFEU* and decentralised the enforcement of Articles 101 and 102 *TFEU* by granting national courts and national competition authorities, alongside with the European Commission, the power to apply these provisions. It also formed a network, named the ECN, of national competition authorities and the Commission.⁸⁴² Even before its conception, the ECN was destined to be “a network of authorities operating on common principles and in close collaboration.”⁸⁴³

⁸³⁷ Fingleton, John, *The International Competition Network: Building on Success*, 6 *Competition L. Int’l* 5 (2010).

⁸³⁸ Raustiala, Kal, *The Architect of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *Va. J. Int. Law* 92 (2002).

⁸³⁹ Fox, Eleanor M., *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 *Int’l Law* 151 (2009).

⁸⁴⁰ ICN, *The Welcome Track: Getting New and Non-Active ICN Members Engaged* <<http://www.internationalcompetitionnetwork.org/uploads/library/doc1026.pdf>>.

⁸⁴¹ Gerard, Damien M. B., ‘The ECN - Network Antitrust Enforcement in the European Union’ in Ioannis, Lianos and Gerard, Damien M. B. (eds), *Handbook On European Competition Law* (Edward Elgar Publishing 2013).

⁸⁴² Regulation 1/2003 on the Implementations of the Rules on Competition Laid Down in Articles 101 and 102 of the Treaty [2003].

⁸⁴³ Commission White Paper on the Modernisation of the Rules Implementing Article 101 and 102 of the *TFEU* [1999].

The ECN exercises its cooperation mechanism through an informal case allocation and extensive information exchange between competition authorities.⁸⁴⁴

In contrast to the ICN, the conception of the ECN was not without its sceptics. Most notable were concerns about the ECN's ability to achieve its objectives and the issues of legal certainty and due process.⁸⁴⁵ Moreover, the composition of the ECN is unbalanced. It has been accused of granting greater hierarchical importance to the Commission.⁸⁴⁶ It follows that the ECN "could best be described as an informal jurisdiction allocation regime surrounded with information exchange mechanisms, rather than a multi-level policy network."⁸⁴⁷ The ECN's origin diverges from the understanding of a network mentioned in the previous section since it is a formal institution born out of a centralised plan whose principal endeavour is to facilitate better coordination amidst greater diversity among member states. Even if the national competition authorities were to achieve individual connection through opportunities provided by the ECN, this is in no way the intended principal purpose of this network.

5.2.3. The AEGC as a Distinctive Regional Competition Organisation

The AEGC membership encompasses the AMSs' national competition authorities or agencies associated with competition policy enforcement. The use of "expert" is a false denomination since it exclusively includes national competition authorities or related governmental officials. In this regard, private entities with knowledge and experience in the area are deliberately excluded. The AEGC is organised into five working groups that concentrate on pressing issues of competition law within the region: the establishment of the ASEAN regional guidelines; the handbook of competition policy; capacity building; and regional competition advocacy. Each working group is supported by different AMSs on a rotating basis. The rotating chairmanship of each working group reflects the chairmanship of the ASEAN Secretariat. It is possible that this is to factor in the ASEAN's operational financing challenge and to encourage better participation from the host members.

The AEGC reaffirmed its objectives as follow:

Strengthening competition-related policy capabilities and best practices among AMSs, developing the "ASEAN Regional Guidelines on

⁸⁴⁴ Cengiz, Firat, *Multi-level Governance in Competition Policy: the European Competition Network*, 35 E.L. Rev. 660 (2010).

⁸⁴⁵ Several authors have chronicled such concerns in Elhermann, Clause-Dieter and Atanasiu, Isabela, *European Competition Law Annual: Constructing the EU Network of Competition Authorities* (Hart Publishing 2002) 283.

⁸⁴⁶ Cengiz, Firat, *Multi-level Governance in Competition Policy: the European Competition Network*, 35 E.L. Rev. 660 (2010).

⁸⁴⁷ *Ibid.*

Competition Policy” and compiling a “Handbook on Competition Policy and Law in ASEAN for Business.” [...]

For advocacy and outreach purposes, the launch of the Regional Guidelines and Handbook was followed by region-wide socialisation workshops in several AMSs with government officials and the private sectors as the target beneficiaries. These two publications and the subsequent workshops were intended to help foster a level playing field, raise awareness concerning fair business competition among the regional enterprises and trans-national businesses, and ultimately enhance the economic performance and competitiveness of the ASEAN region.

Capacity building and intra- and extra-regional networking is another focus of the AEGC. Other focal activities for completion in the medium-term are the development of Strategy and Tools for Regional Advocacy on CPL, strengthening the Core Competencies in competition policy and law as well as the finalization of AEGC Capacity Building Roadmap.

A multi-year programme is currently being implemented to improve and enhance competition-related institutional building, legal frameworks, and advocacy capabilities at the regional and national level.⁸⁴⁸

In its own words, the AEGC is a network of competition authorities concentrating on competition advocacy, aiding the AMSs with their construction of national competition law, and providing a networking forum among the AMSs as well as with external entities. The use of the word “socialisation” is certainly cogent in this instance since it demonstrates a deviation from the purpose of coordination as appeared in the *Blueprint*.⁸⁴⁹ It is essentially a networking organ concentrating on assisting the AMSs in their development of competition laws. This is echoed in the activities which strongly recommend conferences and workshops with foreign partners in a bid to provide foreign technical assistance.

Most noteworthy in the functioning of the AEGC is the absence of the peer review system. In the voluntary peer review process, countries are free to submit their competition law regimes to the scrutiny of their peers without any obligation to implement the recommendations given during the review process. Scrutiny of any nation’s competition enforcement regime should be undertaken regularly. “Every jurisdiction at regular intervals should undertake a basic evaluation of the effectiveness of its competition policy institutions.”⁸⁵⁰ Conducting peer reviews of national competition laws and policies is regarded as the key function for both the OECD and the UNCTAD. Through the peer reviews, multilateral organisations evaluate competition law regimes and recommend how best to increase their effectiveness. The reviews are usually thorough and deal with both regulatory and structural issues. In the OECD, the review prepared by its internal staff is presented to the OECD members or the Global Forum on Competition. During the presentation, participating countries are encouraged to comment and the target country is

⁸⁴⁸ ASEAN, *About the ASEAN Experts Group on Competition (AEGC)*

<<http://www.aseancompetition.org/aegc/about-asean-experts-group-competition-aegc>>.

⁸⁴⁹ *The Blueprint*, art. 41.

⁸⁵⁰ Kovacic, William E., *Achieving Better Practices in the Design of Competition Policy Institutions*, 50 *The Antitrust Bulletin* 511 (2005).

welcome to answer questions and explain its policy. While there is no legal obligation to implement the recommendations, there is encouragement for countries to make legitimate domestic change. The reviews are taken seriously and are the object of national public debates. A negative peer review from the OECD members would imply a need for domestic change or risk losing face.⁸⁵¹ It follows that peer reviews can be used to broker domestic changes to the law. While the peer review lacks binding obligations, peer pressure compensates for this and acts as a strong motivation to change. The UNCTAD has a peer review system similar to that of the OECD. In this case, peer reviews are conducted by different competition experts who provide an objective assessment of a competition law regime to identify its shortcomings. They propose suggestions and offer technical assistance when needed. The UNCTAD peer review exercise is unique in its development perspective and its rich experience in working with developing economies. The AEGC's omission of such a beneficial function would eventually reduce its importance to a mere "talking-shop"⁸⁵² focusing more on discussion than productive work. However, the absence of the peer review exercise is not the only difference separating the AEGC from the UNCTAD and the OECD. Notwithstanding the composition which focuses on geographic proximity in Southeast Asia, the AEGC is distinctively dissimilar to the OECD and the UNCTAD due to its integration mission whereas both the OECD and the UNCTAD aim to promote policies that will improve social and economic well-being.

As a communication forum exclusively related to competition policy within the regional integration structure, it is difficult to compare the AEGC with other institutions. In contrast to other regional organisations, the AEGC as the ASEAN's sole regional organ relating to competition policy is not equipped with the power to enforce or monitor the AMSs' enforcement of the law. Yet, the AEGC is expected to act as the harbinger of the harmonisation of the AMSs' competition laws. It is possible that the AEGC shares similarities with the network forum, in particular, the ICN. Both are networks comprising competition authorities (although in the case of the ICN not exclusively so) who are not representatives of their states. They share the same objective of better harmonisation of competition laws between members through discussion. It is within the membership requirement where they diverge since the AEGC is exclusively reserved for the AMSs and therefore has to serve the regional integration aim of the ASEAN. There have been concerns that the function of the AEGC and the ICN may overlap. However, the AEGC could act as a complementary institution by providing a more comfortable socialisation platform for the AMSs with reference to the fact that there is under participation from developing economies in the ICN. Regardless of its potential, the AEGC does not officially count the ICN among its external partners, although some AMSs do.⁸⁵³ The AEGC is also different from the ECN, another networking group within the regional integration

⁸⁵¹ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010).

⁸⁵² Marsden, Philip, 'Acta Non Verba: 'Talking Shop', Don't Become Another Talking Shop' in Lugard, Paul (ed), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Hart Publishing 2011).

⁸⁵³ ASEAN Competition Policy and Law, *Regional ASEAN-Level Cooperation with External Partners* <<http://www.aseancompetition.org/cooperation/regional-asean-level-cooperation-external-partners>>. (The list includes Australia, New Zealand and Germany).

structure. The only similarity shared with the ECN is that it is a network platform for competition authorities in the construction of regional economic integration. Both organisations differ greatly in their objectives. The AEGC is not constructed to aid better relations with the central competition enforcement organ since the ASEAN simply does not have one.

In conclusion, the AEGC is a distinctive regional competition institution in its organisation and role. It is the sole competition policy organ for regional economic integration without the ability to either enforce or monitor law enforcement by the member states. In this regard, it is unlike other regional competition-related organs and more resembles a competition law network at international level. Nonetheless, it is not without its virtue. One of the main factors explaining the failure cooperation between competition law authorities is their mistrust of each other.⁸⁵⁴ Thus, a forum reuniting different national competition authorities may be the only occasion when they can meet each other to facilitate future day-to-day cooperation.⁸⁵⁵ Though the effect of such a forum is not immediate, general benefits derived from it should not be easily discarded. While the AEGC may lack the common attributes of other regional competition organs and have questionable measures to realise regional harmonisation, its communication forum service is unquestionably useful for the AMSs in their first endeavour to regional integration.

5.3. Resolving Regional Competition Issues with Extraterritoriality and Cooperation

The internationalisation of markets gave rise to global competition problems such as the disconnection between antidumping laws and predatory pricing, jurisdictional gaps allowing export cartels, parochial use of measures that immunise private action, and the lack of a coherent view of world competition and trade and competition problems.⁸⁵⁶ Having an effective competition law regime is important to address the issue of cross-border competition dispute, in particular, since international cartels are more likely to have significant economic effect to trade in developing economies.⁸⁵⁷ Yet, developing economies rarely apply their laws to such conduct.⁸⁵⁸ The importance is intensified in the context of a regional integrated market where cross-border disputes are unavoidable. In its

⁸⁵⁴ Botta, Marco, *The Cooperation between the Competition Authorities of the Developing Countries: Why Does It Not Work? Case Study on Argentina and Brazil*, 5 *Comp. L. Rev.* 153 (2009). (The other factor is the lack of resources to realise the cooperation).

⁸⁵⁵ Damtoft, Russell W. and Flanagan, Ronan, *The Development of International Networks in Antitrust*, 43 *The International Lawyer* 137 (2009).

⁸⁵⁶ Fox, Eleanor M. and Ordovery, Janusz A., *Internationalising Competition Law to Limit Parochial State and Private Action: Moving towards the Vision of World Welfare*, 24 *Int'l Bus. Law.* 458 (1996).

⁸⁵⁷ Levenstein, Margaret and Suslow, Valerie Y., *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 *Antitrust L.J.* 801 (2004).

⁸⁵⁸ Gal, Michal S., *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 *Fordham Int'l L.J.* 1 (2009).

pursuit of a regional economic integration, the ASEAN needs a mechanism to address foreign or national conduct with anticompetitive consequences for the region.

If the ASEAN had set its sight on the creation of regional economic integration, it failed, however, to foresee the necessity for a mechanism to deal with the inevitable competition issues at regional level as became evident in 2013, when it was noted that the ASEAN did not have an appropriate mechanism to deal with competition-related cross-border disputes.⁸⁵⁹ That assessment is still applicable today. The *Guidelines I* suggest resolving regional competition infringements through the extraterritorial application of national competition law⁸⁶⁰ or through regional cooperation,⁸⁶¹ while the *Guidelines II* remain silent in this matter, preferring instead to concentrate solely on national institutional building. The ASEAN's choice to make extraterritoriality and regional cooperation equal alternatives to compensate for its lack of a central mechanism is peculiar considering that cooperation is usually regarded as the measure to curb the effects of the unilateral assertion of national law presented in the principle of extraterritoriality.⁸⁶² Nonetheless, on the scale of global competition law, the use of extraterritoriality in combination with cooperation are regarded as the most visible and effective answer to international anticompetitive practice.⁸⁶³

5.3.1. Extraterritoriality

Historically, the foremost solution to solving the problem of global anticompetitive practice has been to extend the scope of national law by applying it extraterritorially. The ASEAN advised the AMSs to include a provision on the extraterritorial application of national competition law in the *Guidelines I*.⁸⁶⁴ This particular recommendation subsequently disappeared from the *Guidelines II*, ostensibly because of the focus on competition institutional building. There are implications of this simple suggestion, although appearing only once, for the regional economic integration ambitions of the ASEAN. By definition, there is a discernible conflict between extraterritoriality as an expression of the unilateral approach of competition law and the regional approach of the ASEAN. It is difficult to understand how promoting this unilateral approach could help the ASEAN achieve its regional integration goal.

⁸⁵⁹ McEwin's testimony appeared in Samadi, Faez, *Convergence Issues Loom Large for ASEAN* Global Competition Review (2013).

⁸⁶⁰ *Guidelines I*, art. 5.1.3.2.

⁸⁶¹ *Ibid*, art. 10.2.1.4.

⁸⁶² Geradin, Damien, Reysen, Marc and Henry, David 'Extraterritoriality, Comity and Cooperation in EU Competition Law' in Guzman, Andrew T. (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press 2010).

⁸⁶³ Zanettin, Bruno, *Cooperation between Antitrust Agencies at the International Level* (Hart Publishing 2002) 2.

⁸⁶⁴ *Guidelines I*, art. 5.1.3.2.

As a result of globalisation, physical conduct in one country could have harmful economic effects in another. Certain countries believe that it is imperative to address all forms of harmful economic conduct whether it originates from within or outside their territories.⁸⁶⁵ For this reason, they extend the reach of competition law beyond their territories. The term “extraterritoriality” generally refers to “the power to secure the enforcement of the law outside the jurisdiction in which the law was made.”⁸⁶⁶ This idea expands the traditional jurisdiction principle that authorises a state to regulate conduct in its territory, by authorising a state to regulate conduct that occurs outside its territory when that conduct has particular effects within its territory.⁸⁶⁷

On the basis of the traditional territorial principle, a country is able to enact law and enforce it only within its national borders. As enshrined in the *Lotus* case: “[...] all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”⁸⁶⁸ In this regard, “jurisdiction is an aspect of sovereignty”⁸⁶⁹ and is thus limited to the latter. However, when globalisation began reducing the importance of national borders, the principle of territoriality began to be incompatible with world progress.⁸⁷⁰ The traditional approach, applying the principle of territoriality, would prevent countries from protecting their legitimate interests from conduct or behaviour occurring outside their national borders. This disparity presents companies with an opportunity to engage in harmful conduct abroad without facing punishment back in their home state. Moreover, certain countries could transform into competition law “havens”⁸⁷¹ by attracting private firms wishing to avoid competition regulations in their home countries. Accordingly, an exception to the principle of territoriality was necessary and inevitable.⁸⁷² The *Lotus* case recognised this problem and in the judgment it was stated that “[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable [...]”⁸⁷³ Admitting an extension of national law makes it possible for countries to extend their jurisdiction beyond

⁸⁶⁵ Gerber, David, *The Extraterritorial Application of German Antitrust Law*, 77 *American Journal of International Law* (1983).

⁸⁶⁶ Sutton, Alastair, “Extraterritoriality” in *Competition Law from a European Perspective*, 16 *AUT Int’l L. Practicum* 135 (2003).

⁸⁶⁷ Gerber, David, *The Extraterritorial Application of German Antitrust Law*, 77 *American Journal of International Law* (1983).

⁸⁶⁸ *France v. Turkey* [1927] P.C.I.J. Series A, No.10 para. 47.

⁸⁶⁹ Mann, Frederick A., *The Doctrine of Jurisdiction in International Law* (Académie de Droit International, Recueil des Cours 1964).

⁸⁷⁰ Born, Gary B., *A Reappraisal of Extraterritorial Reach of U.S. Law*, 24 *Law & Pol’y Int’l Bus* 1 (1992).

⁸⁷¹ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010).

⁸⁷² Turner, Donald F., *Application of Competition Laws to Foreign Conduct: Appropriate Resolution of Jurisdictional Issues*, 10 *World Competition* 5 (1986).

⁸⁷³ *Lotus*, paras. 46-47.

their national boundaries in certain situations. In this age of globalisation, it has become increasingly difficult to disagree with the principle of extraterritoriality.

It is essential to commence with an examination of other jurisdictions' experience with extraterritoriality before questioning the AMSs' ability to handle extraterritorial applications of national competition law.

5.3.1.1. Leading Jurisdictions' Experiences

The Extraterritorial Application of the US Antitrust Law

The US is one of the first to adopt the principle of extraterritoriality in competition law.⁸⁷⁴ The antitrust policy in the US has been shaped largely by a triad of early legislations: the *Sherman Act*,⁸⁷⁵ the *Clayton Act*⁸⁷⁶ and the *Robinson-Patman Act*⁸⁷⁷ each plays a significant role in local and foreign business. The *Sherman Act* imposes criminal penalties on antitrust violation by both interstate and foreign commerce.⁸⁷⁸ Criminal prosecution under this *Act* is usually confined to traditional violations of the law including price-fixing, bid-rigging and other cartel-like conduct considered unlawful in most countries.⁸⁷⁹ The *Clayton Act* supplements the *Sherman Act* by including prohibitions against interlocking directorates, exclusive dealing, tying of deals and acquisitions with the potential to substantially decrease competition or create monopolies. Similar to the *Sherman Act*, the *Clayton Act*'s non-criminal penalties also apply to commerce "among the several states and to foreign nations."⁸⁸⁰ Finally, the *Robinson-Patman Act* prohibits large retailers from selling goods at discriminatorily low prices that could disadvantage small retailers.⁸⁸¹ Although the *Robinson-Patman Act* only prohibits price discrimination within the US, the *Anti-Dumping Act*⁸⁸² applies similar prohibitions to foreign commerce. Extraterritorial concern was one of the factors in each of these *Acts*. Each provides an important measure to attain the two principal goals of US antitrust law – to preserve competition and economic efficiency in the market.⁸⁸³

⁸⁷⁴ Zanettin, Bruno, *Cooperation between Antitrust Agencies at the International Level* (Hart Publishing 2002) 8.

⁸⁷⁵ The Sherman Act, 26 Stat. 209, 15 U.S.C. [1890]. §§ 1-7

⁸⁷⁶ The Clayton Act.

⁸⁷⁷ The Robinson-Patman Act, 15 U.S.C. §§ 13-13b [1936] 21a.

⁸⁷⁸ The Sherman Act, 26 Stat. 209, 15 U.S.C.

⁸⁷⁹ US Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (4 Trade Reg. Rep., 1995).

⁸⁸⁰ The Clayton Act, §§ 12.

⁸⁸¹ Robinson-Patman Act, §§ 13.

⁸⁸² Antidumping Act, 15 U.S.C. §§ 71-74 [1916].

⁸⁸³ Fox, Eleanor M., Sullivan, Lawrence A. and Peritz, Rudolph J., *Cases and Materials on United States Antitrust in Global Context* (2nd edn., West 2004).

The US courts' interpretation of the antitrust statutes has been important in developing the doctrine of extraterritoriality over the years. The US effects doctrine dated back to *Sisal*⁸⁸⁴ which ruled that jurisdiction under the US antitrust law may be asserted in relation to conduct taking place both within and outside the US national borders. *Sisal* marked an important departure from the traditional territorial approach whereby the court admitted that the US competition law did not apply to activities occurring outside the US's national boundaries⁸⁸⁵ and paved the way for the development of the US effects doctrine. Subsequently, *Alcoa*⁸⁸⁶ heralded the effects principle in which the US courts have jurisdiction and the *Sherman Act* applies if foreigners acting abroad with the intent to affect the US commerce caused a direct effect as intended. By focusing solely on the US interests, the court failed to take into consideration legitimate foreign interests that created friction between the US and other countries who claimed it was a clear violation of international law.⁸⁸⁷ In response to criticisms and threats of retaliation by foreign governments, the US courts⁸⁸⁸ made an attempt to apply restrictions to the US extraterritorial doctrine. They decided that they may not require foreign firms acting in their home territory to do what their home governments forbid or to abstain from doing what the home government requires.⁸⁸⁹ Such an order would undoubtedly intrude on other nations' sovereignty. The balancing principle states that the courts either lack jurisdiction or should refrain from exercising jurisdiction if foreign nations' and foreign nationals' interests in the non-application of the US law outweigh US interests.⁸⁹⁰ In *Timberlane II*, the Circuit Court held that in asserting national jurisdiction, a court should examine "(1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behaviour; and (3) the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity or fairness."⁸⁹¹ Nonetheless, the effectiveness of the *Timberlane* factor is called into question in *Laker* when the Court held that it is incommensurable to balance foreign interests with domestic interests.⁸⁹²

*Hartford Fire*⁸⁹³ announced an important shift from the balancing test in the extraterritoriality doctrine. The Supreme Court held that the *Sherman Act* applies to "foreign conduct that was meant to produce and did in fact produce some substantial effect

⁸⁸⁴ *United States v. Sisal Sales Corp.* [1927] 274 US 268.

⁸⁸⁵ *American Banana Co. v. United Fruits Co.* [1909] 29 S.Ct. 511.

⁸⁸⁶ *United States v. Aluminium Company of America* [1945] 148 F.2d 416. [*Hereinafter* *Alcoa*].

⁸⁸⁷ See, for example, Haight, George Winthrop, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 Yale L. J. 639 (1954); Katzenbach, Nicholas de BelleVille, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L. J. 1087 (1956).

⁸⁸⁸ See, *Timberlane Lumber v. Bank of America* [1976] 549 F.2d 597 (9th Cir.); *Mannington Mills Inc. v. Congoleum Corp.* [1979] 595 F.2d 1287 (3rd Cir.). [*Hereinafter* *Timberlane I*]

⁸⁸⁹ *United States v. Watchmakers of Switzerland Info. Center* [1963] Trade Cases P 70,600 (S.D.N.Y.), order modified, [1965] Trade Cases P 71,352 (S.D.N.Y.).

⁸⁹⁰ Fox, Eleanor M. and Crane, Daniel A., *Global Issues in Antitrust and Competition Law* (West 2010).

⁸⁹¹ *Timberlane Lumber Co. v. Bank of America National Trust and Savings Association* [1984] 749 F.2d 1378. [*Hereinafter* *Timberlane II*]

⁸⁹² *Laker Airways Ltd. v. Sabena, Belgian World Airlines* [1984] 731 F.2d 909.

⁸⁹³ *Hartford Fire*.

in the United States.”⁸⁹⁴ Consequently, “passing the effects test is virtually as easy as showing that a particular transaction or business practice falls within the rubric of interstate commerce [...]. Effects can almost always be found.”⁸⁹⁵ After *Hartford Fire*, the District Courts remained divided. Some Courts held that *Hartford Fire* did not overrule *Timberlane*⁸⁹⁶ and merely added another principle to the doctrine of extraterritoriality, while others followed *Hartford Fire*.⁸⁹⁷

Afterward, *Empagran*⁸⁹⁸ tried to refine the decision in *Hartford Fire*. The Court looked into the *Foreign Trade Antitrust Improvement Act (FTAIA)*⁸⁹⁹ and found that it was designed to limit “but not to expand in any significant way the Sherman Act’s scope as applied to foreign commerce.”⁹⁰⁰ It steered the extraterritoriality doctrine back to its original track by ending the *Hartford Fire*’s trend of excessive expansion of the US antitrust law. The Court admitted that interference with foreign sovereignty is admissible in so far that there is domestic injury involved. In order to further clarify the exception of domestic injury, the Court distinguished between dependent and independent effect to US commerce. If the domestic injury is independent from the foreign harm, foreign plaintiffs could not bring their claim before the US courts. Regrettably, the Court did not give sufficient indication as to what it considered dependent effect to the US commerce and therefore even after *Empagran*, the courts remain divided on the question of extraterritoriality.⁹⁰¹ It appears that *Empagran* has left more judicial uncertainty on the question of extraterritoriality.⁹⁰²

The US experience has reflected the unpredictable nature of the doctrine of extraterritoriality. It seems that extraterritoriality will continue being used differently by different courts. Some courts might favour a more restrictive application while others may be in favour of a more expansive application of extraterritoriality. Waller predicted that “years of additional litigation or statutory change will be necessary to resolve this critical question.”⁹⁰³

⁸⁹⁴ Ibid, para 2909.

⁸⁹⁵ Brockbank, Dean, *The 1995 International Antitrust Guidelines: The Reach of U.S. Antitrust Law Continues to Expand*, 2 J. Int’l Legal Stud. 1 (1996).

⁸⁹⁶ See, e.g., *Metro Indus. Inc. V. Sammi Corp.* [1996] 82 F.3d 839, 846; *Filetech SARL v. France Telecom* [1997] 978 F. Supp. 464 (S.D.N.Y. 1997); *Trugman-Nash Inc. v. New Zealand Dairy Board* [1997] 945 F. Supp. 733, 736.

⁸⁹⁷ See, for example, *United States v. Nippon Paper Industries Co., Ltd.* [1997] 109 F.3d 1; *Caribbean Broad Sys. V. Cable and Wireless Plc.* [1998] 148 F.3d 1080.

⁸⁹⁸ *Hoffman - La Roche Ltd. v. Empagran* [2004] S.A., 124 S. Ct. 2359.

⁸⁹⁹ The Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a [1982].

⁹⁰⁰ *Empagran*, para. 159.

⁹⁰¹ See, for instance, *Intel Corp. v. Advanced Micro Devices, Inc.* [2004] 124 S. Ct. 2466. (Rejected the narrow view in *Empagran* in favour of a broader one despite strong objection from the European Competition Commission).

⁹⁰² Mehrar, Salil K., *More is Less: A Law-and-Economics Approach to the International Scope of Private Antitrust Enforcement*, 77 Temp. L. Rev. 47 (2004).

⁹⁰³ Waller, Spencer Weber, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. Rev. 343 (2002).

The Extraterritorial Application of the EU Competition Law

The EU competition law shares some similarities with the US antitrust, yet still differs in many fundamental respects. Even though the European doctrine of extraterritoriality is younger and the pursuit of extraterritorial assertion of jurisdiction is less vigorous than that of the US, it should not be underestimated.⁹⁰⁴ Dissimilarly from the US experience, the EU's doctrine of extraterritoriality does not find its foundation within the *Treaties*; instead the doctrine has been established by the Commission and the judiciary. Articles 101 and 102 of *TFEU* prohibit certain conduct that affects trade between member states and has an anticompetitive effect within the Common Market. The Commission later clarified that the effect must be "appreciable" which means more than "*de minimis*" but less than "substantial."⁹⁰⁵ Similarly to the US experience, however, are the historical changes the doctrine has undergone throughout the years. Generally, there are three accepted doctrines in the EU regarding extraterritoriality: the single economic entity; the implementation; and the effects doctrine.

It was in *Grosfillex*⁹⁰⁶ that the Commission first considered the effects doctrine. The Commission reasoned that the EU competition law regime was compatible with the "effects" doctrine since the territorial scope of the EU competition law was determined neither by the domicile of the firm nor by where the agreement was concluded or carried out. The decisive criterion here is whether an agreement affects competition within the Common Market. *Grosfillex* made it clear that the Commission fully embraced the US extraterritorial doctrine.

The *Dyestuffs*⁹⁰⁷ judgment marked the first occasion when the CJEU was invited to express its view on the doctrine of extraterritoriality. However, the CJEU avoided the question of extraterritoriality, preferring instead to rely on the doctrine of economic entity. The Court held that jurisdiction should be asserted on the basis of the principle of territoriality by relying on the existence of a single economic entity. In this case, the CJEU ruled that the parent company, which was non-EU-based, exercised control over the strategic business behaviour of its EU-based subsidiary. Therefore, the participation of the subsidiary in illegal conduct could be attributed to the parent company even though the latter was non-EU-based. On this basis, Article 101 *TFEU* could be applied to the foreign-based company without having to resort to the doctrine of extraterritoriality. The group economic unit doctrine is considered "the most established basis in EC competition law for asserting

⁹⁰⁴ George, Barbara C., Dymally, Lynn V. and Lacey, Kathleen A., *Increasing Extraterritorial Intrusion of European Union Authority into U.S. Business Mergers and Competition Practices: U.S. Multinational Businesses Underestimate the Strength of the European Commission from GE/Honeywell to Microsoft*, 19 Conn. J. Int'l L. 571 571 (2004).

⁹⁰⁵ *Notice on Agreements of Minor Importance [1986] OJ C231/2, as amended, [1994] OJ C368/20 and [1997] OJ C372/13.*

⁹⁰⁶ *Grosfillex - Fillistorf* [1964] OJ 58/915.

⁹⁰⁷ *Dyestuff*. [hereinafter *Dyestuffs*]

jurisdiction over foreign companies.”⁹⁰⁸ Historically, the CJEU’s position reflected that of the EU’s politics which at that time fervently criticised the use of extraterritoriality by the US.⁹⁰⁹

The CJEU would later establish a different doctrine called the “implementation” doctrine in the *Wood Pulp* case.⁹¹⁰ It held that the EU competition law could only apply extraterritorially when the price-fixing agreement was implemented within the EU. The decisive factor was the location where the conduct occurred. If the conduct was implemented within the EU, then its competition law would apply. In this case, the price-fixing agreement was established within the Internal Market, thus the CJEU was entitled to apply the EU competition law to non-EU-based undertakings. It is irrelevant whether foreign undertakings implemented the conduct through subsidiaries, agents, sub-agents or branches within the EU. Under this doctrine, foreign conduct or behaviour would be in violation of the EU competition law, not on the ground of its effects within the Internal Market but because it had the effect of implementing the infringement.

In 2004, the Commission adopted the *Guidelines on Effects on Trade between Member States*⁹¹¹ as part of the Commission’s modernisation package. The Guidelines demonstrate the Commission’s desire to fully embrace the extraterritoriality doctrine by providing that Articles 101 and 102 *TFEU* “apply to agreements and practices that are capable of affecting trade between Member States even if one or more of the parties are located outside the Community.”⁹¹² Moreover, the EU competition law applies regardless of the location of the undertakings or the location where the agreement has been concluded provided that the agreement or practice is either implemented or produces effects inside the Union.⁹¹³ In the end, the Commission chose to compromise by combining the CJEU implementation doctrine with the US effects principle.

The principle of extraterritoriality also has significance in the case of mergers, especially with the pre-merger notification requirement that gives competition authorities an opportunity to assert jurisdiction over non-EU companies. The most notable instrument was the *Regulation 139/2004*.⁹¹⁴ The *EUMR* gives the Commission the power to assert jurisdiction over mergers, takeovers, certain joint ventures and the purchase of minority controlling interests provided that the concentration has a Community dimension.⁹¹⁵ The

⁹⁰⁸ Goyder, D. G., Goyder, Joanna and Albers-Llorens, Albertina, *Goyder’s EC Competition Law* (5th edn., Oxford University Press 2009) 581.

⁹⁰⁹ Friedberg, James j., *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. Pitt. L. Rev. 295 (1991).

⁹¹⁰ *Ahlström Osakeyhtiö v. Commission* (Case 89/85) [1993] ECR I-1307. [*Hereinafter* Wood Pulp].

⁹¹¹ *Guidelines on Effect on Trade between Member States*, O.J. C-101/81 (2004).

⁹¹² *Ibid*, para. 100.

⁹¹³ *Ibid*.

⁹¹⁴ *EUMR*. (The original merger regulation was the Council Regulation (EC) No 4064/89 on the Control of Concentrations between Undertakings. which was later replaced by the Council Regulation (EC) No 1310/97 Amending Regulation (EEC) No 4064/89 on the Control of Concentrations between Undertakings [1997].)

⁹¹⁵ *EUMR*, art. 1.

Commission became the central authority with regard to concentration operations. The *EUMR*'s "Community dimension" is a broad concept implying that it is not indispensable for merger operations to have an effect in the EU provided that the financial threshold is met. Therefore, the Commission could assert control over non-EU-based parties even though the merger operation only produces minimal or no effect within the Community. The Commission's pursuit of the extraterritoriality doctrine, as demonstrated in *Boeing/McDonnell Douglas*⁹¹⁶ when the Commission based its analysis on the possible effect on the market after the merger operation, was categorised as an aggressive form of the effects doctrine.⁹¹⁷

At this stage, a question has been raised about the possible incompatibility of the Commission's application of the effects doctrine with the CJEU's implementation doctrine. On the surface, the two doctrines seem incompatible since the *EUMR* could only be applied with the effects doctrine. *Gencor*⁹¹⁸ provided that the *EUMR* does not require the company concerned to be incorporated or established in the EU. The GCEU ruled that the *EUMR* is compatible with public international law if the merger operation's effects within the EU are immediate, substantial and foreseeable.⁹¹⁹ It further concluded that the concept of the Community dimension in the *EUMR* is consistent with the implementation doctrine as established in *Wood Pulp* by the CJEU. Another notable merger case is *GE/Honeywell*.⁹²⁰ This case marks the first time that US antitrust authorities approved a merger between US-based multinational companies only to be stopped by the European Commission.⁹²¹ On appeal, the GCEU confirmed the Commission's decision and dismissed GE's action for annulment.⁹²² This case provoked heavy criticism from the US. In particular, the Commission was accused of protecting competitors and not the competition process.⁹²³

The seeds of divergence between the positions of the US and the EU rested primarily on the different tests used at the time. The US used the "substantial lessening of the competition" test⁹²⁴ in which a merger will be prohibited if it leads to substantial lessening of the competition. On the other hand, the EU employed the "dominance" test⁹²⁵ in which a merger will not be approved if it creates or strengthens a dominant position which will significantly or substantially impede competition in the Common Market. This test would

⁹¹⁶ *Boeing/McDonnell Douglas* [1997] OJ C372, para. 17.

⁹¹⁷ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010) 479.

⁹¹⁸ *Gencor v. Commission* (Case T-102/96) [1999] ECR II-753 [*Hereinafter* Gencor].

⁹¹⁹ *Ibid*, para. 90.

⁹²⁰ *General Electric/Honeywell* [2001] COMP/M.2220. [*Hereinafter* GE/Honeywell]

⁹²¹ George, Barbara C., Dymally, Lynn V. and Lacey, Kathleen A., *Increasing Extraterritorial Intrusion of European Union Authority into U.S. Business Mergers and Competition Practices: U.S. Multinational Businesses Underestimate the Strength of the European Commission from GE/Honeywell to Microsoft*, 19 Conn. J. Int'l L. 571 571 (2004).

⁹²² *General Electric v. Commission* (Case T-210/01) [2005] ECR II-5575.

⁹²³ *Department of Justice Press Release* <http://www.justice.gov/atr/public/press_releases/2001/8510.htm>.

⁹²⁴ The Clayton Act, sec. 7.

⁹²⁵ Council Regulation (EC) No 4064/89 on the Control of Concentrations between Undertakings, art. 2.

later be modified in the *EUMR* by relegating the question of dominance from the sole consideration to the main consideration. Fox claimed the change was provoked by US influence.⁹²⁶ While the EU clearly asserts extraterritorial jurisdiction, the Commission is more constrained in its use of unilateral application of the EU competition law because of the attitude of the member states who have expressed an aversion to the doctrine of extraterritoriality.⁹²⁷

5.3.1.2. Retaliation to Extraterritoriality

While the principle of extraterritoriality has been validated, it remains a natural source of conflict. Foreign governments have objected vehemently to the aggressive use of the doctrine. These reactions are not surprising since the question of jurisdiction is related to sovereignty.⁹²⁸ In this regard, excessive pursuit of extraterritoriality can be interpreted as an act of aggression towards a country's sovereignty. The foreign sovereigns' reactions range from soft diplomatic protests to strong retaliation statutes.

Diplomatic protest by foreign governments against extraterritorial assertion of domestic competition laws is the most common and immediate reaction.⁹²⁹ Foreign governments usually protest that such assertion adversely affects the legitimate interests of the countries concerned and constitutes an intrusion into their domestic affairs.⁹³⁰ Nonetheless, it is by far the least efficient reaction since few diplomatic protests have led to fruitful solutions.⁹³¹

The unproductiveness of diplomatic protests has forced countries to take unilateral steps in retaliation to extraterritorial assertion of jurisdiction. Countries started introducing the same effects doctrine in their territory,⁹³² thus aiding in the generalisation of extraterritoriality. Another retaliatory option is to enact blocking statutes. These blocking statutes aim at prohibiting nationals, who are the subject of competition law investigations by foreign authorities, from complying with requests or orders issued by the latter.⁹³³ The scope of these blocking laws can be broad, ranging from impeding discovery outside of the

⁹²⁶ Fox, Eleanor M., 'GE/Honeywell the U.S. Merger that Europe Stopped-A Story of the Politics of Convergence' in Fox, Eleanor M. and Crane, Daniel A. (eds), *Antitrust Stories* (Foundation Press 2007).

⁹²⁷ Goyder, D. G., *EC Competition Law* (4th edn., Oxford University Press 2003) 499.

⁹²⁸ Mann, Frederick A., *The Doctrine of Jurisdiction in International Law* (Académie de Droit International, Recueil des Cours 1964).

⁹²⁹ See, for example, the response of the UK to the assertion of jurisdiction by the EU in the *Dyestuffs* case, in which a note of diplomatic protest was sent to the Commission.

⁹³⁰ Rishikesh, Deepa, *Extraterritoriality Versus Sovereignty in International Antitrust Jurisdiction*, 14 *World Competition* 33 (1991).

⁹³¹ *Ibid.*

⁹³² OECD, *Restrictive Business Practices of Multinational Enterprises: Report of the Committee of Experts on Restrictive Business Practices* (1977).

⁹³³ Neuhas, Joseph E., *Power to Reverse Foreign Judgments: The British Clawback Statute under International Law*, 81 *Colum. L. Rev.* 1097 (1981).

territory of the enacting country⁹³⁴ to rendering certain types of foreign competition law judgment unenforceable in domestic courts.⁹³⁵ In light of these blocking laws, an attempt by foreign authorities to apply their competition laws extraterritorially would be difficult. Nonetheless, the proportionality of the blocking statutes in response to extraterritoriality has been called into question. These blocking measures are regarded as too drastic⁹³⁶ and could trigger more conflicts between countries. However, resorting to such drastic measures shows meaningful desperation on behalf of the blocking country in the face of what it perceives as a highly intrusive extraterritorial assertion of jurisdiction on its sovereignty.

Countries have also enacted legislation seeking to recover damages paid in satisfaction of foreign antitrust judgments. The UK was one of the first countries to enact such a statute. It adopted the Protection of Trade Interests Act⁹³⁷ in response to a perceived increase in aggressiveness in the extraterritorial enforcement of the US antitrust and trade law.⁹³⁸ This type of legislation is commonly known as the clawback statute.⁹³⁹ It makes it possible for defendants who have paid multiple damage judgment in a foreign country to recover the multiple portions of that judgment from the successful plaintiff. It is obvious that the language used in the clawback statute, such as “multiple damage judgment,” is aimed at the treble damages available under the US antitrust law.⁹⁴⁰ Nonetheless, this legislation lacks international law support and is based solely on the desire to protect British nationals and businesses from what the UK perceives as the American’s excessive assertion of jurisdiction.⁹⁴¹ Similar clawback laws have been enacted in other countries such as Canada⁹⁴² and Australia.⁹⁴³

The doctrine of extraterritoriality is essentially unilateral. It is designed to protect nations’ legitimate interests outside their territories in the absence of a multilateral framework, bilateral cooperation, or regional convergence. The validity of the doctrine is not contested since it is a natural advancement under globalisation but extraterritoriality needs to be

⁹³⁴ (Canada) Ontario Business Records Protection Act, R.S.O. [1950] ch. 54. (France) Loi n° 80-538 du 16 juillet 1980 relative à la Communication de Documents ou Renseignements d’Ordre Economique, Commercial ou Technique à des Personnes Physiques ou Morales Etrangères [1980]. (This French law makes it a crime to request certain type of documentation located in France).

⁹³⁵ (Australia) Foreign Proceedings (Excess of Jurisdiction) Act, 1984, No. 3 [1984].

⁹³⁶ Rishikesh, Deepa, *Extraterritoriality Versus Sovereignty in International Antitrust Jurisdiction*, 14 *World Competition* 33 (1991).

⁹³⁷ Protection of Trading Interests Act [1980]. Read in light of Civil Jurisdiction and Judgments Act [1982].

⁹³⁸ Neuhas, Joseph E., *Power to Reverse Foreign Judgments: The British Clawback Stature under International Law*, 81 *Colum. L. Rev.* 1097 (1981).

⁹³⁹ Griffin, Joseph P., *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 *Geo. Mason L. Rev.* 505 (1997).

⁹⁴⁰ The Clayton Act.

⁹⁴¹ Neuhas, Joseph E., *Power to Reverse Foreign Judgments: The British Clawback Stature under International Law*, 81 *Colum. L. Rev.* 1097 (1981).

⁹⁴² Foreign Extraterritorial Measures Act, Ch. 49 1984 CAN. STAT. 1867 [1984]. An earlier bill was introduced in 1980 Foreign Proceedings and Judgments Act, Bill C-41, 32d Parl., 1st Sess. [1980].

⁹⁴³ 973 Parl. Deb., H.C. (5th ser.) 1544 [1979].

tamed in order to avoid the limitlessness of the manner in which it is used. Its aggressive application tends to create more foes than friends and harms international relations between countries. Animosity at regional level would injure any attempt at cooperation thus further hamper efforts to establish harmonised competition law within the ASEAN. In recent years, the tension created by extraterritoriality seems to be on the decline. This is principally a result of the proliferation of competition laws around the world⁹⁴⁴ and more understanding and acceptance of other countries' extraterritoriality even when it affects their own territoriality.⁹⁴⁵ After *Gencor*, the South African government did not call into question the EU's jurisdiction, and merely expressed its preference for intervention in specific cases of collusion when they arose rather than the outright prohibition of the transaction.⁹⁴⁶ It is not uncommon for small jurisdictions to "free ride"⁹⁴⁷ on the enforcement efforts of more developed jurisdictions. Other authors have recognised the possibility that the effective extraterritorial application of foreign competition law to conduct committed by an international cartel may protect a developing economy with either a weaker or no competition regime.⁹⁴⁸ In addition, the promotion of bilateral and regional cooperation seems to have considerably reduced the friction caused by extraterritoriality.

5.3.1.3. Extraterritoriality and the AMSs

There are some lingering doubts about whether the AMSs are capable of extraterritorially and whether they are able to enforce their national laws to regional problems within the region. First, the principle of extraterritoriality as a whole relies heavily on a country's ability to exert its political and economic power.⁹⁴⁹ Furthermore, "[e]xtraterritoriality is an efficient tool for large jurisdictions that possess sufficient power over foreign firms to command obedience. Small ones often lack the requisite power to discipline foreign entities that harm them. It is thus not surprising that most do not have developed doctrines of extraterritoriality [...]."⁹⁵⁰ Countries with strong economic and political persuasive power coupled with a more established system of competition law possess the necessary tools to extend their competition laws to extend their reach. They can also do so in a more aggressive manner than others. This is not surprising since only stronger states are able to

⁹⁴⁴ Geradin, Damien, *The Perils of Antitrust Proliferation: The Globalisation of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 Chi. J. Int'l L 189 (2009). (Describing this phenomena as "decentralised globalisation.")

⁹⁴⁵ Zanettin, Bruno, *Cooperation between Antitrust Agencies at the International Level* (Hart Publishing 2002) 36.

⁹⁴⁶ *Gencor*, para. 104.

⁹⁴⁷ Sweeney, Brendan, *Combating Foreign Anti Competitive Conduct: What Role for Extraterritoriality?*, 8(1) Melbourne J. Int'l L. 35 (2007).

⁹⁴⁸ Fox, Eleanor M. and Gal, Michal S., 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' in Gal, Michal S. et al. (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar Publishing 2015).

⁹⁴⁹ Gerber, David, *The Extraterritorial Application of German Antitrust Law*, 77 American Journal of International Law (1983).

⁹⁵⁰ Gal, Michal S., 'Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel)' in Guzman, Andrew T. (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press 2010).

extend their jurisdiction to where their interests lie in order to control, what they perceived to be, conduct harmful to their interests. On the other hand, weaker states do not have the capacity to extend their reach of domestic laws to undertakings originating from stronger states and may fear of economic and political retaliation. Their inability to effectively enforce competition law could lead to a legal vacuum where the behaviour is never enforced under any competition law regime. This is particularly true when the harm is confined only to the national territory or when such conduct produces positive effects elsewhere. Moreover, an attempt to enforce competition law by a perceived weaker jurisdiction could potentially result in negative welfare effect.⁹⁵¹ For instance, external constituencies could exit the national market, leaving the market more vulnerable than before the competition law enforcement. At the same time, the limited resources made available to new and developing competition law authorities prevent them from extending their enforcement reach.⁹⁵² The limited resources, both financial and human, can be more severely felt in the field of extraterritoriality since the proof of anticompetitive conduct by foreign firms, especially in the case of international cartels, is costly in both time and money.⁹⁵³

Currently, only two AMSs' competition laws contain extraterritoriality provisions. The *Malaysia Competition Act* applies to behaviours outside Malaysia having an effect on competition in any market in Malaysia.⁹⁵⁴ The language used hints at the effect doctrine. In addition, Singapore's competition law is explicitly applicable to conduct and agreements outside Singapore insofar as there is appreciable object or affect competition within Singapore⁹⁵⁵ or in the case of abuse of dominant position, in so far as there is a negative effect on competition within Singapore.⁹⁵⁶ This reach is more extensive than that of the EU legislation.⁹⁵⁷ Ong explained that this wide-ranging measure is necessary for Singapore because of its small and open economy that is highly reliant on imported commerce, although he expressed his concerns over practical enforcement limitations.⁹⁵⁸

There are some examples of AMSs use of extraterritoriality. One such example is the case involving Singapore, in *Ball Bearings*,⁹⁵⁹ which involved the violation of Section 34 of the *Singapore Competition Act (SCA)* on the prohibition of anticompetitive agreements by the Japanese parent companies and Singaporean subsidiaries. The Commission decided that the jurisdiction should be asserted on the basis of the principle of the territoriality by

⁹⁵¹ Ibid.

⁹⁵² Ibid.

⁹⁵³ Sweeney, Brendan, *Combating Foreign Anti Competitive Conduct: What Role for Extraterritoriality?*, 8(1) Melbourne J. Int'l L. 35 (2007).

⁹⁵⁴ Malaysia Competition Act, art. 3.

⁹⁵⁵ SCA, sec. 33(1).

⁹⁵⁶ Ibid, sec. 47(3).

⁹⁵⁷ Williams, Mark, *The Lion City and the Fragrant Harbor: The Political Economy of Competition Policy in Singapore and Hong Kong Compared*, 54 Antitrust Bull. (2009).

⁹⁵⁸ Ong, Burton, *The Origins, Objectives and Structure of Competition Law in Singapore*, 29 World Competition 269 (2006).

⁹⁵⁹ *CCS Imposes Penalties on Ball Bearings Manufacturers involved in International Cartel* [2014] CCS 700/002/11. [*Hereinafter* Ball Bearings]

relying on the existence of a single economic entity. In this case, the Japanese parent companies exerted a decisive influence over the behaviour of the Singaporean subsidiaries and were therefore jointly and severally liable for the infringement committed by the subsidiaries.⁹⁶⁰ On this basis, the *SCA* could be applied to the foreign-based company without having to resort to the doctrine of extraterritoriality enshrined in Section 33(1) *SCA*. This decision is reminiscent of the CJEU *Dyestuffs* doctrine of economic entity which was also cited in *Ball Bearings*. The same analysis continued in *Freight Forwarders*⁹⁶¹ but with the addition of the application of Section 33(1) read in light of Section 34 *SCA*. The Commission found that the subsidiaries' violation could be attributable to foreign parent companies in accordance with the doctrine of single economic unity. It ruled that Section 34 *SCA* was applicable to the parent companies' anticompetitive agreements carried out outside Singapore's territory in accordance with the doctrine of extraterritoriality in Section 33(1) *SCA*.⁹⁶² In the case of Indonesia, it was reported⁹⁶³ that the Supreme Court applied the CJEU *Dyestuffs* doctrine of economic entity and attributed the subsidiary anticompetitive agreement to the foreign parent firm.⁹⁶⁴ More recently, the Indonesian Competition Commission (Komisi Pengawas Persaingan Usaha or the KPPU) also employed the doctrine of economic entity.⁹⁶⁵ This is an interesting case since Indonesia's competition law does not have an explicit extraterritorial provision. The Commission creatively used this doctrine to expand the interpretation of the definition of "undertaking" in the *Law of the Republic of Indonesia Number 5 Year 1999* which provides that "[e]ntrepreneur is an individual person or a company, in the form of a legal or non-legal entity established and domiciled or engaged in activities within the legal territory of the Republic of Indonesia, conducting various kinds of business activities in the economic sector through contracts, both individually or collectively"⁹⁶⁶ to cover foreign parent firms. In this regard, the Commission managed to overcome the territorial limitation by interpreting the criterion of engagement in activities within the territory in a broad manner. The KPPU decision was upheld by the Supreme Court.⁹⁶⁷

These examples demonstrate that the AMSs possess the capability and willingness to extend their national laws to competition issues with regional and international dimensions. The AMSs are not reluctant to abandon the principle of the ASEAN Way which focuses on the non-interference of other AMSs' internal affairs and non-conflictual conflict resolution if their vested interests are in jeopardy. In addition, the use of extraterritoriality signifies the AMSs' preparedness to withstand the potential political and legal conflicts and

⁹⁶⁰ Ibid, para. 369.

⁹⁶¹ *CCS Fines 10 Freight Forwarders for Price Fixing* [2014] CCS 700/003/11. [Hereinafter *Freight Forwarders*]

⁹⁶² Ibid, paras. 524-525.

⁹⁶³ Toha, Kurnia, *Extraterritorial Applicability of Indonesia Business Competition Law as an Efforts Dealing ASEAN Single Market*, 15 *Jurnal Dinamika Hukum* 19 (2015).

⁹⁶⁴ *KPPU vs PT Pertamina (Persero) et al.* [2005] Putusan Mahkamah Agung Nomor 04K/KPPU/2005.

⁹⁶⁵ *Kelompok Usaha Temasek* [2007] KPPU Decision, No. 07/KPPU-L/2007.

⁹⁶⁶ Law No. 5 of Year 1999, art. 1(5).

⁹⁶⁷ *Temasek Holding Limited, dkk. vs. KPPU* [2008] Putusan Mahkamah Agung Nomor 496K/PDT.SUS/2008.

retaliation from concerned AMSs. This stands in stark contrast to commentators' assumptions that the countries are more likely to favour the avoidance of conflicts engendered by the extraterritorial application of national competition law.⁹⁶⁸ Moreover, the conflict of jurisdictions regarding competition issues might become a reality for which the ASEAN has not developed a mechanism for the resulting jurisdictional dispute. The implementation of the concept of extraterritoriality directly affects cross-border commerce within the region. Kovacic identified two principal consequences: an increase in the cost of complying with requirements for report mergers, and the assessing of the same behaviour according to divergent standards.⁹⁶⁹ The second scenario was demonstrated in *Boing/McDonnell Douglas* and *GE/Honeywell*.

Conscious of their own institutional limitations and in the absence of a relevant mechanism at regional level, it is possible that the *Guidelines I* suggested including a provision for extraterritoriality to deal with intra-regional competition. It is doubtful whether extraterritoriality in national law is an appropriate answer to problems of regional competition, especially in the light of past experiences encountered by more developed jurisdictions. In the interim, the suggestion of extraterritoriality, even without implementation, could further widen the AMSs' disparity. Correspondingly, an AMS with weaker competition jurisdiction will appear less attractive to foreign investment compared with other jurisdictions. Nonetheless, it is inconclusive whether there is a correlation between a decrease in the FDI and a weak competition law regime.

5.3.2. Cooperation Agreements between Competition Authorities within the ASEAN

Cooperation is generally the preferred method for dealing with trans-border competition problems.⁹⁷⁰ It is seen as a solution to palliate the conflicts generated by extraterritoriality. Defining cooperation is difficult, not least because it can have various meanings at different levels. Cooperative activities can be formal or informal. The formality in this context is not due to the nature of participating actors but that of the activities involved. Informal cooperation encompasses networking efforts and can take place at the bilateral, regional and multilateral level. Zanettin categorised cooperation into two groups: hard cooperation and soft cooperation.⁹⁷¹ In hard cooperation, an authority is requested by its foreign counterpart to take action it might not otherwise have taken, such as positive

⁹⁶⁸ Faure, Michael and Zhang, Xinzhu, *Towards an Extraterritorial Application of the Chinese Anti-monopoly Law that Avoids Trade Conflicts*, 45 *The Geo. Wash. Int'l L. Rev* 101 (2013).

⁹⁶⁹ Kovacic, William E., *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 *Am. Soc'y Int'l L. Proc.* 309 (2003).

⁹⁷⁰ See, for example, Jenny, Frédéric, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 *Antitrust Bull.* 973 (2003); Fox, Eleanor M., *Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy*, 48 *Antitrust Bull.* 355 (2003).

⁹⁷¹ Zanettin, Bruno, *Cooperation between Antitrust Agencies at the International Level* (Hart Publishing 2002) 5.

comity and exchange of confidential information. In contrast, soft cooperation refers to a coordination of competition investigations. Most noteworthy is the absence of network cooperation from this classification. It is plausible that the absence is based on the assumption that only competition authorities can participate in the cooperation. However, cooperation has exceeded cooperative procedures between national competition authorities and could include private entities, as attested to by the existence of the ICN. Incidentally, the informal form of cooperation is one that has enjoyed the most success.⁹⁷² Terhechte made an attempt to broadly define cooperation as institutionalised collaboration.⁹⁷³ Regardless of the variety of forms and levels, the uniting characteristic of cooperation lies in its voluntary approach. Countries are free to choose with whom to cooperate and reserve the right to decide the level of cooperation commitment on a case-by-case basis. Developed economies prefer to enter into a cooperation agreement with partners with the same level of competition law advancement. They fear that by agreeing to cooperate with developing competition law regimes, they might be exposed to an abundance of requests for assistance with little chance of reciprocity. They also fear a negative effect on their trade and/or competition interests. Developing economies without effective competition regimes are also reluctant to enter into such an agreement; they fear unilateral extension of participating countries' competition rules. It follows that voluntary cooperative agreements are more common among developed economies than among developing economies.⁹⁷⁴

The rise of cooperation agreements is attributed to the globalisation of competition restrictions, the internationalisation of competition policies and the non-viability of united global competition rules.⁹⁷⁵ In particular, cooperation is seen as a method to curb aggressive extraterritorial application of national law. Jenny found another explanation in the pooling of resources among countries to address common challenges in competition enforcement.⁹⁷⁶

⁹⁷² See, e.g., Fox, Eleanor M., *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 Int'l Law 151 (2009); Hollman, Hugh M. and Kovacic, William E., *International Competition Network: Its Past, Current and Future Role*, 20 Minn. J. Int'l L. 274 (2011); Lugard, Paul, 'The ICN at Ten: Origins, Accomplishments and Aspirations' in Lugard, Paul (ed), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Hart Publishing 2011).

⁹⁷³ Terhechte, Jorg Philipp, *International Competition Enforcement Law Between Cooperation and Convergence* (Springer 2011) 2.

⁹⁷⁴ Heimler, Alberto and Jenny, Frédéric, 'Regional Agreements' in Lewis, David (ed), *Building New Competition Law Regimes* (Edward Elgar Publishing 2013).

⁹⁷⁵ Terhechte, Jorg Philipp, *International Competition Enforcement Law Between Cooperation and Convergence* (Springer 2011) 9.

⁹⁷⁶ Jenny, Frédéric, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 Antitrust Bull. 973 (2003).

5.3.2.1. Various Designs of Cooperation

Bilateral Cooperation

Bilateral cooperation is considered to be the most common form of cooperation and revolves around cooperation between two national competition authorities.⁹⁷⁷ The key advantage of bilateral cooperation is that it eliminates conflicts between countries and facilitates convergence and harmonization between different competition law regimes.⁹⁷⁸ In most cases, bilateral cooperation agreements are concluded between two developed economies.⁹⁷⁹ This is because the efficiency of such an agreement relies heavily on the principle of reciprocity. Arrangements made between two nations with similar competition laws and converging views on the substantive and procedural competition regulations have a better chance at succeeding in effective enforcement.⁹⁸⁰

Bilateral cooperation is an evolving concept with the degree of cooperation being affected by the level of trust shared by the two parties. Bilateral agreement centres on technical and enforcement assistance, in particular the exchange of information between jurisdictions. The exchange of information between authorities is essential in order to detect anticompetitive conduct with a trans-border reach. In this regard the exchange is crucial since the actions of countries overlap.⁹⁸¹ This measure is particularly useful in merger cases as it helps authorities discern the market definition.⁹⁸² However, the information exchanged remains limited. Countries are not allowed to exchange information if it might violate domestic law of privacy or confidentiality, including professional privilege.⁹⁸³ Therefore, the information shared between competition authorities must be non-confidential. Technical assistance is often included in the rare cases of bilateral agreements between developed and developing economies such as the EU-Chile Association Agreement.⁹⁸⁴ The purpose of this type of cooperation agreement has shifted slightly from agreements between developed economies since the two parties are not equal. The goal of this agreement is to help strengthen effective competition law enforcement in the “weaker”

⁹⁷⁷ Petrovsky, Olga, *International Antitrust Agreement: Premature Proposal and Practical Solutions*, 22 N.Y. Int'l L. Rev 131 (2009).

⁹⁷⁸ Taylor, Martyn D., *International Competition Law: A New Dimension for the WTO?* (Cambridge University Press 2006).

⁹⁷⁹ Fox, Eleanor M. and Crane, Daniel A., *Global Issues in Antitrust and Competition Law* (West 2010).

⁹⁸⁰ UNCTAD, *Experiences Gained so Far on International Cooperation on Competition Policy Issues and the Mechanisms Used* (TD/RBP/CONF.6/7, 1999).

⁹⁸¹ Guzman, Andrew T., *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. Rev. 1142 (2001).

⁹⁸² *Ibid.*

⁹⁸³ Sweeney, Brendan, *Combating Foreign Anti Competitive Conduct: What Role for Extraterritoriality?*, 8(1) Melbourne J. Int'l L. 35 (2007).

⁹⁸⁴ Agreement Establishing an Association between the European Community and its Member States, of the One Part, and the Republic of Chile, of the Other Part [2002].

competition law regime.⁹⁸⁵ It also aims to provide the transfer of skills and techniques in detecting and deterring anticompetitive behaviour.

Generally, bilateral agreements between competition authorities contain six principal components: notification, exchange of information, cooperation, consultation, and comity.⁹⁸⁶ This section will focus on comity to highlight its important role in advancing regional cooperation. Comity can exist in both a negative and a positive form.

Negative comity, which seeks to prevent jurisdictional conflicts, was included in the first generation of bilateral cooperation agreements in 1976 when the US signed the Antitrust Accord with Germany.⁹⁸⁷ In practice negative comity means that one party will notify the other party when its enforcement of competition law could affect the interests of the latter.⁹⁸⁸ This suggests that only one party in the agreement would engage in the enforcement of the competition law while the other party is forced to not engage in any action; hence the term “negative” comity. It is fairly difficult to assess the success of such comity since it is not binding. Countries are not compelled to decline their jurisdiction in favour of another. Moreover, the language used in the agreement is too vague to assess whether it could really prevent conflict of jurisdiction.⁹⁸⁹

Positive comity centres on the idea that one jurisdiction will refer a matter to another with the expectation that the receiving jurisdiction will investigate the claim.⁹⁹⁰ This method implies that the referred jurisdiction is better equipped to deal with the competition law issue than the referring country. In contrast to negative comity, positive comity, as indicated by its name, requires positive action. It marks an important development in bilateral agreements in the field of competition law since it requires a high level of trust and confidence on the part of the referring competition authority that the referred competition authority will undertake a serious investigation. However, the referral will not interfere with domestic competition law. This means that if the recipient of the referral is a weak competition authority with an inefficient competition law regime, that authority will not be empowered by virtue of the referral. The referring competition authority will not engage in the investigation. Positive comity appears to work best when countries share similar values in procedural and substantive competition law. The object of positive comity

⁹⁸⁵ Alvarez, Ana Maria and Horna, Pierre, *Implementing Competition Law and Policy in Latin America: The Role of Technical Assistance*, 83 Chi.-Kent L. Rev. 91 (2008).

⁹⁸⁶ Matsushita, Matsuo, *International Cooperation in the Enforcement of Competition Policy*, 1 Wash. U. Global Stud. L. Rev. 463 (2002).

⁹⁸⁷ Agreement between the United States of America and Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices [1976].

⁹⁸⁸ OECD, *Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade* (C(95)130/FINAL, 1995).

⁹⁸⁹ Dabbah, Maher M., *International and Comparative Competition Law* (Cambridge University Press 2010).

⁹⁹⁰ Janow, Merit E., *Remarks at the ABA Conference on the World Trade Organisation* <<http://www.law.georgetown.edu/journals/lpib/symp00/documents/janow.pdf>>. As found in Moschella, Joseph M., *The Necessity of Active American Involvement in Global Competition Law*, 22 Wis. Int'l L.J. 187 (2004).

is to allocate the investigation and prosecution of anticompetitive conduct to the country in the best position to carry out functions.⁹⁹¹

Positive comity has increasingly become more common than negative comity. The exemplar of such an agreement is the agreement between the US and the EU. The cooperation between them is interesting since the two regimes are regarded as the most well developed. In 1991 the EU and the US signed their first bilateral cooperation agreement⁹⁹² which contained obligations of reciprocal notification, exchange of information, assistance, positive comity and negative comity. Unfortunately, the positive comity provision was not sufficiently used. Petrovsky claimed the issue was due to the US's tendency to favour the extraterritorial approach.⁹⁹³ In 1998, the US and the EU concluded their second cooperation agreement.⁹⁹⁴ This agreement confirmed the efforts of the two parties to continue applying the principle of positive comity. Most importantly, the agreement includes a presumption that the referring country will defer or suspend its own enforcement activities over a period not exceeding six months when the anticompetitive behaviour occurred principally in or was directed principally to the referred country. It could be said that positive comity provides a tangible commitment to the notion of cooperation.⁹⁹⁵

However, the advancement of deeper cooperation between the two authorities was hindered by *GE/Honeywell*. Admittedly, the occurrence of cases like *GE/Honeywell* is rare and thus is more likely to be the exception to the rule. Despite certain drawbacks, the EU-US bilateral cooperation agreement was used as the model for several agreements of the same nature.⁹⁹⁶

Multilateral Cooperation

The failure to form a global competition law within the WTO reveals the reluctance of many countries to commit to a legally binding multilateral agreement in the field of competition law. Despite this unwillingness, countries still wish to cooperate in a meaningful way. The attention has thus shifted to an alternative form at the multilateral level, namely non-binding multilateralism which utilises soft harmonisation methods

⁹⁹¹ OECD, *Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade* (1973); OECD, *Making International Markets More Efficient through Positive Comity in Competition Law Enforcement* (1999).

⁹⁹² Agreement between the Government of the United States of America and the Commission of the European Community Regarding the Application of Their Competition Law.

⁹⁹³ Petrovsky, Olga, *International Antitrust Agreement: Premature Proposal and Practical Solutions*, 22 N.Y. Int'l L. Rev 131 (2009).

⁹⁹⁴ Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws [1998].

⁹⁹⁵ *Making International Markets More Efficient through Positive Comity in Competition Law Enforcement*.

⁹⁹⁶ See, for example, Agreement between the United States of America and Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws; Agreement Between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities [1999]; Cooperation Agreement between Canada, the EC and the ECSC [1999].

through recommendations, best practices and guidelines. The benefit of multilateralism over bilateralism is its cover of a broader range of countries. The best known form of multilateral cooperation is the OECD and the UNCTAD. An examination of both organisations was offered in Chapter 4. It revealed a comparable approach in multilateral cooperation regarding the technical assistance provided to countries.

Both organisations publish documents pertaining to the framework of substantive and institutional competition law. Despite the absence of a binding ability, multilateral cooperation has a high level of influence that transcends its membership. Many competition authorities, even non-OECD members, use these works as highly authoritative sources in the field of competition law. The most influential document from the OECD is indubitably the *Recommendation concerning Effective Action against Hard Core Cartels*.⁹⁹⁷ Beyond the area of hard core cartels, the OECD also deals with a variety of different issues of competition law and policy including mergers and cooperation between competition authorities and member states.⁹⁹⁸ The UNCTAD has also contributed to multilateral cooperation relative to competition law. Its best known work is the *UNCTAD Code*⁹⁹⁹ which was adopted unanimously at the UN General Assembly.¹⁰⁰⁰ It contains basic competition law principles generally consistent with the global concept of anticompetitive conduct.¹⁰⁰¹ Beside the *UNCTAD Code*, the UNCTAD has made other contributions to the field of competition law such as the *Model Law on Competition*¹⁰⁰² which is based on the *UNCTAD Code* to aid members in the adoption of the *UNCTAD Code* into their national legislations. The most efficient mechanism is the peer review system in both the OECD and the UNCTAD. In this system, countries voluntarily submit their competition law regime to be evaluated and recommendations from other regimes as well as from competition law experts are made. Conforming to the nature of multilateral cooperation, the recommendations that emerge from the peer review are not binding; countries are under no obligation to implement the recommendations given in the peer review. While domestic regimes are not required to accept the recommendations, peer reviews succeed in encouraging changes to domestic regimes purely due to peer pressure. The UNCTAD peer review system can be distinguished from that of the OECD by its perspective on development and experience in cooperating with developing economies.

Since the adoption of the *UNCTAD Code*, the UNCTAD has become the primary representative of the interests of lesser developed and transition economies in the area of competition policy as a counterweight to the influence of developed economies in the

⁹⁹⁷ OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (C(98)35/FINAL, 1998).

⁹⁹⁸ *Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade*.

⁹⁹⁹ UNCTAD, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (TD/RBP/CONF/10/Rev. 1, UN Doc TD/RBP/CONF/10/Rev. 2, 1980, 2000, 2015). [hereinafter UNCTAD Code].

¹⁰⁰⁰ UN, *United Nations General Assembly* (GA/RES/35/63, 1980).

¹⁰⁰¹ Waller, Spencer Weber, *Antitrust and American Business Abroad* (3rd edn., West 1997) ch. 18 para. 18:4.

¹⁰⁰² *Model Law*.

global setting.¹⁰⁰³ The UNCTAD, contrary to the OECD, is truly global considering its composition of countries around the world with different degrees of political and economic progress and its involvement in development issues. By integrating the development factors with the field of competition law, the UNCTAD is preserving the UN's long-standing tradition of advocating for developing and the least developed economies.

5.3.2.2. The ASEAN's Form of Cooperation

Early on, Ong observed that “[t]he nature and extent of the cooperation arrangements contemplated under the *Blueprint* have not been made publicly known, and any progress on this front will depend very much on the prevailing political climate in each of these member states.”¹⁰⁰⁴ Once again, the emphasis is on the political connection of the AMSs, reflecting the predominance of the ASEAN way. The *Guidelines I* would later come to define the nature and the extent of cooperation within the ASEAN. According to them, “[t]he overarching or long-term objectives of a cooperative competition policy for the AMSs are the promotion of market integration in the lead up to the establishment of a common market, and the promotion of economic efficiency and growth at a regional level.”¹⁰⁰⁵ The *Guidelines I* are highly educative on how to use regional cooperation to promote a common framework for competition policy to achieve the long-term objective of market integration in 2015. The *Guidelines I* affirm that cooperation can bring about a high degree of consistency in the implementation of competition policy in the ASEAN. Such cooperation can create a dynamic dialogue that serves to build consensus and convergence towards sound competition policy and improve the effectiveness of a national competition enforcement body through the exchange of non-confidential knowledge between the AMSs.¹⁰⁰⁶ The latter two benefits have already been realised by the formation of the AEGC which was established explicitly to secure these benefits. It appears that the *Guidelines I* support the idea that regional cooperation can bring about actual convergence in regional competition law.

However, the *Guidelines I*'s suggestion is limited to formal cooperation between the AMSs' national competition authorities. It envisions cooperation among these authorities that is centred on discussion and exchange of non-confidential information as a secondary activity, with the aim of achieving convergence.¹⁰⁰⁷ Competition agencies generally collect a broad range of information, from industry and market statistics to opinions and analyses done by the agency, involved parties or third parties to the case.¹⁰⁰⁸ Some of this

¹⁰⁰³ Waller, Spencer Weber, *Antitrust and American Business Abroad* (3rd edn., West 1997) ch. 18 para. 18:10A

¹⁰⁰⁴ Ong, Burton, ‘Cooperation, Comity and Competition Policy in Singapore’ in Guzman, Andrew T. (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press 2010).

¹⁰⁰⁵ *Guidelines I*, art. 10.1.1.

¹⁰⁰⁶ *Ibid*, art. 10.2.

¹⁰⁰⁷ *Ibid*, art. 10.3.1. read in light of art. 10.2.

¹⁰⁰⁸ Sweeney, Brendan, *Combating Foreign Anti Competitive Conduct: What Role for Extraterritoriality?*, 8(1) *Melbourne J. Int'l L.* 35 (2007).

information is confidential and therefore generally requires authorisation from the parties involved before it can be shared.¹⁰⁰⁹ Confidentiality in the context of competition law investigation has to be protected since the information could contain sensitive market or industry information. Private parties have expressed concern that benefits to private parties arising from information sharing and other forms of cooperation often are not substantial or assured and may be outweighed by a variety of perceived disadvantages. These potential disadvantages include exposure to additional legal risks, particularly when substantive laws diverge; significant potential sanctions or private rights of action in the jurisdiction to which the information is disclosed; differences in investigation timetables; the overburdening of competition authorities with so much information that the investigations would be slowed down rather than hastened; and possible misinterpretation when one authority reviews information that has been prepared to address issues under a different legal regime.¹⁰¹⁰ In response to these concerns, competition authorities have to ensure that any cooperation is within the limit of the confidentiality rules so as to achieve consistent remedies.¹⁰¹¹ Moreover, it is in the interest of national competition authorities to preserve anonymity of the source of such information when guaranteed confidentially is often the sole incentive of the acquirement. Waiver of confidentiality is not uncommon especially in merger cases where parties have strong incentives to agree to such exchange.¹⁰¹² Nonetheless, it is believed that this is not an example of progressive cooperation but merely an expression of the power of a leniency programme.¹⁰¹³ It is thus realistic for the ASEAN to concentrate on a more restricted and informal approach to the exchange of information.

Provisions relating to discussion and exchange of non-confidential information are usually found in bilateral cooperation agreements. In this regard, the ASEAN is narrating a form of regional cooperation which exhibits the characteristics of a bilateral cooperation agreement. Most worrisome is perhaps the *Guidelines I*'s apparent support of the creation of a new platform or agreements, either bilateral or multilateral, between the AMSs or to build upon the existing mechanism of the AEGC.¹⁰¹⁴ This provision is later reinforced by a requirement presented in the *Guidelines I* that the AMSs develop a regional platform, or understanding, or arrangement, or otherwise build on the AEGC to facilitate cooperation between competition regulatory bodies.¹⁰¹⁵ The aim of this regional platform is to allow competition regulatory bodies to exchange their experiences, identify best practices, and endeavour to implement co-operative competition policy and competition regulatory body arrangements that provide for harmonization.¹⁰¹⁶ Within this framework, working groups

¹⁰⁰⁹ OECD, *Hard Core Cartels* (2000).

¹⁰¹⁰ *ICPAC Report*, 182-185.

¹⁰¹¹ Pitofsky, Robert, *EU and U.S. Approaches to International Mergers-Views from the U.S. Federal Trade Commission* (Remarks Before the EC Merger Control 10th Anniversary Conference 14-15 September 2000).

¹⁰¹² ICN, *Waivers of Confidentiality in Merger Investigation: Model Confidentiality Waiver* (2007).

¹⁰¹³ Sweeney, Brendan, *Combating Foreign Anti Competitive Conduct: What Role for Extraterritoriality?*, 8(1) *Melbourne J. Int'l L.* 35 (2007).

¹⁰¹⁴ *Guidelines I*, art. 10.3.3.

¹⁰¹⁵ *Ibid*, art. 10.3.1.

¹⁰¹⁶ *Ibid*, art. 10.3.3.

may be created to discuss general or specific issues related to the establishment and enforcement of competition policy.¹⁰¹⁷ However, the regional platform shall not exercise any rule-making function, and no voting rules should be in place within the working groups, as the cooperation is based on consensus-building.¹⁰¹⁸ If the AMSs were to create a regional platform distinct from the AEGC, it is plausible that there would be an overlapping area of competence, rendering the AEGC vulnerable. Another concern resides in the potential of wider disparity in competition cooperation. Only the AMSs that have made similar progress in competition law enforcement would be able to enter into such an agreement, thus inevitably creating, at the very least, a two-tiered level of cooperation within the region. This could ultimately hamper the ASEAN's efforts to harmonise competition law in all the AMSs. At the same time, the suggestion is made in the interest of facilitating better cooperation among similar competition regimes. There is the potential for faster region-wide cooperation in the future by engaging with those who currently have the capability.

5.3.2.3. The Inadequacies of Cooperation

Cooperation, despite its various forms, is limited by its most obvious advantage – its voluntary approach. The AMSs have the freedom to cooperate but are not obliged to do so. The ASEAN reiterates this position:

The regional platform shall not exercise any rule-making function and no voting rules should be in place within the working groups, as the cooperation is based on consensus building. Where the platform reaches consensus on recommendations or "best practices", arising from the projects, each competition regulatory body may decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, where appropriate.¹⁰¹⁹

It is evident that the continuous reiteration of the voluntary nature of the regional organ is for the benefit of reassuring the AMSs that the platform will not impinge on their sovereignty. Although they will be encouraged to participate, this is entirely dependent on their willingness to do so.

The success of cooperation agreements, particularly bilateral agreements, is indeed impressive and certainly contributes to proving the usefulness of voluntary cooperation agreements between competition authorities.¹⁰²⁰ Notwithstanding the progress made in improving relationships between countries in the matter of competition enforcement, the

¹⁰¹⁷ Ibid, art. 10.3.4.

¹⁰¹⁸ Ibid, art. 10.3.5.

¹⁰¹⁹ Ibid, art. 10.3.5.

¹⁰²⁰ Jenny, Frédéric, 'Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation' in Chao, Yang-Ching et al. (eds), *International and Comparative Competition Law and Policies* (Kluwer Law International 2001).

correlation between cooperation and greater harmonisation remains dubious.¹⁰²¹ Simple similarities in competition analysis do not equate to substantive convergence promoted by cooperative activities. Different competition authorities can arrive at the same conclusion regardless of the method used. This is especially true in the case of mergers with no anticompetitive concern where competition authorities would usually approve. Furthermore, it is also difficult to ascertain whether a national competition authority would be able to uncover or investigate anticompetitive behaviour without cooperation. The problem here lies not in the potential benefit of cooperation but in its measurability.

Jenny admitted that cooperation agreements are not able, in themselves, to address the issue of the interface between trade and competition at the global level.¹⁰²² He raised three arguments in support of his theory. First, cooperation agreements do little to convince countries which do not have competition law that they should adopt one. Secondly, cooperation only unites countries with the same level of advancement regarding competition law regime. Lastly, cooperation is only undertaken when such cooperation is in the mutual interest of the parties to the agreement. In the final analysis, countries that already have similar competition law regimes would be more likely to cooperate with each other. Therefore cooperation agreements contribute to greater asymmetric disparity in the global scheme. Even among similar competition regimes, the participation of involved countries is still limited by differences in the considerations of competition procedure, fundamental standards and requirement of transparency. The overreliance on the voluntary approach could make the benefits of cooperation illusory as evidenced by *Boing/McDonnell Douglass* and *GE/Honeywell*. There is certainly a possibility that these cases are simply exceptions rather than the rule of ineffectiveness in cooperation.

Perhaps Fox's astute remark made in 2003 remains valid today. She proclaimed that:

For inbound problems, the combination of extraterritoriality and cooperation works well for nations with well-resourced agencies of large countries addressing matters not encumbered by conflicting national policies. In that set of cases, gaps and illegitimacies are relatively few. For outbound problems, gaps and illegitimacies are significant. For world problems, we are doing remarkably well working with the tools we have, but the tools, alas, are pre-globalisation. In important ways they are not legitimate, and they are not sufficient.¹⁰²³

¹⁰²¹ Jenny, Frédéric, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 *Antitrust Bull.* 973 (2003).

¹⁰²² Jenny, Frédéric, 'Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation' in Chao, Yang-Ching et al. (eds), *International and Comparative Competition Law and Policies* (Kluwer Law International 2001).

¹⁰²³ Fox, Eleanor M., *Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy*, 48 *Antitrust Bull.* 355 (2003).

Jenny corroborated Fox's position and claimed that there is a "growing need to elaborate a multilateral framework."¹⁰²⁴ It follows that the tools of extraterritoriality and cooperation handpicked by the ASEAN to assist in its market integration will not be sufficient to resolve the ASEAN regional competition issues.

5.4. Conclusion

This chapter has demonstrated that in its pursuit of regional economic integration, the ASEAN has concentrated on supporting the national institutional framework of competition enforcement. It created the AEGC as the sole regional organ dealing with competition policy within ASEAN with similar traits to a voluntary cooperation agreement, and resolving regional competition issues through national solutions and bilateral and/or multilateral cooperation. In addition, the support of extraterritoriality helps explain the ASEAN's fixation with national competition institution structures since it chiefly relies on it to resolve its regional issues.

In comparison with other regional economic integration efforts, the ASEAN is unique by being the only regional organisation without a central competition law-related institution capable of monitoring the AMSs' competition law regimes and the enforcement of competition law. It neither has a centralised institution similar to the WAEMU or the COMESA nor a national representative institution comparable to the MERCOSUR's practice. What the ASEAN established is a simple institution capable of providing a platform of discussion to interested AMSs through the AEGC.

Through the *Guidelines I* and *II*, the ASEAN has, remarkably, equipped the AMSs with necessary information and choices to help their construction of a national competition institution. Unfortunately, that is the limit of the ASEAN's efforts regarding institutional building. Simultaneously, the AEGC has revealed its weakness as a regional competition organ without the capabilities to monitor the enforcement of competition policy by the AMSs and to resolve competition issues raised at the ASEAN level. Its deficiency is principally caused by the principle of non-interference between the AMSs resulting in the absence of a centralised organ. Since this principle is the cherished core value of the organisation, the ASEAN has no choice but to abide by it and work around it. What it has proposed, no matter how fragile, is undoubtedly the best it can offer.

¹⁰²⁴ Jenny, Frédéric, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 Antitrust Bull. 973 (2003).

Chapter 6 The Approaches of ASEAN and AMSs to Competition Policy

Previous chapters have analysed the substantive and institutional approaches taken by the ASEAN in its pursuit of regional competition law suitable for regional economic integration. It is now opportune to focus on the approach taken by the AMSs regarding national competition laws to ascertain whether soft harmonisation at a regional level (which was the aspiration of the ASEAN in establishing the AEC) is possible. This chapter will examine whether the AMSs' competition laws share sufficient commonalities, other than merely a superficial appearance that they do, to enable soft harmonisation at a regional level.

Indeed, “[d]esigns cannot be conjured in the abstract; they must fit the family that lives in the house, its aspirations, possibilities, and practical limits.”¹⁰²⁵ As the architect of the Southeast Asian regional competition policy framework, the ASEAN must take into consideration all of the AMSs' aspirations, capabilities, and limitations regarding the enactment and the implementation of competition law. It is crucial that the ASEAN's framework is suitable and compatible with the AMSs' local contexts to avoid disintegration or departure from the regional design. Both situations would be detrimental to the ASEAN's economic integration aspiration. The ASEAN presents a peculiar case in that many members of the family have enacted and enforced competition laws. It is thus necessary for the ASEAN's design to accommodate existing competition law-related constructions while encouraging individual nations to align their laws with the ASEAN's framework. Equally, encouraging the enactment of new competition law regimes should also figure among the ASEAN's priorities.

Indonesia¹⁰²⁶ and Thailand¹⁰²⁷ were the first AMSs to introduce competition law statutes in 1999 followed by Vietnam¹⁰²⁸ and Singapore¹⁰²⁹ in 2004. Generally, these enactments were spurred on by a shift in national policy towards a market economy, notably trade liberalisation, the deregulation of the economy, and the privatisation of states' assets, as well as international pressures.¹⁰³⁰ Indonesia and Thailand, in their state of “economic and financial distress”¹⁰³¹ both adopted their first comprehensive competition law in the wake of the Asian Financial Crisis. Indonesia enacted its competition law statute in light of the conditional terms laid down by the IMF in exchange of the latter's financial assistance,¹⁰³²

¹⁰²⁵ Fox, Eleanor M., *Antitrust and Institutions: Design and Change*, 41 Loy. U. Chi. L. J. 473 (2010).

¹⁰²⁶ Law No. 5 of Year 1999.

¹⁰²⁷ TCA.

¹⁰²⁸ Vietnam Law on Competition, No.27/2004/QH11.

¹⁰²⁹ SCA.

¹⁰³⁰ De Sevelinges, Franz Hepp, *Snapshot of Competition Laws in ASEAN and China*, 26 AUT Int'l L. Practicum 115 (2013).

¹⁰³¹ Sivalingam, G., *Competition Policy and Law in ASEAN*, 51 The Singapore Economic Review 241 (2006).

¹⁰³² Indonesia, *Letter of Intent and Memorandum of Economic and Financial Policies* <<https://www.imf.org/external/np/loi/072998.htm>>.

while Thailand's competition law was introduced as a part of financial sector reforms.¹⁰³³ The enactment of Vietnam's competition law was fuelled by the introduction of the *doi moi* policy and was centred around the development of a socialist-oriented market economy. It was reported that a bilateral trade agreement with the US, as well Thailand's aspirations to join the WTO were the catalyst for its competition legislation.¹⁰³⁴ Both internal and external factors contributed to Singapore's comprehensive competition law. The enactment followed its transition to a market economy and the conclusion of a bilateral agreement with the US.¹⁰³⁵

Following the ASEAN's announcement of regional economic integration with competition policy as its pillar, Malaysia,¹⁰³⁶ Myanmar,¹⁰³⁷ and the Philippines¹⁰³⁸ passed their competition law bills. It is easy to assume that the AEC motivated their enactments in light of the timing. This is especially evident in the case of Myanmar and the Philippines whose laws were introduced mere months before the introduction of the AEC at the end of 2015 although the ASEAN's contribution was never publicly acknowledged by these AMSs. As mentioned in Chapter 3, regional economic integration is not among the goals of their competition law statutes, although this is not an uncommon practice in member states of a regional organisation. Currently, there are still three AMSs without comprehensive national competition statutes: Brunei, Cambodia and Lao PDR. Examining the AMSs' competition law regimes reveals superficial commonalities, chiefly in the core areas of competition law. All AMSs have established at least one dedicated regulatory body in charge of enforcing competition law. Following the Indonesian competition statute¹⁰³⁹ and the presidential decree,¹⁰⁴⁰ the Indonesian Competition Commission (KPPU) was established as an independent competition regulatory agency to regulate competition, enforce competition law, and provide recommendations to the government regarding competition-related policies. The KPPU is accountable to only the President and the House Representatives. In the same year, Thailand established its Trade Competition Commission based on provisions of the *Thai Trade Competition Act (TCA)*.¹⁰⁴¹ In the following years, other AMSs each created a single national competition authority: namely, the Competition Commission of Singapore,¹⁰⁴² the Malaysian Competition Commission,¹⁰⁴³ the

¹⁰³³ Flatters, Frank, 'Thailand and the Crisis: Roots, Recovery and Long-Run Competitiveness' in Woo, Wing Thye, Sachs, Jeffrey D. and Schwab, Klaus (eds), *The Asian Financial Crisis Lessons for a Resilient Asia* (Cambridge MA, The MIT Press 1997); Thailand, *Letter of Intent* <<https://www.imf.org/external/np/loi/081497.htm>>.

¹⁰³⁴ Furse, Mark, *Antitrust Law in China, Korea and Vietnam* (Oxford University Press 2009) 26-27.

¹⁰³⁵ United States-Singapore Free Trade Agreement [Signed 6 May 2003, Ratified 31 July 2003, Implemented 1 January 2004] art. 12(2)(1).

¹⁰³⁶ Malaysia Competition Act.

¹⁰³⁷ Myanmar Competition Law.

¹⁰³⁸ Philippines Competition Act, Republic Act No. 10667.

¹⁰³⁹ Law No. 5 of Year 1999, art. 30.

¹⁰⁴⁰ Presidential Decree No. 75/1999 Komisi Pengawas Persaingan Usaha [1999].

¹⁰⁴¹ TCA, ch. 1.

¹⁰⁴² SCA, part 2.

¹⁰⁴³ Malaysia Competition Commission Act, Act 713 [2010] sec. 3.

Competition Commission of Myanmar¹⁰⁴⁴ and the Philippines Competition Commission.¹⁰⁴⁵ Vietnam is the only AMS with two institutional arrangements – The Vietnam Competition–Administration Department established in 2004 under the Ministry of Trade, and the Vietnam Competition Council, established in 2006 as an independent agency. Both organs were established on the basis of the same competition statute.¹⁰⁴⁶ In addition, most AMSs' competition regimes include all the core substantive components of competition law, namely, provisions for the prohibition of anticompetitive agreements,¹⁰⁴⁷ abuse of dominant position,¹⁰⁴⁸ and merger control.¹⁰⁴⁹ Among these regimes, the Malaysia's competition law is unique due to the absence of merger control in the law. This absence is inexplicable and deprives the Malaysian Competition Commission of considerable power and influence in exercising its functions and duties.¹⁰⁵⁰

Despite the seeming similarities in the broad principles of competition law across jurisdictions, competition laws are not necessarily identical across all AMSs. This chapter will examine whether the AMSs' competition laws share sufficient commonalities beyond superficial appearance to enable soft harmonisation at a regional level. This question is of particular importance in the context of the ASEAN because of the ASEAN's reliance on the willingness to harmonise on behalf of the AMSs without the aid of a regional centralised institution. Singapore and Thailand are chosen for this comparison since fall at opposite ends of the efficacy spectrum. The literature is unanimous in its condemnation of the efficacy of Thailand's competition law¹⁰⁵¹ despite Thailand having one of the oldest competition law regimes in the region. In spite of its 16 years of existence, Thailand's

¹⁰⁴⁴ Myanmar Competition Law, art. 5.

¹⁰⁴⁵ Philippines Competition Act, Republic Act No. 10667, sec. 5.

¹⁰⁴⁶ Vietnam Law on Competition, No.27/2004/QH11, ch. 4. TCA, sec. 27. Vietnam Law on Competition, No.27/2004/QH11, arts. 8-10. Philippines Competition Act, Republic Act No. 10667, sec. 14.

¹⁰⁴⁷ See, Law No. 5 of Year 1999, ch. 3; SCA, sec. 34; Malaysia Competition Act, sec. 4; TCA, sec. 27; Vietnam Law on Competition, No.27/2004/QH11, arts. 8-10; Philippines Competition Act, Republic Act No. 10667, sec. 14; Myanmar Competition Law, sec. 13(b) & 14.

¹⁰⁴⁸ See Law No. 5 of Year 1999, art. 25; Malaysia Competition Act, sec. 10; SCA, sec. 47; TCA, sec. 25; Vietnam Law on Competition, No.27/2004/QH11, arts. 11-15; Myanmar Competition Law, art. 13(c); Philippines Competition Act, Republic Act No. 10667, sec. 15.

¹⁰⁴⁹ See Law No. 5 of Year 1999, art. 28; SCA, sec. 54; TCA, sec. 26; Vietnam Law on Competition, No.27/2004/QH11, arts. 16-24; Myanmar Competition Law, ch.10; Philippines Competition Act, Republic Act No. 10667, ch. 4.

¹⁰⁵⁰ Lee, Cassey, *Competition Law Enforcement in Malaysia: Some Recent Developments* (ERIA Discussion Paper Series 2014).

¹⁰⁵¹ See, for example, Nikomborirak, Deunden, *The Political Economy of Competition Law: The Case of Thailand*, 26 Nw. J. Int'l L. & Bus. 597 (2006); Chantara-Opakorn, Anan, *Thailand Competition Law and Its Implication on International Mergers and Acquisition*, 18 Wis. Int'l L.J. 591 (2000); Paopongsakorn, Nipon, *The New Competition Law in Thailand: Lessons for Institutional Building*, 21 Review of Industrial Organisation 185 (2002); Thanitcul, Sakda, *Competition Law in Thailand: A Preliminary Analysis*, 1 Wash. U. Global Stud. L. Rev. 171 (2002); Williams, Mark, *Competition Law in Thailand: Seeds of Success or Fated to Fail?*, 27 World Competition 459 (2004); Thanitcul, R. Ian McEwin and Sakda, 'Thailand' in Williams, Mark (ed), *The Political Economy of Competition Law in Asia* (Cheltenham, Edward Elgar Publishing 2013); Nikomborirak, Deunden, 'The Political Economy of the Competition Regimes in Thailand and Korea: A Comparison' in Lewis, David (ed), *Building New Competition Law Regimes: Selected Essays* (Cheltenham, Edward Elgar Publishing 2013).

competition regime has yet to produce an enforcement decision. In contrast, Singapore's competition law is substantially enhanced by secondary regulations and actual enforcement decisions. Its enforcement has been lauded for its "remarkable haste."¹⁰⁵² Indeed, the first decisions were made as early as 2006,¹⁰⁵³ merely two years after the enactment of the statute. Moreover, the two AMSs' local contexts best reflect the deeply rooted issues of diversity experienced in Southeast Asia. As explained in Chapter 1, Singapore supports the democratic political system while Thailand remains indefinitely under the military junta. Singapore's economic development has resulted in its classification as an advanced economy while Thailand, as with most AMSs, is a developing economy. Their competition statutes were implemented under different circumstances and sufficient time has passed to allow both competition regimes to grow. It would be inappropriate to evaluate a competition regime in this context without giving it the benefit of maturing and earning experience and expertise from actual enforcement over time.

6.1. The Origins of Competition Laws in Thailand and Singapore

The differences between the competition law in Thailand and Singapore go back to the very foundation of the laws.

6.1.1. Thailand

The *TCA* replaced the *Price Fixing and Antimonopoly Act*¹⁰⁵⁴ whose primary goals were price control of goods and services, and monopoly control. It is unfortunate that the *TCA* was originally connected to a package of measures introduced to deal with the consequences of the Asian financial crisis;¹⁰⁵⁵ competition itself was not a priority in the reforms since most of these reforms were related to financial sector reconstruction. The *TCA* has been controversial since its conception and the motivation behind its enactment is still being debated. It is neither a product of international commitments made to the IMF¹⁰⁵⁶ following the 1997 Financial Crisis, nor a term of conditional accession to the WTO as Thailand had gained membership in 1995.¹⁰⁵⁷ Further, there are no obligations resulting from free trade agreements as Thailand's earliest free trade agreement was only

¹⁰⁵² Ong, Burton, *The Origins, Objectives and Structure of Competition Law in Singapore*, 29 World Competition 269 (2006).

¹⁰⁵³ *Qantas & British Airways Restated Joint Services Agreement* [2006] CCS 400/002/06; *Qantas & Orangestar Co-operation Agreement* [2006] CCS 400/003/06.

¹⁰⁵⁴ The Price Fixing and Anti-Monopolies Act.

¹⁰⁵⁵ Flatters, Frank, 'Thailand and the Crisis: Roots, Recovery and Long-Run Competitiveness' in Woo, Wing Thye, Sachs, Jeffrey D. and Schwab, Klaus (eds), *The Asian Financial Crisis Lessons for a Resilient Asia* (Cambridge MA, The MIT Press 1997); Thailand, *Letter of Intent* <<https://www.imf.org/external/np/loi/081497.htm>>.

¹⁰⁵⁶ A competition law related chapter is absent from Thailand's letters of intent to the IMF. Thailand, *Letter of Intent* <<https://www.imf.org/external/np/loi/081497.htm>>; Thailand, *Letter of Intent* <<https://www.imf.org/external/np/loi/112597.htm>>.

¹⁰⁵⁷ WTO, *Member Information* <http://www.wto.org/english/thewto_e/countries_e/thailand_e.htm>.

concluded in 2005.¹⁰⁵⁸ Hence, contrary to popular belief,¹⁰⁵⁹ the *TCA* was *not* a result of international pressures. It was also not designed to address any emerging national economic issues, unlike South Korea's restraint of *chaebols*¹⁰⁶⁰ or the US's control of trusts. The evidence points to a self-made law devoid of external intervention, despite rumours of US self-interested intervention.¹⁰⁶¹ The Thai authorities decided autonomously that they needed a law adjusted to the rapid economic growth and drastic changes in Thailand's economic structure from 1987–1992.¹⁰⁶² Moreover, the promulgation of the *TCA* was necessary to fulfil the mandate established by the *Constitution of Thailand 1997*,¹⁰⁶³ in particular Article 50 which states that “a person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition”¹⁰⁶⁴ and Article 87 which encourages a free economic system through market forces, fair competition, protection of consumers, and prevention of monopolies.¹⁰⁶⁵ The discordance regarding the origin of Thailand's competition law continues. Despite relying on international best practice and experiences, there are contrasting theories about its source of inspiration. On one hand, Thanitcul asserted that the *TCA* was modelled after the *South Korea Monopoly Regulation and Fair Trade Act* and the *Taiwan Fair Trade Law*¹⁰⁶⁶ because of the similarities in economic structure – a few national market dominant firms and many SMEs.¹⁰⁶⁷ On the other hand, Supanit, one of the drafters of the *TCA*, maintained that it was not based on any existing model; rather, it was designed specifically to suit the unique reality of the Thai economy.¹⁰⁶⁸

On the surface, the *TCA* contains all the substantive competition provisions found in most competition law statutes, namely, abuse of dominant position,¹⁰⁶⁹ merger control,¹⁰⁷⁰ and restrictive agreements.¹⁰⁷¹ It also contains a provision for unfair competition¹⁰⁷² as well as a unique trade policy provision prohibiting restrictions on international trade for personal

¹⁰⁵⁸ Thailand-Australia Free Trade Agreement [1 January 2005].

¹⁰⁵⁹ Rennie, Jane, *The Evolution of Competition Law in Singapore and Thailand and Its Implications for Bilateral Competition Policy in SAFTA and TAFTA*, 15 Int. T.L.R. 1 (2009).

¹⁰⁶⁰ Nikomborirak, Deunden, *Paper Tiger and Big Business Monopolies [in Thai]*, 53 Way Magazine (2012).

¹⁰⁶¹ Asavanich, Bodin, *Ensuring Compliance and Cooperation in Competition Law Enforcement* (Unpublished 2001). (as seen in Thanitcul, Sakda, *Competition Law in Thailand: A Preliminary Analysis*, 1 Wash. U. Global Stud. L. Rev. 171 (2002).)

¹⁰⁶² Thanitcul, Sakda, *Competition Law in Thailand: A Preliminary Analysis*, 1 Wash. U. Global Stud. L. Rev. 171 (2002).

¹⁰⁶³ Since then Thailand has had three more Constitutions two of which were installed by the military coups.

¹⁰⁶⁴ The Constitution of the Kingdom of Thailand [1997] sec. 50.

¹⁰⁶⁵ *Ibid.*, sec. 87.

¹⁰⁶⁶ Thanitcul, Sakda, *Competition Law in Thailand: A Preliminary Analysis*, 1 Wash. U. Global Stud. L. Rev. 171 (2002).

¹⁰⁶⁷ Chantara-Opakorn, Anan, *Thailand Competition Law and Its Implication on International Mergers and Acquisition*, 18 Wis. Int'l L.J. 591 (2000).

¹⁰⁶⁸ Supanit, Sutee, *Thailand Report* (Report to the Fair Trade Commission of Japan, 2013).

¹⁰⁶⁹ *TCA*, sec. 25.

¹⁰⁷⁰ *Ibid.*, sec. 26.

¹⁰⁷¹ *Ibid.*, sec. 27.

¹⁰⁷² *Ibid.*, sec. 29.

consumption.¹⁰⁷³ It was speculated that the inclusion of the latter was to prevent consumers from purchasing luxurious cars directly from foreign manufacturers, thus bypassing local retail agents.¹⁰⁷⁴ The *TCA* is ambiguous and secondary regulations clarifying its enforcement were unjustly delayed. The *TCA* explicitly states that to be enforceable, provisions for the abuse of dominant position and mergers first need secondary regulations defining dominant position in a relevant market¹⁰⁷⁵ and transaction-size thresholds for merger control.¹⁰⁷⁶ The definition of dominant position would not be established until 2007,¹⁰⁷⁷ eight years after the *TCA*'s enactment, while the definition of mergers and acquisitions was only introduced in 2013.¹⁰⁷⁸ Prior to their arrival, it was impossible to enforce provisions on abuse of dominant position and merger control. Moreover, the merger control is the only area without official guidelines.

The *TCA* establishes the primary competition law enforcement authority called the Trade Competition Commission [*hereinafter* TCC]¹⁰⁷⁹ and the Office of Trade Competition Commission [*hereinafter* the Office] acting as its secretariat body.¹⁰⁸⁰ The TCC has investigated and considered ninety-five cases over its 16-year run,¹⁰⁸¹ based primarily on complaints received. None were adjudicated. In 2012, the TCC promised to make its first enforcement case.¹⁰⁸² To this date, the fate of this case remains unknown.

It was reported that a new draft competition bill gained the approval of the National Reform Council, an organ formulated by the National Council for Peace and Order¹⁰⁸³ to implement its reform agenda, on 21 July 2015¹⁰⁸⁴ on the heels of a civil society group campaign against one of the country's largest monopolistic conglomerations.¹⁰⁸⁵ However, the reform had already been made part of the "reform agenda No.12 on monopoly and fair competition" planned by the military junta which assumed power.¹⁰⁸⁶ It is rumoured that

¹⁰⁷³ *Ibid.*, sec. 28.

¹⁰⁷⁴ Thanitcul, Sakda, *Competition Law in Thailand: A Preliminary Analysis*, 1 Wash. U. Global Stud. L. Rev. 171 (2002).

¹⁰⁷⁵ *TCA*, sec. 8.

¹⁰⁷⁶ *Ibid.*, sec. 26.

¹⁰⁷⁷ Office of Thailand Trade Competition Commission, *Notifications of Trade Competition Commission on Criteria for Business Operator with Market Domination* (2007).

¹⁰⁷⁸ Office of Thailand Trade Competition Commission, *Resolutions of Trade Competition Commission on Criteria for Business Combination [in Thai]* (2013).

¹⁰⁷⁹ *TCA*, sec. 6.

¹⁰⁸⁰ *Ibid.*, sec. 18.

¹⁰⁸¹ Office of Thailand Trade Competition Commission, *Data on Complaints Received [in Thai]* <http://otcc.dit.go.th/?page_id=61>. (most notably is the absence of any complaints lodged in 2014 which the TCC reported the cause was the political turmoil in Bangkok, Thailand)

¹⁰⁸² Samadi, Faez, *New Thai Trade Enforcer Promises Action* Global Competition Review (2012).

¹⁰⁸³ Following Thailand's 2014 coup d'état, the National Council for Peace and Order was formed by the military junta after its deposal of the elected government to govern Thailand.

¹⁰⁸⁴ National Reform Council, *Record of Meeting No. 58/2558* (21 July 2015).

¹⁰⁸⁵ Prachathai, *Civil Society Groups Campaign for Boycott of 7/11*

<<http://www.prachatai.com/english/node/5032>>.

¹⁰⁸⁶ National Reform Council, *Reform Agenda No.12 on Monopoly and Fair Competition* (The Secretariat of the House of Representative, August 2015).

the new draft will introduce many changes to the law,¹⁰⁸⁷ the most notable of which would be the inclusion of state-owned enterprises within the scope of competition law and a shift towards more genuine independence for the TCC's structure. It is essentially a modernisation of Thailand's competition law. It was promised that the draft bill would be introduced to the parliament at the end of 2015 to coincide with the institution of the AEC but currently there is no new development. Given the lack of development in Thailand's competition law, the scope of discussion on this subject may appear limited when compared with the discussion of Singapore's competition law.

6.1.2. Singapore

The enactment of Singapore's comprehensive competition law was due to both internal and external factors. Its introduction coincided with the emergence of the market economy movement and it established a competition law regime that could be applied to all sectors, except those explicitly regulated by sectoral regulations such as the *Telecom Competition Code*¹⁰⁸⁸ and the *Media Market Conduct Code*.¹⁰⁸⁹ These were a part of the liberalisation of industry sectors which have traditionally been monopolised by State enterprises.¹⁰⁹⁰ Sector-specific competition regulations are necessary to ensure the relevant industry's competitiveness after liberalisation. The impetus for the market economy movement can be traced back to the government's conscious decision to expose domestic firms to greater levels of competition, thus making them more resilient and better-equipped to compete in a globalised market while at the same time creating a more attractive legal environment for foreign investors upon whom Singapore is heavily reliant.¹⁰⁹¹ This decision marked "an important shift in Singapore's hitherto relatively laissez-faire commercial environment in which undertakings have been free to compete, or not to compete, in whatever manner that suited their commercial objectives."¹⁰⁹² Another significant factor was the bilateral trade agreement concluded with the US in 2003 under the terms of which Singapore is required to "enact general competition legislation by January 2005, and shall not exclude enterprises from that legislation on the basis of their status as government enterprises."¹⁰⁹³ It is evident that the government-linked companies [*hereinafter* GLC] are of significant concern to the US and its enterprises. "GLCs are wholly or partly government-owned companies that are held by two principal state holding companies – the Government of Singapore Investment Co. and Temasek Holdings Pte. Ltd. These two unlisted companies

¹⁰⁸⁷ National News Bureau of Thailand, *The National Reform Council Approved the Report of the Commission on Reform of Agriculture, Industry, Commerce, Tourism and Services on the Proposed Reform of Competition Law in Order to Solve the Monopoly Issue*

<http://thainews.prd.go.th/website_th/news/news_detail/TNPOL5807210010024>.

¹⁰⁸⁸ Code of Practice for Competition in the Provision of Telecommunication Services [2000].

¹⁰⁸⁹ Code of Practice for Market Conduct in the Provision of Media Services [2003].

¹⁰⁹⁰ Ong, Burton, *The Origins, Objectives and Structure of Competition Law in Singapore*, 29 *World Competition* 269 (2006).

¹⁰⁹¹ *Ibid.*

¹⁰⁹² Ong, Burton, *The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape* Sing. J. Legal Stud. 172 (2006).

¹⁰⁹³ United States-Singapore Free Trade Agreement, art. 12(2)(1).

are wholly owned by Singapore's government."¹⁰⁹⁴ Through the GLCs, the government has ownership and involvement in many industries in Singapore and overseas.¹⁰⁹⁵ However, the lingering public suspicion of preferential treatment accorded to the GLCs was deemed to be unfounded.¹⁰⁹⁶

The *Singapore Competition Act (SCA)*¹⁰⁹⁷ was enacted in 2004. It was largely modelled on the *UK Competition Act of 1998*, which was in turn premised on European Union competition law before the reforms of 2004.¹⁰⁹⁸ The most obvious example of the inspiration drawn in this case is the *SCA*'s prohibition of abuse of dominant position which is a direct transplant of Article 102 *TFEU*.¹⁰⁹⁹ The choice of inspiration is unsurprising given the country's British colonial past. It seems that Singapore is employing the contextualised approach in which it borrowed ideas and principles from foreign competition laws and adapted them to its own context.¹¹⁰⁰ The *SCA* was implemented cautiously in three phases. During the first phase, starting from 1 January 2005, only provisions pertaining to the creation of the Competition Commission of Singapore [*hereinafter* CCS], Singapore's competition authority, were in force. A year later, the second phase saw the enforcement of provisions relating to anticompetitive agreements, abuse of dominant position, and the CCS's enforcement power. The last phase in 2007 commenced the enforcement of merger control. Unlike the case of Thailand, the CCS did not wait long to start exercising its enforcement power. As soon as the second phase was implemented with the establishment of major competition law-related provisions, the CCS issued its first decisions.¹¹⁰¹ Despite this, the CCS was still criticised for its cautious approach with few case laws and decisions issued.¹¹⁰²

6.2. Substantive Provisions

On the surface, both the *TCA* and the *SCA* contain all major provisions, namely prohibition of anticompetitive agreements and abuse of dominant position, and provisions on the

¹⁰⁹⁴ Williams, Mark, *The Lion City and the Fragrant Harbor: The Political Economy of Competition Policy in Singapore and Hong Kong Compared*, 54 *Antitrust Bull.* (2009).

¹⁰⁹⁵ Healey, Deborah, *Application of Competition Laws to Government in Asia: The Singapore Story*, 2 *KLRI Journal of Law and Legislation* 57 (2012).

¹⁰⁹⁶ Ramirez, Carlos D. and Tan, Ling Hui, *Singapore, Inc. Versus the Private Sector: Are Government Linked Companies Different?* (IMF Working Paper WP/03/156, 2003).

¹⁰⁹⁷ *SCA*.

¹⁰⁹⁸ Ong, Burton, 'Cooperation, Comity and Competition Policy in Singapore' in Guzman, Andrew T. (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press 2010).

¹⁰⁹⁹ For further analysis on the transplant of Article 102 *TFEU* see, Ong, Burton, *Exporting Article 82 EC to Singapore: Prospects and Challenges*, 2 *Competition Law Review* 99 (2006).

¹¹⁰⁰ Shahein, Heba, 'Designing Competition Laws in New Jurisdictions: Three Models to Follow' in Whish, Richard and Townley, Christopher (eds), *New Competition Jurisdiction: Shaping Policies and Building Institutions* (Edward Elgar Publishing 2012).

¹¹⁰¹ *Qantas & British Airways Restated Joint Services Agreement; Qantas & Orangestar Co-operation Agreement*.

¹¹⁰² Cheng, Thomas K., *A Tale of Two Competition Law Regimes - The Telecom-Sector Competition Regulations in Hong Kong and Singapore*, 30 *World Competition* 501 (2007).

control of concentrations of undertakings but differ slightly with regard to the scope of their respective laws.

6.2.1. The Scope of Competition Law

The *TCA* broadly applies to undertakings in “agriculture, industry, commerce, finance, insurance, and services and shall include other undertakings prescribed by Ministerial Regulations.”¹¹⁰³ It takes an institutional approach focusing on a determined set of commercial activities, namely, distributor, producer, or importer, in the domain of agriculture, industry, commerce, finance, insurance, and services, as well as other undertakings prescribed by ministerial regulations.¹¹⁰⁴ The language used in this statute is highly detailed and specific, demonstrating its intent to clearly communicate the scope of the law. State administrations, state-owned enterprises, farmers’ groups, and business under a specific regulatory authority are excluded from its application.¹¹⁰⁵ The exclusion of state-owned enterprises is particularly worrisome in the case of Thailand where this type of enterprises ventures into the structural area, notably in the field of electricity, gas and petroleum, and railways.¹¹⁰⁶ This choice is attributed to the Ministry of Finance’s fear that competition law would obstruct state-owned businesses or state-owned utility businesses which do not seek profit.¹¹⁰⁷ The fear is misplaced and misguided since state-owned enterprises enter into competition with private businesses and also gain profit from selling their concessions to other business operators. Finally, the *TCA* does not cover foreign enterprises.

In contrast, the scope of the *SCA* is defined in a more generalised and positive manner. It applies to all undertakings, defined here as “any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services.”¹¹⁰⁸ The language chosen in this statute is thus more inclusive compared to the *TCA*. Exempted from the law are the acts or agreements entered into by the government, any statutory body, or any person acting on behalf of the government or that statutory body.¹¹⁰⁹ It follows that the *SCA* does not regard the government and its statutory bodies as market players. In addition, the statute does not apply to sector-specific activities that are already under sectoral authority regulations.¹¹¹⁰ Services of general economic interest or other public policy are exempted from this provision.¹¹¹¹ The most notable absence from the exclusion list are the GLCs. This is evidently the influence of the aforementioned US–Singapore Free Trade

¹¹⁰³ *TCA*, sec. 3.

¹¹⁰⁴ *Ibid.*

¹¹⁰⁵ *Ibid.*, sec. 4.

¹¹⁰⁶ Nikomborirak, Deunden, *Paper Tiger and Big Business Monopolies [in Thai]*, 53 *Way Magazine* (2012).

¹¹⁰⁷ Thai Publica, *Academic Seminar on Antitrust Amendment to Sustainably Eliminate Monopolies [in Thai]* <<http://www.thaipublica.org/2011/10/academics-antitrust-amendment/>>.

¹¹⁰⁸ *SCA*, sec. 2(1).

¹¹⁰⁹ *Ibid.*, sec. 31(4).

¹¹¹⁰ *Ibid.*, Third Schedule, paras. 6 & 7.

¹¹¹¹ *Ibid.*, Third Schedule, para. 1.

Agreement. Regardless of how extensive it appears to be, Williams deemed the scope of the *SCA* to be narrow and riddled with generous exemptions, and stated that it would be unlikely to bring about significant change to the Singapore's domestic economy.¹¹¹²

6.2.2. The Prohibition of Anticompetitive Agreements

6.2.2.1. The Definition of Agreement

Section 27 of the *TCA* and Section 34 of the *SCA* both prohibit anticompetitive agreements. Neither defines what constitutes an agreement. In the absence of a definition for the term "agreement", the *TCA* restricts the scope of the term to actions on each part to "do any act."¹¹¹³ It follows that a consensus not to act would not fall within the scope of the *TCA*. The statute is silent on decisions by associations of undertakings or concerted practices, and block exemptions. It, however, accepts both form of the concept of agreement: horizontal and vertical agreements may be subject to the application of the *TCA*.¹¹¹⁴

In the case of Singapore, the *CCS Guidelines on the Section 34 Prohibition* clarify that an agreement occurs when there is a "consensus on the actions each party [to the agreement] will, or will not, take."¹¹¹⁵ According to the *SCA*, the concept of agreements between undertakings can be expanded to include decisions by associations of undertakings or concerted practices.¹¹¹⁶ The language of the *SCA* suggests that agreement can take any form including an informal one. It covers even mere participation in a meeting with an anticompetitive purpose. The participant does not need to manifest opposition or publicly distance him/herself.¹¹¹⁷ However, Section 34 of the *SCA* does not apply to undertakings which form a single economic unity.¹¹¹⁸ Therefore, an agreement between a parent and its subsidiary units or between two firms under the control of a third firm does not constitute an agreement under Section 34 of the *SCA*. Services of general economic interest or other public policy as well as agreements within the block exemption order are exempted from this provision.¹¹¹⁹ To date, there has been only one block exemption issued for liner

¹¹¹² Williams, Mark, *The Lion City and the Fragrant Harbor: The Political Economy of Competition Policy in Singapore and Hong Kong Compared*, 54 *Antitrust Bull.* (2009).

¹¹¹³ *TCA*, sec. 27.

¹¹¹⁴ *Ibid.*

¹¹¹⁵ Competition Commission of Singapore, *CCS Guidelines on the Section 34 Prohibition* (2007) para. 2.10.

¹¹¹⁶ *SCA*, sec. 34.

¹¹¹⁷ *Price Fixing of Monthly Salaries of New Indonesian Foreign Domestic Workers by Employment Agencies* [2011] CCS 500/001/11 para. 52. Subsequently affirmed in *Ball Bearings* para. 41.

¹¹¹⁸ *Qantas & Orangestar Co-operation Agreement* para. 30. (the CCS admits that the application of single economic entity is based on the facts of the case but the general factors are unity of interest, financial and operational support, and decisive influence); *CCS Guidelines on the Section 34 Prohibition*, para. 2.7.; *Ball Bearings*, para. 352.

¹¹¹⁹ *SCA*, Third Schedule.

shipping agreements.¹¹²⁰ In addition, Section 34 shall not apply to vertical agreements, unless specifically specified by the Minister of Trade and Industry.¹¹²¹ In this context, a vertical agreement refers to any agreement entered into between two or more undertakings each of which operates, for the purpose of the agreement, at a different level of the production or distribution chain.¹¹²² The gravity of this exception is considerable considering vertical agreements usually manifest under price (e.g., minimum or maximum resale price maintenance) and non-price restraints (e.g., exclusive territorial or customer arrangement, exclusive dealings, tie-ins, selective distribution, and quantity forcing).¹¹²³ The exemption is on the premise that vertical agreements are generally less detrimental to competition than horizontal agreements.¹¹²⁴ This is in line with the commonly accepted approach which recognises that vertical agreements are generally efficient and thus procompetitive.¹¹²⁵

6.2.2.2. The Restriction to Competition Test

The mere existence of an agreement is not always indicative of anti-competitiveness. For this, agreements need to undergo the restriction to competition test. Both the *TCA* and the *SCA* apply this test. The *TCA* prohibits agreements between undertakings that result in monopoly, and reduce or eliminate competition in the relevant market.¹¹²⁶ The *Guidelines on Section 27* later clarified that the TCC evaluates the agreement by reference to its effect.¹¹²⁷ The *TCA* provides a lengthy list of agreements falling within its application.¹¹²⁸ It considers price-fixing, big-rigging, and agreements with intention to create market dominance or market control as hard core restrictions under the *per se* rule. Meanwhile, market sharing, limiting production to less than the market demand, reducing the quality of the goods or services while maintaining or raising the price, sharing a sole distributor, and limiting purchase or distribution conditions or practice to achieve the uniform or agreed practice could be exempted with an express *ex ante* permission of the TCC provided that there is commercial necessity. There is no indication pertaining to the analysis of the rule of reason and the exclusion of agreements with countervailing benefits is conspicuously

¹¹²⁰ Competition Commission of Singapore, *Competition (Block Exemption for Liner Shipping Agreements) Order* (2006). (Renewed by Competition Commission of Singapore, *Competition (Block Exemption for Liner Shipping Agreements) (Amendment) Order* (2010). and will remain in effect until 31 December 2015).

¹¹²¹ *SCA*, Third Schedule, para. 8(1).

¹¹²² *Ibid*, Third Schedule, para. 8(2). The definition corresponds with the general definition of vertical agreement in which it is commonly referred to as “those between undertakings operating at different levels of the production chain of one same set of goods or services.” See, Colino, Sandra Marco, *Vertical Agreements and Competition Law : A Comparative Study of the EU and US Regimes* (Hart Publishing 2010) 1.

¹¹²³ OECD, *Trade and Competition Policies for Tomorrow* (OECD Publishing 1999) 43.

¹¹²⁴ *CCS Guidelines on the Section 34 Prohibition*, para. 2.12.

¹¹²⁵ Godek, Paul E., *A Chicago-School Approach to Antitrust for Developing Countries*, 43 *The Antitrust Bulletin* 261 (1998).

¹¹²⁶ *TCA*, sec. 27.

¹¹²⁷ Office of Thailand Trade Competition Commission, *Guidelines on Section 27 of Thailand Trade Competition Act [in Thai]* (2010) art. 6.2 & 6.3.

¹¹²⁸ *TCA*, sec. 27.

absent. It is possible that the *TCA* is more concerned about determining the existence of hard-core cartels under the *per se* rule.

The *SCA* evaluates the agreement with reference to its object or effect, and the appreciable prevention, distortion or restriction of competition within Singapore.¹¹²⁹ The statute then proceeds to compile a list of what constitutes restriction to competition. Restriction to competition is when companies:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.¹¹³⁰

Conversely, an agreement will fall outside of the scope of Section 34 when it has an insignificant effect on the market.¹¹³¹ The *CCS Guidelines on the Section 34 Prohibition* further clarify that an agreement generally has no appreciable adverse effect on competition:

- If the aggregate market share of the parties to the agreement does not exceed 20% on any of the relevant markets affected by the agreement;
- If the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement, where the agreement is made between non-competing undertakings;
- In the case of an agreement between undertakings where each undertaking is a small or medium enterprise.¹¹³²

In this regard, the primary factor considered under the rule of reason test is market share threshold. An agreement involving price-fixing, bid-rigging, market sharing or output limitations are considered hard-core restriction under the *per se* rule.¹¹³³

In addition, the *SCA* grants exemption to agreements with net economic benefit.¹¹³⁴ These are considered to be agreements with a countervailing effect to competition, agreements

¹¹²⁹ *SCA*, sec. 34.

¹¹³⁰ *Ibid*, sec. 34(2).

¹¹³¹ This is reminiscent of *Franz Völk v. S.P.R.L. Ets J. Vervaecke* (Case 5/69) [1969] ECR 295, [1969] CMLR 273.

¹¹³² *CCS Guidelines on the Section 34 Prohibition*, para. 2.19.

¹¹³³ *Ibid*, para. 2.20; *Collusive Tendering (Bid-Rigging) in Electrical and Building Works* [2010] SGCCS 4; *Re Price Fixing of Rates of Modelling Services in Singapore by Modelling Agencies* [2013] SGCAB2. [hereinafter *Modelling Services*]

contributing to improving production or distribution, or promoting technical or economic progress insofar as they do not impose on the undertakings concerning restrictions which are not indispensable to the attainment of those objectives or afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

6.2.3. The Prohibition of Abuse of Dominant Position

6.2.3.1. The Definition of Dominant Position

Coincidentally, the concept of dominant position was introduced in both Thailand and Singapore in 2007¹¹³⁵ despite Thailand having had a comprehensive competition statute since 1999. According to the *Notifications on Criteria for Business Operator with Market Domination*, the following are considered to be in a dominant position under the TCA:

1. A business operator in any goods or services, with market share in the previous year over 50% and at least THB 1,000 million [approximately USD 28 million] turnover; or
2. The top three business operators, in any goods or services, with combined market share in the previous year over 75% and at least THB 1,000 million turnover.

The exception is for a business operator with the market share less than 10% or turnover less than THB 1,000 million in the previous year.¹¹³⁶

The language chosen demonstrates that a dominant position need not be exclusively held by a single undertaking but can be shared between three undertakings. In addition, the market share is the sole criteria in determining market dominance.

In comparison, the CCS states that the market share criterion alone may not be sufficiently reliable and suggests other determinants may need to be considered as well. These could include entry barriers, the degree of innovation, product differentiation, the responsiveness of buyers to price increases, and the price responsiveness of competitors.¹¹³⁷ This position has been sustained by the Competition Appeal Board.¹¹³⁸ Henceforth, the factors that could be considered include the market share of the undertaking, the ability of the undertaking to profitably sustain prices above competitive levels, the undertaking's ability to eliminate or weaken competitors, the existence of countervailing buyer power as well as barriers to entry in the market. However, the primary factor remains the market share. It follows that

¹¹³⁴ SCA, Third Schedule, para. 9.

¹¹³⁵ *Notifications of Trade Competition Commission on Criteria for Business Operator with Market Domination*; Competition Commission of Singapore, *CCS Guidelines on the Section 47 Prohibition* (2007).

¹¹³⁶ *Notifications of Trade Competition Commission on Criteria for Business Operator with Market Domination*.

¹¹³⁷ *CCS Guidelines on the Section 47 Prohibition*, para. 3.7.

¹¹³⁸ *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] SGCAB 1, paras. 222-249.

the CCS generally considers market share of above 60 percent as an indicator of a dominant position in the relevant market.¹¹³⁹

Some differences also emerge in the conceptualisation of dominance, most notably in the evaluation of dominant position. Here again, the TCC operates under a more restrictive analysis by depending exclusively on the criterion of market share threshold. It is possible that this decision was based on economic practicality¹¹⁴⁰ and legal certainty suitable for an inexperienced competition authority at the cost of unreliable technical accuracy.¹¹⁴¹

6.2.3.2. The Classification of Abuse

When it is established that an undertaking is in a dominant position, the second test to determine whether the undertaking's behaviour is an abuse of dominant position will take place. According to the *TCA* the abuse is:

- (1) unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services;
- (2) unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators;
- (3) suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand;
- (4) intervening in the operation of business of other persons without justifiable reasons.¹¹⁴²

In sub-paragraph (4) the *TCA* might overtly enlarge the concept of abuse. Without actual decisions or guidelines to aid in clarifying the ambiguous statute, it is impossible to estimate the scope of the text. There is no indication of whether the *TCA* based its classification of abuse on actual or potential impact of the conduct on competition.

In comparison, the *SCA* lists a broader classification of abuse as follows:

- (a) predatory behaviour towards competitors;
- (b) limiting production, markets or technical development to the prejudice of consumers;

¹¹³⁹ *CCS Guidelines on the Section 47 Prohibition*, para. 3.8.

¹¹⁴⁰ Gal, Michal S., *Competition Policy for Small Market Economies* (Harvard University Press 2003) 61.

¹¹⁴¹ Baker, Jonathan B. and Bresnahan, Timothy F., *Estimating the Residual Demand Curve Facing a Single Firm*, 6 *International Journal of Industrial Organization* 283 (1988); Vickers, John, *Market Power in Competition Case*, 2 *European Law Journal* 8 (2006).

¹¹⁴² *TCA*, sec. 25.

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of contracts.¹¹⁴³

Both actual and potential effect of the conduct in competition is accepted.¹¹⁴⁴ Despite the different language used in the *TCA* and the *SCA*, the two sets of classification of abuse resemble each other in nature since they both refer to exploitative and exclusionary conduct.

6.2.4. The Merger Control

6.2.4.1. The Definition of Merger

Section 26 of the *TCA* prohibits anticompetitive mergers. Mergers are deemed to have arisen in the following contexts:

- (1) a merger made by a producer with another producer, by a distributor with another distributor, by a producer with a distributor, or by a service provider with another service provider, which has the effect of maintaining the status of one business and terminating the status of the other business or creating a new business;
- (2) a purchase of the whole or part of assets of another business with a view to controlling business administration policies, administration and management;
- (3) a purchase of the whole or part of shares of another business with a view to controlling business administration policies, administration and management.¹¹⁴⁵

The *TCA* chooses the term “merger” to encompass a broader concept which includes merger, acquisition, direct and indirect control, joint venture, as well as horizontal and vertical mergers. Essentially, a merger occurs when previously independent undertakings are transformed into a single new entity irrespective of the precise nature and language of the concentration. Despite introducing further clarification to the *TCA*, there remains persistent ambiguity in many important issues. For instance, there is no explanation regarding the appraisal of the business concentrations. None of the known tests – the dominance test, the substantial lessening of competition test, the significantly impede effective competition test – are mentioned in the *TCA* nor secondary regulations. Incidentally, merger control is the only major provision of the *TCA* that has no practical guidelines.

¹¹⁴³ *SCA*, sec. 47(2).

¹¹⁴⁴ *Re SISTIC*, paras. 290-291.

¹¹⁴⁵ *TCA*, sec. 26.

The SCA utilises the same approach in defining a merger. According to the statute, a merger occurs if:

- (a) two or more undertakings, previously independent of one another, merge;
- (b) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- (c) the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.¹¹⁴⁶

Similarly, the SCA employs the term “merger” to cover merger, acquisition, direct and indirect control over the whole or part of an undertaking, and a joint venture to perform on a lasting basis all the functions of an autonomous economic entity. Mergers occur when two or more previously independent undertakings merge. In relation to direct and indirect control, the CCS clarifies that “[t]he existence of control is determined by whether decisive influence is capable of being exercised, rather than the actual exercise of such influence.”¹¹⁴⁷ In addition, a change in the control, for instance from joint control by two undertakings to sole control, is sufficient to constitute a merger.¹¹⁴⁸ The CCS admits decisive influence exists if there is ownership of more than 50 per cent of the voting rights of the undertaking.¹¹⁴⁹ Consequently, if the ownership is between 30 and 50 per cent, the CCS is of the opinion that there exists a rebuttal presumption of decisive influence.¹¹⁵⁰

6.2.4.2. The Organisation of Merger Control

Once the existence of a merger is established, its assessment is based on its economic effect on the relevant market. The TCA prohibits mergers which may result in a monopoly or unfair competition.¹¹⁵¹ As late as 2013, the *Resolutions on Criteria for Business Combination* clarified that the TCC considers competition issues likely to arise when the transaction concerns:

- at least 30 % of market share before and after the merger and the previous year’s sale/revenue of over THB 2 billion [approximately USD 55 million]; or

¹¹⁴⁶ SCA, sec. 54(2).

¹¹⁴⁷ Competition Commission of Singapore, *CCS Guidelines on the Substantive Assessment of Merger* (2007) para. 3.8.

¹¹⁴⁸ *Proposed Acquisition by Heineken International B.V. of Asia Pacific Breweries Limited* [2012] CCS 400/005/12, para. 20.

¹¹⁴⁹ *CCS Guidelines on the Substantive Assessment of Merger*, para. 3.10.

¹¹⁵⁰ *Ibid.*

¹¹⁵¹ TCA, sec. 26.

- the acquisition of at least 25 % of share in the case of a public limited corporation or 50 % of share in the case of limited corporation with one or a combination of both with market share of at least 30 % and combined the previous year sale/revenue of at least THB 2 billion [approximately USD 55 million] in relevant market.¹¹⁵²

The TCC must be notified of transactions falling within this threshold prior to their conclusion. Like most merger control regimes,¹¹⁵³ Thailand uses the mandatory notification system. The criteria presented are market shares both before and after the transaction, and the sales or revenue in the preceding year. The need for a dedicated threshold for different categories of company remains unclear. Despite introducing greater clarification to the *TCA*, the *Resolution* does not adequately disperse the ambiguity surrounding the statute. Nevertheless, the *TCA* contains the balancing approach and allows the TCC to grant temporary permission to the transaction falling under Section 26 of the *TCA* provided that there is reasonable necessity.¹¹⁵⁴

A voluntary notification system is in place in Singapore and applies to both mergers and anticipated mergers.¹¹⁵⁵ This is probably a direct transplant of the UK merger control.¹¹⁵⁶ Consequently, merging undertakings are not required to submit the transaction for review to the competition authority, unless the transaction is likely to pose anticompetitive risk.¹¹⁵⁷ The CCS firmly believes the choice is most appropriate for Singapore since most mergers are “unlikely to raise competition concerns.”¹¹⁵⁸ By not notifying the CCS, however, undertakings faced the risk of an *ex post facto* investigation by the competition authority. In exercising merger control, the *SCA* selects the SLC test.¹¹⁵⁹ This means that the focus is on the impact of the merger on the relevant market, in particular changes in market structure and concentrations. The CCS considers competition concerns are likely to arise if:

- the merged entity will have a market share of 40 % or more; or
- the merged entity will have a market share of between 20 % to 40 % and the post-merger CR3 is 70 % or more [the CR3 refers to the combined market share of the three largest firms in the relevant market].¹¹⁶⁰

To summarise, the predominant criteria are market share and the concentration ratio. Market share is merely one of the indicators of potential competition concerns - for

¹¹⁵² *Resolutions of Trade Competition Commission on Criteria for Business Combination [in Thai]*. [hereinafter the Resolution]

¹¹⁵³ Paas-Mohando, Katri, *Choice of Merger Notification System for Small Economies*, 34 ECLR 548-553 (2013).

¹¹⁵⁴ *TCA*, sec. 35.

¹¹⁵⁵ *SCA*, secs. 56-58.

¹¹⁵⁶ See, Enterprise Act [2002] c.40, sec. 96.

¹¹⁵⁷ Paas-Mohando, Katri, *Choice of Merger Notification System for Small Economies*, 34 ECLR 548-553 (2013).

¹¹⁵⁸ Competition Commission of Singapore, *Public Consultation on Proposed Merger Regime* (2006).

¹¹⁵⁹ *SCA*, sec. 54.

¹¹⁶⁰ *CCS Guidelines on the Substantive Assessment of Merger*, para. 5.15.

instance barriers to entry and expansion and countervailing buyer power.¹¹⁶¹ Market share alone cannot give rise to the presumption that the transaction will substantially lessen the competition.¹¹⁶² It follows that competition concerns could still be raised even if the market share is below the market share threshold. The CCS has admitted that it would be unlikely to investigate small firms where the turnover in Singapore in the financial year preceding the merger is below SGD 5 million [approximately USD 3.6 million], and the combined worldwide turnover in the financial year preceding the merger is below SGD 50 million [approximately USD 35.8 million].¹¹⁶³

Singapore's appraisal of mergers contains the balancing approach. The SCA shall not apply to any merger if the efficiency arising or that may arise from the merger outweighs the adverse effects due to the substantial lessening of competition in the relevant market in Singapore.¹¹⁶⁴ The difficulty lies in the evaluation of efficiency. It is suggested that the CCS considers the increase of rivalry in the market provided that no substantial lessening of competition would result from the transaction, and net economic efficiencies regardless of the substantial lessening of competition caused.¹¹⁶⁵ In claiming the efficiency defence, applicants must provide detailed and verifiable evidence.¹¹⁶⁶

Fragmentations continue in the assessment of mergers. While Singapore's competition regime prefers the SLC test, it would appear that Thailand is leaning towards the dominance test. Nevertheless, they both utilise the balancing approach.

6.3. Institutional Provisions of Competition Law

This section will examine the choices made by Thailand and Singapore regarding their competition institutional model. In order to carry out its responsibilities, it is crucial that a competition institution possess the following attributes: independence, accountability, fairness, transparency, confidentiality, effective powers, influence, resources, and cooperation skills. This section will, however, focus on only the principle of independence which is accorded priority by the ASEAN.

¹¹⁶¹ *Proposed Acquisition by United Parcel Service, Inc. of TNT Express N.V.* [2012] CCS 400/004/12, para. 43.

¹¹⁶² *CCS Guidelines on the Substantive Assessment of Merger*, para. 5.16.

¹¹⁶³ Competition Commission of Singapore, *CCS Guidelines on Merger Procedure* (2012) sec. 3.5.

¹¹⁶⁴ SCA, Fourth Schedule, para. 3.

¹¹⁶⁵ *CCS Guidelines on the Substantive Assessment of Merger*, paras. 7.16 & 7.17.

¹¹⁶⁶ *Proposed Acquisition by Seek Asia Investments Pte. Ltd. of the Jobstreet Business* [2014] CCS 400/004/14 para. 240. (The CCS ultimately decided there is insufficient evidence of efficiencies.)

6.3.1. Institutional Models

Although there is stark diversity in the design of competition institutions,¹¹⁶⁷ there are three accepted referential models: the bifurcated judicial model, the bifurcated agency model and the integrated agency model. These are based on the arrangement of the principal functions of competition enforcement – investigation, enforcement, and adjudication.¹¹⁶⁸

6.3.1.1. Thailand

Thailand opts for the bifurcated judicial model. This separates investigative and enforcement functions from the adjudicating function¹¹⁶⁹ on account of the TCC, with the aid of its Office, assuming the former roles.

The *TCA* gives the TCC as well as competent officials from the Office extensive power of investigation. They can request information or statements from relevant parties¹¹⁷⁰ under the penalty of criminal imprisonment not exceeding three months and/or a modest fixed fine.¹¹⁷¹ Obstructing competent officials' duties¹¹⁷² and failing to provide reasonable assistance are also punishable by both imprisonment and fine.¹¹⁷³ The *TCC* never specifies what constitutes reasonable assistance in this context and remains silent on penalties for supplying incomplete or incorrect information. Moreover, the competent officials reserve the right to enter the premises without a warrant to search and seize evidence on the property when a flagrant offence is being committed or if there is reasonable suspicion that the evidence maybe lost while waiting for the search warrant.¹¹⁷⁴ In addition, they also have the power to arrest offenders under the *TCA*.¹¹⁷⁵ Their arresting power is similar to that of an administrative or police officer under the *Criminal Procedure Code*.¹¹⁷⁶ The reason commissioners and competent officials being given such extensive investigative power is to best help them with the gathering of evidence due to the heavy burden of proof requirement for the infringement of competition law. Yet, it is precisely this same reasoning that has made the investigation too cumbersome for the authorities who have voiced their concerns over difficulties in evidence gathering.¹¹⁷⁷ The law has given vast

¹¹⁶⁷ The OECD thoroughly chronicles the different models adopted by countries in the OECD, *Countries Review of Competition Law*

<<http://www.oecd.org/regreform/sectors/countryreviewsofcompetitionpolicyframeworks.htm>>.

¹¹⁶⁸ Trebilcock, Michael J. and Iacobucci, Edward M., *Designing Competition Law Institutions*, 25 World Competition 261 (2002).

¹¹⁶⁹ *Ibid.*

¹¹⁷⁰ *TCA*, sec. 8(9).

¹¹⁷¹ *Ibid.*, sec. 48.

¹¹⁷² *Ibid.*, sec. 49.

¹¹⁷³ *Ibid.*, sec. 50.

¹¹⁷⁴ *Ibid.*, sec. 19(2).

¹¹⁷⁵ *Ibid.*, sec. 24.

¹¹⁷⁶ Criminal Procedure Code of Thailand [1934] ch. 2.

¹¹⁷⁷ Yodmuangchareon, Siripol, *The Urgency of Competition Law* (The ASEAN Conference on Fair Competition Law and Policy 2003); *Thailand Report*.

investigative power to civil servants with no background or training in gathering information. It is not advisable to coerce resource-starved competition authorities to give ambitious legal commands to powerful economic and political entities.¹¹⁷⁸

The TCC is also has broad enforcement power encompassing criminal imprisonment, monetary fines, administrative orders, and injunctions. The sanction for non-compliance of competition law is criminal imprisonment not exceeding three years and/or a fixed fine not exceeding THB 6 million (approximately USD 191,000).¹¹⁷⁹ The amount shall be doubled in the case of repeated offence.¹¹⁸⁰ These penalties apply universally to all infringements of competition law, thus making them both mild and draconian. The monetary fine is fixed without any regard to the undertaking's size, market share or annual turnover of the preceding year. Because it is substantially low, it has a questionable deterring effect. Deterrence only occurs when the potential gain from violation of the law is outweighed by the severity of the sanction.¹¹⁸¹ Given the meagre fine, it is implausible to expect potential competition law violators to be deterred. At the same time, the sanction can be considered to be severe because it indiscriminately covers infringements of every substantive provision including: abuse of dominant position, mergers, restrictive agreements and unfair competition. The universal criminal sanction directly affects the aforementioned strict burden of proof which in turn, dilutes the competition authority's power of investigation. Despite such extensive investigating power, the TCC was criticised for not using it properly.¹¹⁸²

The TCC has exclusive power to issue administrative orders. It has the power to order suspension, cessation or rectification with regard to abuse of dominant position, mergers, anticompetitive agreements, and restrictions in international agreements.¹¹⁸³ Furthermore, its power is not limited to behavioural remedy but extends to structural remedy of an undertaking. In the case of an undertaking with dominant position of more than 75 per cent of market share, the TCC may order the restructuring of market share.¹¹⁸⁴ Despite having these vast enforcement powers, there is no record of any issued order by the TCC.

Faced with difficulties in exercising the enforcement power given by the *TCA*, the TCC favours judicial recourse. When the TCC decides to enforce a case, it transfers its findings to the public prosecutor¹¹⁸⁵ who is not under any obligation to follow its recommendation. In the case of non-prosecution decision, the Chairman of the TCC may direct its objection

¹¹⁷⁸ Kovacic, William E., *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 *Brook. J. Int'l L.* 403 (1997).

¹¹⁷⁹ *TCA*, sec. 51.

¹¹⁸⁰ *Ibid.*

¹¹⁸¹ Parker, Christine and Nielsen, Vibeke Lehmann, *Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation*, 56 *Antitrust Bull.* 377 (2011).

¹¹⁸² Thanitcul, Sakda, *Competition Law in Thailand: A Preliminary Analysis*, 1 *Wash. U. Global Stud. L. Rev.* 171 (2002).

¹¹⁸³ *TCA*, sec. 31.

¹¹⁸⁴ *Ibid.*, sec. 30.

¹¹⁸⁵ *Thailand Report*.

to the Director-General of Public Prosecution for its final decision.¹¹⁸⁶ The Director-General is not bound by this objection. Consequently, the decision to enforce competition law is not in the hands of the TCC. To date, the Prosecutor has never followed the TCC's decisions. The most significant refusal to enforce is the *motorcycle case*, a case concerning an exclusive dealing agreement entered into between a motorcycle manufacturer and its distributors.¹¹⁸⁷ The TCC built its case around the provision of the violation of unfair competition provision. At the time, the provision on abuse of dominant position could not be enforced due to the unavailability of the criteria of dominant position. In this case, the TCC has been heavily criticised for making claims without supporting evidence or reasoning.¹¹⁸⁸

6.3.1.2. Singapore

Singapore has chosen the integrated agency model with the CCS assuming the roles of investigation, enforcement and adjudication. Its power of investigation is as expansive as that of Thailand's insofar as the CCS or its officers has the power to require specified documents or information both pre-investigation¹¹⁸⁹ or as part of the investigation¹¹⁹⁰ and to enter premises with or without a warrant.¹¹⁹¹ ¹¹⁹² Similarly to the case of Thailand, the SCA prescribes relatively harsh penalties, both financial and criminal, to any non-compliance with the CCS's exercise of its investigation power. Any non-compliance is considered an offence¹¹⁹³ and is liable to a fine not exceeding SGD 10,000 [approximately USD 6,900] or to imprisonment for a term not exceeding 12 months or the combination of both.¹¹⁹⁴ In contrast to Thailand's competition law regime, criminal sanction is only allowed in the context of non-compliance to the investigation of the CCS. The extensive investigative power is not without its limitations. Communication between undertakings and legal counsel are privileged and thus excluded.¹¹⁹⁵

The CCS holds broad power in enforcing competition law. It can give directions to rectify the anticompetitive situation including modifying or terminating the anticompetitive agreement, modifying or discontinuing the abuse of dominant position conduct, modifying the structure of a merger or ordering the dissolution of an already realised merger.¹¹⁹⁶ In essence, the CCS's enforcement power covers both structural and behavioural remedy. In

¹¹⁸⁶ TCA, sec. 16.

¹¹⁸⁷ Phakdeekhong, Monticha, *A Legal Analysis of Competition Law in Thailand* (DPhil Thesis, Ramkhamhaeng University 2012) 98.

¹¹⁸⁸ Thanitcul, Sakda, *Competition Law in Thailand: A Preliminary Analysis*, 1 Wash. U. Global Stud. L. Rev. 171 (2002).

¹¹⁸⁹ SCA, sec. 61.

¹¹⁹⁰ *Ibid*, sec. 63.

¹¹⁹¹ *Ibid*, sec. 64.

¹¹⁹² *Ibid*, sec. 65.

¹¹⁹³ *Ibid*, sec. 75.

¹¹⁹⁴ *Ibid*, sec. 83.

¹¹⁹⁵ *Ibid*, sec. 66(3)(a).

¹¹⁹⁶ *Ibid*, sec. 69.

the context of merger control, the CCS may accept commitments to remedy, mitigate, or prevent adverse effects of a merger prior to a formal decision.¹¹⁹⁷ Financial penalties can only be imposed if it is proven that the infringement has been committed intentionally or negligently.¹¹⁹⁸ For instance, the CCS considers that collusive tendering or bid-rigging arrangements are serious infringements of section 34 prohibition which have as their object the restriction of competition and are likely to have been, by their nature, committed intentionally.¹¹⁹⁹ In addition, price-fixing agreements have, by nature, the object of preventing, restricting or distorting competition and the parties involved must have undeniably been aware of them.¹²⁰⁰ Therefore, intention and negligence are naturally assumed in the case of hard-core restrictions. Furthermore, the financial penalties cannot exceed ten per cent of the turnover of the undertaking in Singapore for each year of infringement for such period (up to a maximum of three years).¹²⁰¹ These clauses indicate the CCS's preference for rectifying anti-competitiveness, and therefore, the market in Singapore, rather than focusing on pecuniary damages. It conforms to the more cost-effective approach to compliance employed by the CCS.

Regardless of the addition of intentional and negligence clauses, the imposition of financial penalty still serves the double function of reflecting the seriousness of the infringement caused to the relevant market and deterring future anticompetitive conduct or agreements. The CCS reserves the discretionary right to determine the amount of the financial penalty.¹²⁰² It will be calculated according to the seriousness of the infringement, the turnover of the undertaking in Singapore in the preceding year, the duration of the infringement, other relevant factors such as the deterrent value, and any further aggravating or mitigating factors.¹²⁰³ In the past, the CCS based its calculation on other complementary factors such as economic or financial benefits derived from the infringement,¹²⁰⁴ as well as size and financial position of the undertakings in question.¹²⁰⁵ However, the economic difficulties of the cartels will not be taken account by the CCS in considering reducing the penalties imposed.¹²⁰⁶ The ability of the CCS to levy financial penalty is thus correctly labelled as “the most significant weapon in the CCS’ armoury.”¹²⁰⁷ In contrast, criminal sanction only applies to failure to comply or cooperate with the CCS’s

¹¹⁹⁷ *Ibid.*, sec. 60A.

¹¹⁹⁸ *Ibid.*, sec. 69(3).

¹¹⁹⁹ *Collusive Tendering (Bid-rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore* [2008] CCS 600/008/06 para. 356. [*hereinafter* Pest Control]

¹²⁰⁰ *Re Price Fixing of Coach Bus Services for Travelling between Singapore and Destinations in Malaysia from 2006 to 2008* [2009] SGCAB1, SGCAB 2, para. 42. [*hereinafter* Bus Services]

¹²⁰¹ SCA, sec. 69(4).

¹²⁰² Competition Commission of Singapore, *CCS Guidelines on the Appropriate Amount of Penalty* (2007) para. 1.7.

¹²⁰³ *Ibid.*, para. 2.1.

¹²⁰⁴ *Pest Control*, para. 380.

¹²⁰⁵ *Ibid.*

¹²⁰⁶ *Bus Services*, para. 58.

¹²⁰⁷ Ong, Burton, *The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape* Sing. J. Legal Stud. 172 (2006).

investigation.¹²⁰⁸ Furthermore, under section 81 of the *SCA*, officers of a body corporate, such as director, manager, or secretary, are liable to punishment if they have consented to or connived with an offence or the offence is due to neglect on their part. Critics asserted that Singapore's competition law regime would benefit from an increased penalty ceiling, in particular an expansion to include worldwide turnover in the statutory penalty ceiling.¹²⁰⁹ However, it is plausible that the limitation of the penalty to domestic turnover is one of practicality since Singapore has a small open economy.

6.3.2. The Fading Importance of Independence

It is widely acknowledged that the principle of independence is at the core of competition authorities' efficacy.¹²¹⁰ While jurisdictions often differ in their formulation of independence, competition authorities should be insulated from political and budgetary interference.¹²¹¹ Neither Thailand's nor Singapore's competition regime embraces this concept.

6.3.2.1. Thailand

The *TCA* does not create an independent competition agency from its inception. By design, the TCC is placed directly under the purview of the executive branch. The TCC is chaired by the Minister of Commerce, despite the *TCA*'s explicit exclusion of political figures from the TCC's composition.¹²¹² The cabinet minister is joined by the Permanent Secretary for the Ministry of Commerce as vice-chairman and the Director-General for the Department of Internal Trade in the Ministry of Commerce as secretary.¹²¹³ Both positions are held by senior bureaucrats. Other commissioners include the Permanent Secretary for the Ministry of Finance and between eight to twelve experts in the field of law, economics, commerce, business administration or public administration.¹²¹⁴ From the formation of the TCC, it would appear that the *TCA* has managed to secure direct representation on the executive branch. In addition, there have been complaints that the members lack expertise in the area of competition law.¹²¹⁵ Some criteria, notably expertise in business and public

¹²⁰⁸ *SCA*, secs. 65 & 75-78.

¹²⁰⁹ Shiau, Daren and Cheng, Chloe, *Compliance under the Singapore Competition Regime: Penalties, Leniency and Private Action*, 24 *E.C.L.R.* 590 (2013).

¹²¹⁰ UNCTAD, *The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy* (TD/RBP/CONF.7/3 2010).

¹²¹¹ Khemani, R. Shyam and Dutz, Mark A., 'The Instruments of Competition Policy and Their Relevance for Economic Development' in Frischtak, Claudio R. (ed), *Regularities Policies and Reform: A Comparative Perspective* (World Bank 1995).

¹²¹² *TCA*, sec. 7.

¹²¹³ *Ibid*, sec. 6.

¹²¹⁴ *Ibid*.

¹²¹⁵ Thanitcul, Sakda, *Competition Law in Thailand: A Preliminary Analysis*, 1 *Wash. U. Global Stud. L. Rev.* 171 (2002); Williams, Mark, *Competition Law in Thailand: Seeds of Success or Fated to Fail?*, 27 *World Competition* 459 (2004).

administration, stated in the statute seem too ambiguous and to a certain extent, irrelevant to competition law enforcement.

In addition, at least half of these experts must be selected from the private sector.¹²¹⁶ The institution's non-autonomous structure is reinforced by a subsequent regulation that further opened up opportunities for businesses. The *Ministerial Regulations* assert that the private sector experts are to be nominated by the two most prominent trade associations in Thailand, namely the Federation of Thai Industries and the Board of Trade of Thailand.¹²¹⁷ Since big businesses tend to dominate these trade associations, the probability of representatives from small- and medium-sized enterprises obtaining a nomination is small. Consequently, large businesses are over-represented at the TCC. With regard to the remaining experts, the Ministry of Commerce and the Ministry of Finance each put forward nominations.¹²¹⁸ The final list of candidates shall be proposed by the Ministry of Commerce and appointed by the Cabinet.¹²¹⁹ It is feasible that the candidates chosen are those who are sympathetic to the government cause. Furthermore, the ex-officio members are senior bureaucrats and the TCC is staffed by civil servants of the Department of Internal Trade in the Ministry of Commerce.¹²²⁰ The entire nomination process is under the discretion of involved authorities with no public announcement or solicitation for qualified candidates. It indicates direct interference from both the private sector and the executive branch. The TCC's architecture is consistently respected by eight Commissions. In so doing, the TCA supports obvious conflict of interest in the TCC. There are at least two recorded incidences of commissioners being affiliated with undertakings under investigation by the TCC.¹²²¹ The situation was further aggravated when there was no record of the commissioners in question recusing themselves from the TCC during the investigation or decision-making process.¹²²²

Such a design exposes the TCC to regular political intervention. Corporate lobbies occur throughout the investigation periods both openly and behind the scenes. One such example resulted in the delay of the promulgation of the dominant position threshold.¹²²³ In 2000, the TCC proposed dominant position criteria of 33 per cent of market share and THB 1 billion sales revenue in the relevant market. However, the proposal was met with strong

¹²¹⁶ TCA, sec. 6.

¹²¹⁷ *Thailand Ministerial Regulations under Thailand Trade Competition Act of 1999* (1999) sec. 2(1).

¹²¹⁸ *Ibid.*, sec. 2(3).

¹²¹⁹ *Ibid.*, sec. 5.

¹²²⁰ TCA, secs. 6 & 8.

¹²²¹ Nikomborirak, Deunden, *The Political Economy of Competition Law: The Case of Thailand*, 26 *Nw. J. Int'l L. & Bus.* 597 (2006). (The author recounts the historic moment of a commissioner who was also the director of a company affiliated with the whiskey conglomeration which was under investigation for its tie-in sale agreement, and another commissioner, then Director-General of the Department of Internal Trade, who was a director of a company affiliated with the cable television monopoly under investigation.)

¹²²² Thailand Development Research Institute, *Thailand Trade Competition Act of 1999: Limitations and Reform [in Thai]* (TDRI Report 92, 2011). (detailing instances of the conflict of interest in the nomination of Commissioners)

¹²²³ Paopongsakorn, Nipon, *The New Competition Law in Thailand: Lessons for Institutional Building*, 21 *Review of Industrial Organisation* 185 (2002).

opposition from the Federation of Thai Industries who counter-proposed a threshold of 50 per cent of market share. The TCC's proposal was subsequently discarded. As shown earlier in this chapter, the dominant position criteria would not get adopted until 2007.¹²²⁴ They were eventually defined according to the proposition from the business sector. At the same time, they greatly restrict the scope of application of the law since few undertakings actually fit the description.

The non-independence of the competition institution from both political and corporate influences is referred to the Appellate Committee that has the power to review the TCC's decisions.¹²²⁵ Its decision is considered to be final.¹²²⁶ The Appellate Committee consists of seven members appointed by the Council of Ministers with government officials from the Department of Internal Trade under the Ministry of Commerce serving as secretary and assistant-secretary to the committee.¹²²⁷ According to the *TCA*, the Appellate Committee shall consist of government officials and experts in the area of law, economics, business administration and public administration.¹²²⁸ The qualifications for the appellate body are identical to that of the TCC. The similarity continues with the composition of the Appellate Committee which is receptive to interferences from business sector and the executive branch. The Appellate Committee has, naturally, never been called upon as there has never been an enforcement case.

A representative from the Office denied any political interference, citing fundamental human rights as its justification but ultimately argued that the agency had to be a part of the government body in order to facilitate its launch especially in the area of financial budgeting, human resources and information gathering.¹²²⁹ There were no attempts made to justify the direct involvement of the private sector in the TCC.

In a country where competition law has been transplanted into an environment where the concept of competition was previously unknown, competition authority without any link to other ministerial bodies risks becoming isolated and incapable of enforcing the competition statute.¹²³⁰ The incorporation with an influential Ministry can help boost the agency authority and aid in its actual enforcement against both private entity and occasionally, other governmental bodies. It is therefore understandable that a new institution would wish to be launched under the tutelage of the executive branch provided that it was only temporary. When the institution matures, it is imperative to transition to a more

¹²²⁴ *Notifications of Trade Competition Commission on Criteria for Business Operator with Market Domination.*

¹²²⁵ *TCA*, sec. 44.

¹²²⁶ *Ibid*, sec. 47.

¹²²⁷ *Ibid*, sec. 42.

¹²²⁸ *Ibid*.

¹²²⁹ Hasamin, Prattana, *Competition Institution Thai's Experience* (The APEC Training Course on Competition Policy (2-4 August 2005)).

¹²³⁰ Botta, Marco, *Fostering Competition Culture in the Emerging Economies: The Brazilian Experience*, 32 *World Competition* 609 (2009).

autonomous formation.¹²³¹ Such is not the case for the TCC since its political and financial dependence on the government is permanent.

6.3.2.2. Singapore

The CCS, like the TCC, does not seem to value the principle of independence. Its political dependence on the government is evident in its composition: the CCS comprises between two and sixteen members with a chairman,¹²³² all of whom are appointed by the Minister of Trade and Industry.¹²³³ The qualifications required to be appointed are competence and experience in industry, commerce, or administration or professional qualifications or other suitability.¹²³⁴ These seem to be broader than the qualifications required by the TCC. The close connection between the Minister and the CCS is not viewed favourably¹²³⁵ and there could be doubts about the CCS's willingness and ability to investigate the conduct of the government and its entities. However, the CCS answered this concern with the infringement decision issued against SISTIC. This is a government-linked company whose business has persistently had 90 per cent of the market share. Thus the decision was made on the basis of its abuse of dominant position, with reference to its provision of exclusive agreements.¹²³⁶ "It is a positive indication that government liability under [the SCA] is not illusory."¹²³⁷

The tradition of non-independence persists at the appeal stage. The Competition Appeal Board [*hereinafter* the Appeal Board] consists of up to thirty members who are appointed by the Minister according to the same qualifications as members of the CCS except for Chairman of the Appeal Board, who must be qualified as a Judge of the Singapore's Supreme Court.¹²³⁸ All the functions and duties are exercised by the committee consisting of at least three members of the Appeal Board.¹²³⁹ It has extensive power to:

- (a) remit the matter to the [CCS];
- (b) impose or revoke, or vary the amount of a financial penalty;
- (c) give such direction, or take such other step, as the [CCS] could itself have given or taken; or

¹²³¹ Gal, Michal S., 'Reality Bites (or Bits): The Political Economy of Competition Policy in Small Economies' in Hawk, Barry E. (ed), *International Antitrust Law and Policy* (Juris Publishing 2002).

¹²³² SCA, sec. 5.

¹²³³ *Ibid*, First Schedule, para. 1(1).

¹²³⁴ *Ibid*, First Schedule, para. 1(3).

¹²³⁵ Healey, Deborah, *Application of Competition Laws to Government in Asia: The Singapore Story*, 2 KLRI Journal of Law and Legislation 57 (2012); Williams, Mark, *The Lion City and the Fragrant Harbor: The Political Economy of Competition Policy in Singapore and Hong Kong Compared*, 54 Antitrust Bull. (2009).

¹²³⁶ *Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2010] CCS/600/008/07. The CCS decision was upheld at appeal but with reduced penalty levied *Re SISTIC*.

¹²³⁷ Healey, Deborah, *Application of Competition Laws to Government in Asia: The Singapore Story*, 2 KLRI Journal of Law and Legislation 57 (2012).

¹²³⁸ SCA, sec. 72(5).

¹²³⁹ *Ibid*, sec. 72(8).

(d) make any other decision which the [CCS] could itself have made.¹²⁴⁰

In this regard, the Appeal Board has the power to rehear the case during the process of which the Board has the power to summon witnesses and admit or exclude evidence. In the past, it has ordered a reduction in financial penalties, ruling that in so doing, the deterrent effect would not be compromised.¹²⁴¹ The right of appeal is restricted to only the party directly affected by the CCS's decision; that is, any party to an anticompetitive agreement, any party whose conduct was considered abuse of dominance by the CCS, or any party to an anticipated merger or a merger. A decision made by the Appeal Board can be appealed in front of the High Court. The High Court will confirm, modify or reverse the Appeal Board's decision.¹²⁴² The decision of the High Court is considered to be made in the exercise of its original civil jurisdiction and further rights of appeal can be extended to the Court of Appeal.

The process of the appointment of the Appeal Board exposes it to regular political intervention from the government. The appointment of Board members and the budgetary funding by the Minister of Trade and Industry deprive the Appeal Board of both political and financial independence.¹²⁴³ Exacerbating the situation, members of the Appeal Board may at any time and without justification be removed by the same Minister who appointed them.¹²⁴⁴ Nonetheless, Ong insisted that the absence of independence in the constitution of Singapore's competition regulatory body was born out of "fairly pragmatic considerations"¹²⁴⁵ since the CCS was staffed initially by the Minister of Trade and Industry. It is thus to be expected that the traditional non-independence culture would survive.

6.4. Conclusion

From this chapter's analysis of two of the largest ASEAN economies, it is clear that the AMSs regimes differ widely in scope, both in substance and in institutional design. They differ in origin, and are placed within different socio-political contexts. The arguments made in relation to Thailand and Singapore are merely a microcosm of a much wider situation but at the same time, representative of the overall malaise in the region. This chapter has revealed that the commonalities in Thailand's and Singapore's competition law regimes do not extend beyond a superficial façade. The discrepancies are most notable in the area of competition law-related assessment and cover a large area from the scope of competition law to the institutional model. Consequently, the discrepancies in the

¹²⁴⁰ Ibid, sec. 73(8).

¹²⁴¹ *Modelling Services*, para. 175.

¹²⁴² SCA, sec. 74.

¹²⁴³ Ibid, sec. 12.

¹²⁴⁴ Ibid, sec. 72(3).

¹²⁴⁵ Ong, Burton, *The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape* Sing. J. Legal Stud. 172 (2006).

enforcement of national competition laws within the region have made soft harmonisation as envisioned by the ASEAN improbable.

Since the local terrain is uneven, it is difficult to ascertain the suitability of the ASEAN's regional design. Regardless of the complications, Wisuttisak argued that the *ASEAN Guidelines* are compatible with the AMSs' competition laws.¹²⁴⁶ His hypothesis was based principally on the scope of the AMSs' competition statutes. While both the *TCA* and the *SCA* share a similar functional approach in defining undertaking using the *Guidelines*, there remains a noteworthy difference in the exclusion of state-owned enterprises and farmers' groups in the *TCA*. Furthermore, Chapter 4 explained that the ASEAN has exhibited conflicting views regarding the scope of competition law through two sets of consecutive *Guidelines*. It remains ambiguous whether the prevailing vision is for a broad model in which the competition law applies to all business engaged in commercial economic activities in all sectors including state-owned enterprises,¹²⁴⁷ or for a more restrictive one in which state-owned enterprises can be excluded from the application of national competition law.¹²⁴⁸ The variance in the treatment of state-owned enterprises by Thailand's and Singapore's competition statutes confirms this state of confusion.

With regard to other areas of competition law, the ASEAN's approach appears more receptive to the AMSs' experiences. The *Guidelines I* certainly admit so in their formulation.¹²⁴⁹ In defining the term "agreement" as "a consensus on the actions each party will, or will not, take,"¹²⁵⁰ the *Guidelines I* replicate the exact formulation used by the *CSS Guidelines on Section 34 Prohibition*.¹²⁵¹ The similarity continues with the inclusion of concerted practice in the definition.¹²⁵² However, unlike the *SCA*, the *Guidelines I* do not exclude vertical agreements from the application of anticompetitive prohibition provision to conform to standard international practice.¹²⁵³ Moreover, there are some notable discrepancies in the qualification of agreements falling within the rule of reason or the *per se* rule. By placing market sharing, and limiting or controlling production under the rule of reason analysis, the *TCA*'s classification of hard-core restrictions appear more restrictive than the *SCA* and the *ASEAN Guidelines I*.¹²⁵⁴ The appreciable test conducted by the *TCC* appears to be limiting since it only takes into consideration the effect of the anticompetitive agreement. Moreover, the *TCA* does not contain a provision on granting exemptions or exclusions to certain agreements and conducts which have significant countervailing

¹²⁴⁶ Wisuttisak, Pornchai, *The ASEAN Competition Policy Guidelines and Its Compatibility with ASEAN Member Countries Competition Law* (3rd Biennial Conference of Asian Society of International Law 27-28 August 2011).

¹²⁴⁷ *Guidelines I*, art. 3.1.2.

¹²⁴⁸ *Guidelines II*, 27.

¹²⁴⁹ *Guidelines I*, Foreword.

¹²⁵⁰ *Ibid*, art. 3.2.1.3.

¹²⁵¹ *CSS Guidelines on the Section 34 Prohibition*, para. 2.10.

¹²⁵² *Guidelines I*, art. 3.2.5.

¹²⁵³ *Ibid*, art. 3.2.1.

¹²⁵⁴ *Ibid*, art. 3.2.2.

benefits despite the *Guidelines I*'s encouragement to the contrary.¹²⁵⁵ The *Guidelines I* resemble more the approach taken by the *SCA* in the context of anticompetitive agreements. This is demonstrated through similar approach to the appreciable effect to competition test, the classification of hard-core restrictions, and the exemptions for agreements with countervailing effects. Some differences also emerge in the concept of dominance especially in the evaluation of dominant position. Here again, the *TCC* operates under a more restrictive analysis by relying exclusively on the criteria of market share threshold. Despite the different language used by the *TCA* and the *SCA*, the two sets of classification of abuse appear to be similar in nature since they contain exploitative and exclusionary conduct, both of which are suggested by the *Guidelines I*.¹²⁵⁶ In addition, both the *SCA* and the *ASEAN* embrace the form- and effect-based analysis. In the domain of the control of concentrations of undertakings, the *Guidelines I* carry on the Thailand's and Singapore's legal tradition of employing the term 'merger' to envelope various types of concentrations of undertakings.¹²⁵⁷ Fragmentations continue their presence in the assessment of mergers. Only Singapore and the *ASEAN* support the *SLC* test¹²⁵⁸ whereas Thailand favours the dominance test; all the regimes examined in this chapter utilise the balancing approach.¹²⁵⁹ The *TCA* adopts mandatory merger notification regime while the *SCA* chooses the voluntary notification regime. The *Guidelines I* support both notification regimes. Perhaps where the discrepancy is most obvious is in the institutional model. The *ASEAN*'s preference for an integrated model¹²⁶⁰ echoes the choice made by Singapore's competition regime. The *ASEAN* should be disappointed as the only strong suggestion it has made with respect to competition policy has been ignored by the *AMSs*. Indeed, the principle of the independence of competition law institution, which is highly regarded by the *ASEAN*,¹²⁶¹ is not held in the same regard by either Thailand's or Singapore's competition authorities.

It is possible that the *ASEAN*'s approach is very similar to Singapore's competition law regime because they are both based largely on an internationally accepted model. Many differences still persist but the *AMSs* have not shown any interest or progress in adapting their competition laws to more closely resemble each other's. The willingness to undertake soft harmonisation is simply not present.

¹²⁵⁵ *Ibid*, art. 3.5.3.

¹²⁵⁶ *Ibid*, art. 3.3.1.2.

¹²⁵⁷ *Ibid*, art. 3.4.1.1.

¹²⁵⁸ *Ibid*, art. 3.4.1.

¹²⁵⁹ *Ibid*, art. 3.5.3.

¹²⁶⁰ *Guidelines II*, 32.

¹²⁶¹ *Guidelines I*, art. 4.1.3.

Chapter 7 Conclusion: Towards the Harmonisation of the ASEAN Regional Competition Law

This thesis has examined the prospects of developing an effective competition policy framework within the ASEAN and in doing so, has furnished an account of the relevant laws and policies at both the domestic and the regional levels. Each of the previous chapters addressed particular research issues and came to specific conclusions. This chapter summarises the analysis undertaken as a whole and addresses its implications towards the harmonisation of competition enforcement in the ASEAN region, as well as offers a glimpse into the future of ASEAN regional competition policy under the AEC.

The prognosis for the ASEAN's regional competition policy has always been uncertain; this was apparent when the AMSs all ignored the common competition policy objective set out in the *Guidelines I*.¹²⁶² Indeed, as discussed in Chapter 3, the goals of "the promotion and protection of the process of competition" are not replicated in any of the AMSs' domestic competition law statutes. While the situation is understandable in the cases where the AMSs' competition statutes were enacted before the announcement of the creation of the AEC in 2003 (most notably Indonesia and Thailand), there is no justifiable explanation in the cases of Singapore, Vietnam, Malaysia, the Philippines and Myanmar. By ignoring the common reference guide published by the ASEAN Secretariat, the AMSs communicated their unwillingness to harmonise their national competition policies with that of the ASEAN's.

Chapter 4 demonstrates that the ASEAN employs a soft harmonisation approach regarding substantive competition law. This approach is a non-binding multilateralism which offers more flexibility and practicality than binding commitments. The primary flaw of the soft harmonisation approach is its over-reliance on participating states' voluntary commitment and willingness to follow the regional approach. Most of the ASEAN's contributions regarding substantive competition policy concentrate on supporting the enactment of domestic competition law statutes. The ASEAN has never proposed a framework unique or conducive to its vision. Instead, it is content with presenting known best practices in the field of competition law and policy to the AMSs. The AMSs are free and even encouraged to neglect the ASEAN's assembled efforts in favour of their own particular needs, situations, or preferences. Giving the AMSs such a large margin of flexibility could result in a regional organisation that is a vehicle for economic, social, and political divergence on various issues rather than compelling the AMSs to move towards regional economic integration.¹²⁶³ Chapter 5 discusses the ASEAN's supporting role in the construction of a national competition institution. The ASEAN has neither established a supranational institution nor a representative institution composed of national representatives at regional level. In their stead, it has created an expert competition organ called the AEGC which is

¹²⁶² Ibid, art. 2.2.3.

¹²⁶³ Leviter, Lee, *The ASEAN Charter: ASEAN Failure or Member Failure?* 43 N.Y.U. J. Int'l L. & Pol. 159 (2010).

composed of national competition authorities or related governmental officials in the case of the AMSs without relevant competition law authorities. Furthermore, the ASEAN has opted to resolve regional competition issues through national extraterritorial solutions, bilateral and multilateral cooperation.

The actual approaches taken by the ASEAN display an obvious disconnect from the announced goal. The ASEAN would like a spontaneous move towards harmonisation by the AMSs through increased contact among competition authorities and relevant officials with the help of the information provided and facilitated by the ASEAN. However, an examination of the AMSs' competition law regimes in Chapter 6 has revealed that the spontaneous harmonisation of national competition laws as envisioned by the ASEAN is unlikely to occur. Despite sharing some similarities in the broad principles of competition law across jurisdictions, the AMSs' domestic competition laws are not harmonised. For instance, Malaysia's competition law does not contain provisions on merger control. Further discrepancies are observed between the scope of competition law and the actual competition assessment in the enforcement of the law. While all the AMSs with competition law statutes have established national competition authorities, different models have been adopted. It appears that the AMSs continue to largely ignore the approaches charted by the ASEAN. Moreover, the ASEAN has failed to pressure the AMSs to follow through with its single commitment to introduce national competition law before the institution of the AEC at the end of 2015, as appeared in the *Blueprint*.¹²⁶⁴ To date, only seven members have fulfilled this commitment: Indonesia,¹²⁶⁵ Thailand,¹²⁶⁶ Vietnam,¹²⁶⁷ Singapore,¹²⁶⁸ Malaysia,¹²⁶⁹ Myanmar,¹²⁷⁰ and the Philippines.¹²⁷¹ Brunei Darussalam, Cambodia and Lao PDR are still in the process of drafting the bill. The AMSs' failure to fulfil their expectations could prove problematic in accomplishing the regional framework of competition law. COMESA, for instance, has encountered unsurmountable problems because some of its member states, notably Malawi, could not meet their domestic enforcement obligations.¹²⁷²

As is often the case when pursuing regional competition law in developing economies, the ASEAN is faced with various challenges such as differences in socio-political situations, uneven economic development, resource restrictions, and lack of a competition culture. Some obstacles are decidedly ASEAN-specific: AMSs' diversity in the area of economics

¹²⁶⁴ *The Blueprint*, art. 41.

¹²⁶⁵ Law No. 5 of Year 1999.

¹²⁶⁶ TCA.

¹²⁶⁷ Vietnam Law on Competition, No.27/2004/QH11.

¹²⁶⁸ SCA.

¹²⁶⁹ Malaysia Competition Act.

¹²⁷⁰ Myanmar Competition Law.

¹²⁷¹ Philippines Competition Act, Republic Act No. 10667.

¹²⁷² Lipimile, George K. and Gachuri, Elizabeth, 'Allocation of Competences Between National and Regional Competition Authorities: The Case of COMESA' in Brusick, Philippe, Alvarez, Ana Maria and Cernat, Lucian (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1 2005).

and politics, and the ASEAN Way. The ASEAN approach to regional competition law corresponds well to the organisation's inherent limitations. It does not attempt to overcome the obstacles but instead chooses to confine itself comfortably within the boundaries. The path of soft harmonisation without a regional organ with the necessary allocated power to impose a competition law regime model or monitoring compliance by members with the regional vision is symptomatic of the ASEAN Way.

In Chapter 2, this research established that there is no optimal template for regional competition policy. While in many cases the EU model serves as an inspirational model for emerging regional competition regimes, each regime needs to adapt the model to its own particular needs and local context. In the pursuit of regional harmonisation of competition policy on which the AEC is based, the ASEAN has chosen a configuration of soft harmonisation of substantive law but without a central institution. The combination is a mixture of the MERCOSUR's harmonisation approach, which focuses on encouraging the member states to enact and enforce national competition law, and the NAFTA's free trade area agreement's lack of a dispute resolution system. Furthermore, the ASEAN is the sole regional organisation with the aim of market integration without a competition law-related regional institution. In this regard, it would seem that the ASEAN is charting a new road for regional competition law that is distinctive from other models.

In conclusion, with a regional framework that aims to inform rather than create a common approach and without a regional institution capable of enforcement or monitoring duty, it is unlikely that the ASEAN's approach to competition law would be effective. Furthermore, the only engagement required from the AMSs – the introduction of national competition law – is not unanimously followed. It is thus inconceivable that the ASEAN would achieve its ambitious goal of regional harmonisation of competition policy. The AEC is at risk of operating as an internal market devoid of an effective regional competition policy, despite being previously hailed as the most feasible pillar of the ASEAN Community.¹²⁷³ It appears that although the ASEAN has made significant progress, it has not yet achieved its objective of constructing a single market.¹²⁷⁴ While it is plausible that the AEC failed at its launch, the ASEAN would never announce or acknowledge this. Consequently, the ASEAN is in danger of joining many other developing economies' experiences with regional competition law in that they only exist in the text.

On 31 December 2015, the ASEAN celebrated the arrival of the ASEAN Community.¹²⁷⁵ It is crucial to recall that the AEC offers, or is intended to offer, regional economic integration with free movement of goods, services, investment, skilled labour, and a freer

¹²⁷³ Roberts, Christopher B., *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Routledge 2012) 187.

¹²⁷⁴ Das, Sanchita Basu, *The ASEAN Economic Community and Beyond: Myths and Realities* (ISEAS 2016) 14.

¹²⁷⁵ Kuala Lumpur Declaration on the Establishment of the ASEAN Community.

flow of capital¹²⁷⁶ without regional competition law. The aspiration to intensify the development of competition policy in the region remains and is expected to progress even after the entrance of the AEC.¹²⁷⁷ A sliver of hope presents itself in the form of a formal recognition of the need to have common core elements with respect to the legal frameworks on competition policy and law amongst the AMSs.¹²⁷⁸ It remains to be seen whether the project will come to fruition and in what form.

It has been suggested that “[m]ore time may be needed for ASEAN to have a systematic harmonisation of competition law.”¹²⁷⁹ This thesis reserves some doubts regarding the proposed solution. The temporal extension could only serve to prolong the problematic state of the ASEAN regional competition policy.

How then should the ASEAN proceed in order to achieve regional harmonisation of competition law? The most effective solution is through the reconstruction of the ASEAN’s internal mechanism. The doctrine of the ASEAN Way has been a monumental obstruction to achieving meaningful regional integration. It has been demonstrated throughout this thesis that harmonisation, whether soft or hard, cannot happen without a central organ competent of enforcing regional competition law and monitoring member states’ compliance with the regional framework. A departure from such classical non-interference measure the likes of the ASEAN Way would allow the ASEAN to finally form necessary measures to accomplish harmonisation. In this regards, the establishment of common substantive rules as well as a centralised institution capable of enforcing members’ compliance to the former - both measures rendered impossible by the preminent existent of the ASEAN Way - could become a reality. The abandonment of the ASEAN Way would also allow the ASEAN’s institutional structure to evolve beyond its original conception, which is the informal cooperation, and suitably match with the new integration identity of the organisation. It is noteworthy that while the ASEAN as an organisation has constantly undergone transformation, the institutional structure has principally remained the same. The ASEAN has long operated under “a highly decentralised structure”¹²⁸⁰ with no supranational institution. While the ASEAN Secretariat is the main regional institutional body, it does not possess decision-making power. Decisions are made through consultation and consensus at the ASEAN Summit in accordance with the principle of non-interference or the ASEAN Way.¹²⁸¹ Unfortunately, this alternative is unlikely to be considered by the ASEAN and would undoubtedly be met

¹²⁷⁶ ASEAN Secretariat, *ASEAN Economic Community* <<http://www.asean.org/communities/asean-economic-community>>.

¹²⁷⁷ *The Blueprint*.

¹²⁷⁸ ASEAN Secretariat, *ASEAN Discusses Approach to Effective Competition Enforcement* <<http://www.asean.org/news/asean-secretariat-news/item/asean-discusses-approach-to-effective-competition-enforcement>>.

¹²⁷⁹ De Sevelinges, Franz Hepp, *Snapshot of Competition Laws in ASEAN and China*, 26 *AUT Int'l L. Practicum* 115 (2013).

¹²⁸⁰ Hung, Lin Chun, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9 *Chinese J. of Int'l L* 821 (2010).

¹²⁸¹ The ASEAN Charter [2007] arts. 7, 12 & 20.

with strong objections from the AMSs considering their historical preference for state's sovereignty over the principle of supranationality.

Another possibility to achieve harmonisation is through the adjustment of the AEC's ambitious goal from economic integration with a single market to mere economic cooperation. Relegating the goal of the AEC to simple regional cooperation has the benefit of compatibility with existing regional competition law framework of soft harmonisation of substantive rules without a centralised institution. It requires less substantial change than the previous alternative and is thus poised to receive more positive reception from the AMSs. It appears that setting realistic and achievable goals would be more valuable than having an ambitious-yet-impossible trial.¹²⁸² If the ASEAN were to pursue this option, it would evidently need to adopt a more balanced approach to granting the AMSs flexibility in its enforcement of the regional economic cooperation in order to avoid a repetition of the history of the ineffective *PTA* and the *AFTA*.

At the same time pursuing an economic cooperation aim under the auspice of economic integration community could be deemed misleading. A question could also arise whether a revision of the *AFTA* to include competition rules similar to the experience of the *EFTA* would not be more appropriate considering the *AFTA* is still in effect. In particular, the *AFTA* could serve as a precursor to the deeper integration system of the ASEAN Community where countries could progressively harmonise their national laws. Alternatively, the *AFTA* could also act as a more integrated vehicle for the AMSs which are capable and willing to achieve truthful economic integration beyond the current level offered by the ASEAN. Regardless of its possible new purposes, the *AFTA*'s effectiveness is still weighted down by its lack of dispute resolution system. A concrete mechanism of dispute resolution therefore needs to be established first. The *AFTA* Council, a ministerial-level council which already has the role of supervising, coordinating and reviewing the implementation of the *AFTA*, should be granted an additional dispute resolution role. Furthermore, if much of the *EFTA*'s effectiveness in harmonisation relies on the EU system, the *AFTA* does not possess the same luxury. The ASEAN is currently not a dependable foundation on which it could rely. Consequently, walking the path paved by the *EFTA* while desirable is simply of little practical possibility for the ASEAN.

Regardless of the attractiveness of previous alternatives, the most realistic and achievable approach is to enhance the responsibilities of the AEGC. This could be done through the inclusion of new tools such as the peer review of the AMSs' domestic competition policies in comparison with the approaches of the ASEAN, the installation of deeper cooperation and coordination efforts, and concrete communication between national competition authorities concerning the enforcement and development of domestic competition law regimes. The peer review system, in particular, corresponds well to the nature of the ASEAN organisation which relies on good relationship and mutual respect between members without infringing on their sovereignty. While it is understandable that

¹²⁸² Leviter, Lee, *The ASEAN Charter: ASEAN Failure or Member Failure?* 43 N.Y.U. J. Int'l L. & Pol. 159 (2010). [arguing about appropriate ASEAN's trajectory]

establishing a centre of merger notification for mergers with regional dimension within the ASEAN will be challenging, the AEGC could considerably benefit from acting as an information centre for merger notification filings on a regular basis.

To continue with the research of this thesis, which has focused on the perspective of the ASEAN's regional competition policy, further research could fruitfully explore the ASEAN's direction after the entrance of the AEC. It would be interesting to examine whether the ASEAN could make more progress with regard to its competition policy within the region and whether it will finally adopt any measures to properly address the challenges of regional competition policy. In light of the ASEAN's recent acknowledgement of the necessary establishment of common core elements on competition policy amongst the AMSs, the ASEAN's next move will be eagerly anticipated. The AMSs' actions in the field of competition law should also be carefully observed to determine whether they remain separated, further divided, or spontaneously more harmonised in the era of the AEC. It is unclear whether the ASEAN could successfully persuade the three remaining AMSs—Brunei Darussalam, Cambodia and Lao PDR—to implement domestic competition law regimes. It is even less evident whether the ASEAN could encourage the AMSs to voluntarily harmonise their competition law statutes. In this regard, the role of the AEGC in the wake of the AEC should not be ignored. It remains to be seen whether it retains the simple role of the facilitator between national competition authorities and relevant officials. The role and place of the AEGC and, by extension, the ASEAN related to competition law within the Southeast Asia region is a subject that should be further pursued. Observance of the actual outcome of the AEC is necessary as it is an important pillar of the ASEAN Community and could be beneficial to the literature of regional competition policy. Finally, the examination of foreign influence in the adoption and enforcement of competition law in Southeast Asian countries could result in a better understanding of the local climates of the ASEAN's competition policy.

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