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Introduction to CPI Special Issue on ASEAN Competition Law

R. Ian McEwin
University of Malaya

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Southeast Asia is a region of considerable ethnic differences, levels of economic development, regime types (although all are authoritarian), state administrative capacity, and general institutional development. Despite these considerable differences, the Association of Southeast Asian Nations ("ASEAN") in December 1997 adopted a Vision 2020 that envisaged "a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services investment and freer flow of capital, equitable economic development and reduced poverty and socioeconomic disparities." In 2003, ASEAN leaders signed the Declaration of ASEAN Concord II aimed at developing an ASEAN Economic Community ("AEC") by 2020—brought forward to 2015 at the 12th ASEAN Summit in the Philippines.

In November 2007, at the 13th ASEAN Summit in Singapore, ASEAN Governments signed the ASEAN Charter, which outlined ASEAN Member States commitments to economic integration. A *Blueprint* was laid out to accelerate the economic integration.[2] As part of its goal of achieving a "highly competitive economic region" the *Blueprint* included commitments to develop a competition policy (as well as other goals such as strengthening consumer protection, regional co-operation in intellectual property rights, co-operation in infrastructure development, etc.).

In a major change of direction, the Singapore Summit also committed to moving away from a soft-law approach of political commitments towards an "adherence to rules-based systems for effective compliance and implementation of economic commitments."[3] For competition policy the *Blueprint* noted:

> 41. The main objective of the competition policy is to foster a culture of fair competition. Institutions and laws related to competition policy have recently been established in some (but not all) ASEAN Member Countries (AMCs). There is currently no official ASEAN body for cooperative work on CPL to serve as a network for competition agencies or relevant bodies to exchange policy experiences and institutional norms on CPL.[4]

The *Blueprint* also said that all ASEAN Member Countries would endeavor to introduce competition policy by 2015. As of August 2015 all countries in ASEAN[5] have adopted a competition law, apart from Cambodia—which is very close.

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[1] Dr. R. Ian McEwin holds the Khazanah National Chair of Regulatory Studies, University of Malaya.

[2] ASEAN Economic Community Blueprint, *available at* http://www.asean.org/archive/5187-10.pdf.

[3] *Id.* at 21.

[4] *Id.* at 32.

[5] Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

As part of the Action Plan, in 2010 the ASEAN Secretariat published the *ASEAN Regional Guidelines on Competition Policy* that had been developed by the ASEAN Experts Group on Competition ("AEGC").[6] The *Regional Guidelines* were to "serve as a general framework guide for the AMSs as they endeavour to introduce, implement and develop competition policy in accordance with the specific legal and economic context of each AMS."[7] The *Regional Guidelines* also noted that the "Regional Guidelines serve only as a reference and are not binding on the AMSs."[8]

While the *Regional Guidelines* claim to "take into account the varying development stages of competition policy in the AMSs"[9] the *Regional Guidelines* were written by a European law firm and are based on European Community competition law with little account taken of the economic conditions and institutions in Southeast Asia and the appropriateness of a general model of competition law for the region. Partially as a result of this approach, the *Regional Guidelines* have only served as a general guide and have not been followed in detail by any Member State.

The eight papers in this special issue describe the current state of play in all ASEAN countries except for Brunei Darussalam and the Lao PDR. These are two of the three countries that have not yet finalized and made public their competition laws. Brunei has approved a competition law but not disclosed it as yet. Their law is likely to follow the approach followed in Singapore and Malaysia, which are both based on European competition law. Given Brunei's small population, and as its major industries are covered by competition codes in regulation, there would not seem to be much scope for a general law—perhaps simply a cartel law should be sufficient.

The National Assembly of the Lao PDR approved changes to the Prime Ministerial Decree of 2004 on July 16, 2015, which are currently being finalized before final approval. The 2004 Decree was based on Thai competition law, but in several drafts that I was involved with there was a move to incorporate some of the market share presumptions in the Vietnamese competition law—but as the law has not been finally approved and translated, this is only speculation.

In his article, David Fruitman speculates about the final version of competition law in Cambodia. As he points out there has been a long gestation period (In 2004, Cambodia committed, as part of its accession to the WTO, to enact a competition law by 2006). But the law is close and while Fruitman does not have the benefit of the latest draft his analysis of a previously released draft should provide good guidance on the likely final outcome.

Myanmar is the last ASEAN country that needed to introduce a completely new competition regime by the 2015 deadline. It has passed its competition law (Competition Law No. 9/2015) but it has yet to come into effect. Even when it comes into force there will be a two-

[6] ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy,* (August 2010), *available at* http://www.asean.org/archive/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf.

[7] *Id.* at 1, ¶1.2.1.

[8] Id. at 1, ¶1.2.2.

[9] Id. at 2, ¶1.3.1.

year grace period before enforcement commences. As Minn Naing Oo & Daren Shiau point out, guidelines and regulations are urgently needed to provide more clarity in a number of areas. For example, a literal interpretation of the Act suggests that many of the prohibited practices are *per se* illegal. It is also not clear whether the Act will apply to state-owned enterprises. So while the Act has met the 2015 ASEAN deadline, much more work needs to be done before competition law becomes operational in Myanmar.

The next six papers describe how ASEAN competition laws established before 2015 have worked out and are, in some cases, being restructured. Deswin Nur outlines what has been happening in Indonesia, especially its problems in penalizing cartels. It is proposed that the Act be amended to give the KPPU greater powers to conduct dawn raids and to allow for the admission of circumstantial evidence. Of more importance, perhaps, is that existing competition law has now spurred a concern with broader competition policy issues. In January 2015, the National Development Plan included competition policy. The proposed changes include strengthening the KPPU as well as other general policies including the harmonization of competition policies. Expect some interesting changes with a greater level of enforcement.

Sakda Thanitcul points out that Thailand's competition authority has failed to penalize anyone for anticompetitive activities despite having had a trade competition law since before the turn of the century. As a result, a Sub-Committee of the Thai Law Reform Commission was formed to recommend changes to the Trade Competition Act. The Sub-Committee presented recommendations to the Prime Minister, National Legislative Council, and the National Reform Council in November 2014. They included some important changes including an extension of the Act to state-owned enterprises competing with the private sector and making the Prime Minister responsible for the Act's administration—an improvement on the current situation where there is overlapping ministerial responsibility. It is also recommended that the Trade Competition Commission become independent and have full-time Commission Members and that the Commission provide more detailed guidelines on provisions dealing with abuse of dominance, criminal offenses, etc.

LUU Huong Ly assesses the role that competition law in Vietnam has played in its move from a centrally planned economy to greater reliance on markets. She concludes that enforcement has been poor so far. Of particular concern is the large number of state-owned enterprises—at the time competition law was enacted all monopolies were state-owned. However, they continue to engage in anticompetitive practices to maintain their market dominance. Vietnam introduced competition law in 2004 to join the World Trade Organization; unfortunately, since then there has been little political will to enforce competition law.

Kala Anandarajah and Dominique Lombardi describe the introduction of competition law in Singapore; a law regarded by many as having had a highly successful implementation. The Competition Commission of Singapore ("CCS") recently celebrated 10 years of operation. The authors point out that the Act does give the CCS power to settle or to accept commitments (except for the voluntary merger regime) but there "is nevertheless an overriding power accorded to the CCS to do anything incidental to its functions under the Act." It seems likely that there may be changes in store in this area. The CCS also has a strong outreach program and provides assistance to new competition law regimes in the region.

Anand Raj, Cynthia Lian, and Wen-Ly Chin examine competition law in Malaysia since its introduction in 2012. The Malaysian Competition Commission ("MyCC") has been very active despite the lack of a merger provision. Penalties in Malaysia are potentially very high (up to 10 percent of worldwide turnover) yet, despite these potentially high fines, the authors note that actual penalties so far have been relatively minor. One interesting feature of the MyCC's enforcement so far has been the focus on allegations of abuse of dominance, unlike many other new regimes that focus on anticompetitive agreements. For the future, they note that the oversight of the Ministry of Domestic Trade, Co-operatives and Consumerism "remains influential in the MyCC's operations" and that the MyCC needs to become more independent.

After more than 20 years since a competition-related bill was first filed in the Philippines, and four years after the OFC endorsed an updated and consolidated version for legislative ratification, President Benigno S. Aquino III signed the Philippine Competition Act ("PCA") on July 21, 2015. Geronimo Sy explains how the new Act strengthens competition reforms and, in particular, analyzes the challenges that the new Philippine Competition Commission will face going forward in dealing with the system of strong sector regulators that the Philippines has also embraced.

In all, competition law will evolve gradually in ASEAN. While there are many differences between the competition laws, increasing regional integration is likely to lead to greater uniformity and the development of institutional mechanisms to deal with cross-border competition disputes—but these developments are highly unlikely to lead to an ASEAN competition law regulator with supranational powers. ASEAN competition regimes are very much a work in progress.