

## Designing Competition Law Under Financial Crisis—Indonesia and Thailand Compared

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**T**he 1997 the Asian Financial Crisis was the impetus for the introduction of competition law in both Indonesia and Thailand. The crisis upset cozy pre-existing government-business relations and led to the collapse of some financial empires. There was a belief in both countries that anticompetitive practices, sanctioned by government, contributed to the crisis and so this proved to be a catalyst for the introduction of competition law in 1999 in both Indonesia and Thailand. While the International Monetary Fund imposed, as a condition for financial support, a requirement that Indonesia introduce a competition law, it did not impose the same condition on Thailand despite the fact that, arguably, Thailand was in worse economic shape prior to the AFC than Indonesia. However, despite the common causal factor, Indonesia and Thailand each designed different competition laws and institutions and both have quite different enforcement records. Why? This is a difficult question, but we present several answers, leading to the realization that while the world has changed in Indonesia and competition is more important there now, the same cannot be said for Thailand—yet.

### I. INTRODUCTION

Government is inseparable from big business networks in Southeast Asia. Small political elites (who gain individual political and economic power from their official positions) or oligarchs (who gain individual political and economic power directly from their material wealth, not their position) control the politics and economies of all countries in Southeast Asia—and so all countries in the region are best described as plutocracies. Of course, elites and oligarchs are often inseparable and oligarchs can use their wealth to buy official or political positions, and often do.

Cozy relationships between government and business limit competition and innovation in many important markets. Government-provided exclusive licenses, preferential lending (often from state-owned banks), elite and oligarchic control of state-owned enterprises (“SOEs”) that compete with the private sector and government tolerance of anticompetitive practices not only provide the elite and oligarchs with considerable financial rewards but also prevent entry by more efficient firms—particularly foreign firms.

Given these circumstances it is hard to envisage that competition law would be introduced at all given that political power and incumbent wealth has been derived from excluding competition. After all

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oligarchy is all about the politics of wealth defense<sup>2</sup>—which would include preventing the introduction of competition law. In democracies, pressure for microeconomic reform and the introduction of competition law is likely to come from a middle class who benefit from the lower prices resulting from more competition or improved market access through reduced

entry barriers and control of dominant firms. Southeast Asian economies have grown considerably in the last twenty years and so the size of the middle class has also grown, increasing pressures on government for a more “level playing field.” However, the size of the middle class was still relatively small in both Indonesia and Thailand when competition law was introduced in both countries in the late 1990s.

In the World Economic Forum’s Executive Opinion Survey when asked: “In your country, to what extent does anti-monopoly policy promote competition” Indonesia ranked 43 and Thailand 69 out of 148 countries in the Global Competitiveness Report 2013-14.<sup>3</sup> But do executive opinions reflect proper perceptions of competition law? Or do they simply reflect vague impressions of competition policies including privatization, tariff policies, etc.? As will be seen Thailand does not enforce its competition law at all so it is hard to understand its relatively high ranking.

DESPITE THE COMMON CAUSAL FACTOR, INDONESIA AND THAILAND EACH DESIGNED DIFFERENT COMPETITION LAWS AND INSTITUTIONS AND BOTH HAVE QUITE DIFFERENT ENFORCEMENT RECORDS

The 1997 the Asian Financial Crisis (“AFC”) was the impetus for the introduction of competition law in both Indonesia and Thailand. The crisis upset cozy pre-existing government-business relations and led to the collapse of some financial empires. There was a belief in both countries that anticompetitive practices, sanctioned by government, contributed to the crisis and so this proved to be a catalyst for the introduction of competition law in 1999 in both Indonesia and Thailand. While the International Monetary Fund (“IMF”) imposed, as a condition for financial support, a requirement that Indonesia introduce a competition law, it did not impose the same condition on Thailand despite the fact that, arguably, Thailand was in worse economic shape prior to the AFC than Indonesia.

Despite the common causal factor, Indonesia and Thailand each designed different competition laws and institutions and both have quite different enforcement records. Why? This is a difficult question to answer. Both are essentially civil law countries (although Thailand has elements of the common law). Because judges are trusted less in civil law countries than in common law countries, civil law countries in Southeast Asia tend to spell out in detail what is prohibited, if not in the legislation (including market-share thresholds for example) then in detailed decrees or guidelines. If these details are not provided, it is unlikely that competition law provisions will be implemented either by civil law regulators or the courts.

Undoubtedly, the design of a competition law and competition regulator depends on a number of factors that are difficult to disentangle empirically. Factors that influence the design outcome can include: (i) pre-existing network relationships; (ii) the extent to which foreigners are involved in the process, including the amount of foreign aid being provided; (iii) the structure of business including its competitiveness and the extent to which underlying important monopolistic practices exist; (iv) political circumstances, including the extent to which big business groups control government and parliament; (v) the extent to which the state (including the army and royalty) is involved in business; and (vi) the adjudication institutions, such as the legal system and traditions, and their history of independence and enforcement effectiveness in each country.

Big business is similar in both Indonesia and Thailand—small numbers of very rich oligarchs (mostly of Chinese ethnic origin) control conglomerates that dominate each economy. So it could be expected that elites and their networks in each country would have the same kinds of interests to protect and so would want similar kinds of competition laws that limit the impact on their wealth. With control of the political process, it would be expected that elites and conglomerates would not want regulators to be independent, instead preferring them to be within government ministries they can influence politically directly or indirectly through control over the appointment of regulators. Judicial discretion, similarly, would want to be minimized.

However, despite the fact that both countries had weak coalition governments around the time of the introduction of competition law, Indonesia and Thailand have vastly different competition laws. Competition law is complex in Indonesia and has an independent regulator. Thailand's competition law is relatively simple, derived from competition laws in Northeast Asia and Europe, but its regulator is located within a ministry. The difference can be explained, at least partially, by the fact that competition law in Thailand was drafted by technocrats within the civil service, while in Indonesia it was mainly a political compromise between in-house parliamentary groups.

At the time of the AFC Thailand was saddled with weak coalition governments that resulted in considerable policy dithering due to interest group bickering. But Thailand already had a competition law—the *Price Control and Anti-Monopoly Act 1979*—which was not enforced. This was replaced by the *Competition Act 1999*. Interestingly, despite the military being involved in business in Thailand, both Acts were the result of military-installed governments—which may explain the harshness of the penalties. At the moment Thailand still only has criminal penalties although there are proposals to introduce civil penalties.

Indonesia, by contrast, at the time of the AEC, had just replaced a strong, centralized government under the dictator Soeharto. This was a government with a long history of cronyism and backroom deals and increasingly unpredictable policies. After Soeharto's fall, to counter the economic power of future presidents, the competition law was written by groups within Parliament (with some input from the executive) who were suspicious of elite and oligarchic domination of the economy under Presidents Sukarno and Soeharto in conjunction with the military. Being a compromise of competing interest groups within Parliament,

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the resulting Act is complex and internally inconsistent as it was driven by an attempt to cover every conceivable kind of anticompetitive and unfair practice. In order to prevent the executive from assuming the control over business it had previously enjoyed, the Indonesian regulator ("KPPU") was made the first independent regulator in Indonesia—with staff recruited from outside the civil service and so not enjoying civil service benefits such as permanency.

Given the above it could be expected that with a relatively clearly written act in Thailand—the product of extensive research within the bureaucracy—there would be a greater level of enforcement in Thailand.

Yet not one case has proceeded to a sanction. While several major cases were investigated during the first year, including those involving a cable television monopoly and a whisky tied sales case, enforcement effectively stopped with the election of the Thai Rak Thai party in 2000, led by Thaksin Shinawatra. Thaksin had built a considerable base of electoral support, particularly among the poor in the North and Northeast, but led a party dominated by big business and which competed with other elites groups in the opposing Democrat Party. Cases recommended for prosecution by the Trade Competition Commission to the Attorney-General have usually been returned to the Commission stating that more evidence was required to meet the standard for a criminal prosecution.

THE LACK OF SUCCESSFUL PROSECUTIONS IS NOT ONLY DUE TO ELITE OR OLIGARCHIC INTERFERENCE AT THE INVESTIGATING STAGE AND PROBLEMS OF MEETING THE CRIMINAL STANDARD OF PROOF, BUT ALSO DUE TO THE FACT CRIMINAL CONVICTIONS MEAN CONSIDERABLE LOSS OF FACE IN THAILAND.

The lack of successful prosecutions is not only due to elite or oligarchic interference at the investigating stage and problems of meeting the criminal standard of proof, but also due to the fact criminal convictions mean considerable *loss of face* in Thailand. So cases may have had an indirect impact on the Attorney-General's network relationships—not just the direct business interests of those involved. Recent proposals to allow for civil penalties (which mean less loss of “face”) may lead to a greater level of enforcement.

On the other hand, face does not seem to be quite so important in Indonesia. Many cases have been investigated and action taken by the KPPU. While many have been lost on appeal in the courts, many have also succeeded. So the level and quality of enforcement have been much greater in Indonesia than in Thailand.

## II. THE ASIAN FINANCIAL CRISIS

The AFC crisis began in Thailand in July 1997 (sometimes called the *Tom Yum Goong Crisis*—that is, hot, spicy but sour) when the Thai baht was allowed to float. In Thailand close government-business ties usually meant that favored businesses felt protected from government and so immune from sudden changes in economic policy. However, a weak coalition government failed to respond to early signs of the impending crisis and the sudden float of the Thai baht in 1997 upset longstanding business expectations that they would be protected.

Before the AFC the Thai Finance Ministry had guaranteed the creditworthiness of Thai financial institutions. The float of the baht arose as a result of the appointment of a new finance minister in Thailand in June 1997. The Thai Finance Ministry, under the previous minister, had sought data on the amount of foreign reserves held by the Central Bank but could not get a reply. In frustration, Prime Minister Chevalit Yongchaiyudh appointed Thanong Bidaya (who has a PhD in management from Northwestern University) as the new finance minister. Bidaya went to the Central Bank to inspect their records and to his dismay he discovered that reserves would only cover Thai imports for two days—whereas the Bank was required to hold reserves for 60 days. One reason was that the Central Bank had lent about U.S. \$8 billion to local banks who were in difficulty. As Haley, Haley, & Tan put it:

The Central Banks's officers had not reported the true state of affairs six months earlier to the government and public because the officers would have lost face.<sup>4</sup>

Presumably their network friends would also have lost considerable amounts of money. However, U.S. authorities knew about the foreign reserve problem. Timothy Geithner wrote that Thai authorities refused to listen to the IMF's warnings about short-term foreign currency borrowing coupled with a fixed exchange rate. Geithner said that Thai authorities claimed to have U.S. \$20 billion in foreign exchange reserves but "we knew

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the real number was closer to zero; the Thai central bank had sold its dollars in the forward market to conceal the depth of its problems."<sup>5</sup>

Thailand reached a standby arrangement with the International Monetary Fund in August 1997. Indonesia did the same in November. However, Soeharto's initial commitment to reform as part of the IMF bailout was followed by backpedalling due to business pressures. Soeharto's backpedalling may account for why the IMF insisted on a formal commitment to introduce competition law.

The crisis had significant political impact as well as financial. Business and government have always been close in Southeast Asia and politically well-connected businesses suffered considerable reductions in income and wealth due to the floating of their currencies, as foreign borrowings had usually not been hedged—the government had been "trusted" not to float without advance notice. At the same time, normal citizens suffered considerably and blamed the crisis on political corruption and business-government links. As often happens with economic crises, subsequent political turmoil led to important political changes.<sup>6</sup> The Asian Financial Crisis led to the end of the Soeharto regime in Indonesia and the Chavalit government in Thailand.

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### III. SOME GENERAL FEATURES OF BIG BUSINESS IN SOUTHEAST ASIA

Wealth is highly concentrated in families in all Southeast Asian countries. For example:

The largest ten families in Indonesia and the Philippines control more than half the corporate assets (57% and 52.2% respectively). The concentration of control in the hands of large families is also high in Thailand (46.2%) and Hong Kong (32.1%). A quarter of the corporate sector in Korea, Malaysia and Singapore is controlled by the largest ten families. In contrast, family control in Japan is insignificant, as the largest 15 families own only 2.8% of listed corporate assets.<sup>7</sup>

Businesses tend to share a number of common characteristics, which include the importance of networks (both domestically and across countries), the use of business groups, and a concern with control over

the distribution chain.

## A. *Networks*

In general, loyalty and trust form the basis for most networks and so every country develops its own business networks where legal institutions are weak. In Southeast Asia, networks have been traditionally important because, until recently, legal institutions have not developed to regulate business relationships, including the enforcement of contracts, etc. So it is not surprising that immigrant Chinese families and clan groups, for self-protection against governments and indigenous networks, formed ethnic business networks during the 19th and 20th in all countries in Southeast Asia. These networks usually extended beyond individual countries.

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In Southeast Asia, most big business is dominated by the Overseas Chinese. In Thailand, one exception is the *Crown Property Bureau*, which is at the heart of the network monarchy that dominates many significant Thai economic sectors. Not much is written about the Bureau, probably due to a fear that anything critical will breach *lese majeste* laws. One exception is a work by Porphant Ouyyanont, who describes the initial source of the Bureau's wealth as follows:

In 1890, as part of the overall modernisation of administration ... royal expenses were formally separated from the government budget and placed under the management of a revamped Privy Purse Bureau (PPB) within the Ministry of Finance. Around 15% of total government revenue was assigned to the PPB.<sup>8</sup>

After paying for household expenses, there was a surplus which was invested and serves as the basis for the monarchy's extensive investments in Thailand today, particularly in real estate, banking (the Siam Commercial Bank ("SCB")), and business (the Siam Cement Company—which had a monopoly on cement production at a time of considerable urban expansion). After the absolute monarchy was abolished in 1932, the PPB's assets were divided into three: those belonging to the King personally; state property including the palaces; and the assets used to fund the monarchy as an institution—which included the SCB and Siam Cement—which were then controlled by the Crown Property Bureau and which came under the Ministry of Finance with directors appointed by the government. However, in 1948 the *Crown Property Act* established the Crown Property Bureau as a juristic person and gave control back to the monarchy.

The CPB has its own website and provides an annual report<sup>9</sup> which does not include financial statements. Porphant Ouyyanont estimated the total worth of the CPB in 2005 to be about 1.1 trillion baht, which is about U.S. \$34.4 billion at current exchange rates. While the CPB is not given an explicit exemption from competition law, given the importance of the monarchy network in Thailand it is highly unlikely the CPB would be investigated for alleged competition law offenses.

Overseas Chinese place great value on connections (*guanxi*) and because they believe in putting

family first, necessarily see relations outside the family as being potentially opportunistic. Gifts are seen as a way of developing trustworthy relations outside the family in societies where the ability to enforce contracts is limited. Trust developed through goodwill over time helps to expand the number of people one would otherwise deal with outside the family. Drawing the line between *guanxi*—used to develop long-term relationships in an uncertain world that reduce transaction costs—and corruption and/or anticompetitive practices is difficult. Adding to the complexity is that, for survival, Overseas Chinese developed close links with indigenous rulers, often collecting taxes for them and otherwise helping to develop their businesses—which also gave them the ruler’s protection against often hostile indigenous competitors.

BUT A SOLE CONCERN WITH OWNERSHIP MASKS ISSUES OF CONTROL, WHICH ARE PARTICULARLY IMPORTANT IN BUSINESSES IN ASIA.

Haley et al.<sup>10,11</sup> summarize the types of Overseas Chinese business networks as follows: Clan grouping (by family surname); locality group (by locality of origin in China); dialect grouping (e.g. Hokkien, Teochew); guild grouping; and trust grouping (based on experience or recommendation). One of the advantages of the Overseas Chinese business networks is the ability to discuss matters openly, without fear that what is communicated will be used against them (i.e. no fear of loss of “face”). While this openness allows for better decision-making, it also allows for the possibility (or probability) for potentially anticompetitive matters to be discussed, such as price-fixing and exclusionary boycotts. Overseas Chinese business networks allow for the network to transmit information about prices, changing economic conditions, and the trustworthiness of those within and without the network. These networks also allow for long-term co-operation and “network co-ordination” of prices, targeting of businesses to exclude, and agreements not to compete with each other—hence competition law should take an interest in such networks.

## **B. Business Groups**

For most competition law purposes, corporate form is not considered relevant. Companies are assumed to have widely dispersed ownership and corporate governance is there to overcome agency problems between shareholders as principals and management as their agents. But a sole concern with ownership masks issues of control, which are particularly important in businesses in Asia.

La Porta, Lopez-de-Silanes, & Shleifer<sup>12</sup> examined the ownership structure of the 20 largest publicly traded firms in 27 of the richest countries in the world, where the likelihood of widely dispersed ownership is high. They found, particularly in countries that have poor minority shareholder protection, that even large firms tend to have controlling shareholders, with control held sometimes by the state but mostly held by a family (either the founder or his—invariably male—descendants). Usually, controlling shareholders have a degree of control over company assets greater than their rights to the cash flows or assets of the firm. This is achieved through the use of pyramid structures or dual class shares.

Furthermore, the Overseas Chinese family businesses often “expand by acquiring an ever-increasing number of companies rather than by expanding existing companies. The overall business group may be large,

but its individual components may be relatively small. This means that ethnic Chinese feature strongly in lists of the wealthiest families or entrepreneurs, but are under-represented in lists of the biggest companies.”<sup>13</sup>

Claessens, Djankov, & Lang found that corporate control is usually enhanced through the use of pyramid structures and cross-holdings among East Asian firms.<sup>14</sup> Pyramid control is fairly common in continental European countries and in Asia but not in the United Kingdom and the United States. Pyramids are usually created through a holding company that has a controlling interest in another holding company that has, in turn, a controlling interest in an operating company. Because both dual-class shares and corporate pyramids are mechanisms to separate cash flow rights and voting rights, they allow a party to control corporate assets while contributing only a small proportion of equity capital. Once established, control can be increased through rights issues. Funds are sought from existing shareholders, with those that contribute increasing their relative ownership share. As a strategy, rights issues can be used to dilute the shareholding of non-network shareholders.

WHILE THE EXERCISE OF MARKET POWER MAY BE SIMILAR, A DISTINCTION SHOULD BE MADE BETWEEN CONGLOMERATES AND BUSINESS GROUPS

The economic basis for exercising control through dual-class shares and pyramids is essentially the same as for “trust networks”—they can achieve efficiencies but also increase market power. They may bring efficiencies where institutions, such as equity markets, are undeveloped. For example, the business group

IMPORTANTLY, FOR COMPETITION LAW PURPOSES, LARGE BUSINESS GROUPS ALSO FACILITATE THE EXERCISE OF MARKET POWER

can serve as an internal financial market where cash from profitable firms within the group support those firms that are struggling. Just as importantly, where legal institutions are undeveloped (and thus contracts are difficult to legally enforce) then a business group, conglomerate, or corporate pyramid can substitute internally for outside contracting—thereby bypassing outside markets and networks. A recent empirical study of business groups concluded that “their emergence and early establishment often occur under very difficult institutional conditions and that they played a pivotal role in the early stages of many countries’ and regions’ economic development.”<sup>15</sup>

Importantly, for competition law purposes, large business groups also facilitate the exercise of market power. Pyramidal group, allow for centralized control of interrelated markets. This enables, for example, one group member to secretly tie the products of network members, or to provide below cost inputs to another member company, allowing the downstream firm to drive competitors out of business. For example, suppose A owns 51 percent of shares in Company X, a monopolist. A also owns 100 percent of shares in Company Y. Company X sells an input to Company Y. A could direct Company X to sell the input to Company Y at a 30 percent discount compared to other buyers. This increases A’s overall profits (A receives only 50 percent of profits from Company X, but 100 percent of profits from Company Y). Company Y gets a competitive advantage in the downstream market and may be able to drive out his/her other competitors or force the others to join a cartel. If the business group operates across countries, a competition regulator will have

difficulty proving predatory pricing, in particular where the chain of companies includes private companies that operate with few records or public scrutiny.

While the exercise of market power may be similar, a distinction should be made between conglomerates and business groups. Conglomerates typically are a corporate group, with a parent company and subsidiaries. For example:

Many successful ethnic Chinese families in the region have modernised their business interests along similar lines. Typically, their companies are formed into a squat pyramid format, with a private holding company at the apex, a second tier holding the most prized assets which are usually privately held, and a third tier comprising the group's publicly-listed companies. Such a structure makes it easier for the families to implement the maxim: 'what is profitable is 100 per cent mine; what is not is mostly not mine.' Should there be a desire to do so, it also makes it easier to raise funds at the bottom of the pyramid from shareholders in the group's public companies, then pass these up the pyramid.<sup>16</sup>

Business groups are an intermediate type of organization lying between market contracting and common-ownership conglomerates. A business group is a collection of legally distinct firms that do business with each other on favorable terms. While they may resemble conglomerates, the companies in a business group are legally independent, i.e., there is no formal control. However, despite this independence they coordinate their long-term strategies. Despite the formal lack of control there is still, however, a high degree of informal control within business groups; for example, by:

BECAUSE BUSINESS GROUPS CONTROL MUCH OF THE WEALTH IN SOUTHEAST ASIA THEY MAY REPRESENT A PARTICULAR CHALLENGE FOR COMPETITION LAW

- a family (e.g., ethnic Chinese groups in Indonesia, Malaysia, the Philippines, and Thailand, or the Bumiputera groups in Indonesia and Malaysia);
- the State (e.g., government-linked groups in Singapore or Vietnam, the military in Thailand or Indonesia); or
- a financial institution.

Why are business groups so pervasive and important in Southeast Asia? The usual explanation for business groups, as mentioned above, is efficiency. That is, they arise due to market failures or "institutional voids," similar to the economic explanation for networks. But as institutional deficiencies are rectified with increasing standards of living, it would be expected that they would be no longer needed. However, business groups are still important in Southeast Asia, even with high levels of economic development, which casts doubt then on the "institutional voids" hypothesis and suggests that creation of the market power may be, now, more, important.

Many business groups in Southeast Asia are state-created. Often, following the end of colonial rule, the state monopolized capital and used it to assist specially selected small groups of local entrepreneurs to

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buy the assets of the departing colonists, or the state simply nationalized them and transferred control to indigenous entrepreneurs linked to government. Usually, this state-led strategy was accompanied by the grant of domestic monopolies and protection from foreign competition (both by import protections and restrictions on foreign ownership).

Because business groups control much of the wealth in Southeast Asia they may represent a particular challenge for competition law. Reasons include: (i) close relations with government (this is more of a problem in the civil law countries where there are usually fewer private remedies available, because state regulators do not act on complaints about anticompetitive conduct); (ii) common anticompetitive practices such as collusion between members of the same business group; and (iii) abuse of market power achieved through coordination of policies and resources (e.g., impeding entry or driving competitors out by obtaining preferential prices or terms for inputs from other members of the group, including preferential financing or favorable distribution through cheaper retail outlets).

As far back as 1995, the Australian East Asia Analytical Unit noted that:

A growing phenomenon among many prominent ethnic Chinese-controlled companies, particularly in South-East Asia, is the degree to which they move together in their quest to jointly dominate markets. This occurs at an international level, emphasising that senior ethnic Chinese business people often treat the region as a single, borderless market.<sup>17</sup>

### ***C. Control of Distribution***

The Overseas Chinese originally concentrated in trading due to the comparative advantage given them by their networks in many Asian countries. Additionally, they have a very high savings rate and tend to keep much of their wealth in liquid form. Investments are spread across many different industries again reflecting an underlying (deserved) concern with misappropriation by indigenous rulers or other businessmen due to a lack of contract law enforcement. Haley, et al.<sup>18</sup> suggest that:

... the Overseas Chinese prefer to maintain control over distribution of their goods. Perhaps this practice originates through their historical role in trade and distribution of goods; regardless of the reason, most goods sold in Southeast Asia go through the hands of Overseas Chinese intermediaries at some point in their passage between manufacturers and end user.

This “historical role” partly resulted from the lack of legal contract enforcement in China and Southeast Asia. Douglass North<sup>19</sup> stressed that economic growth depends on “How effectively contracts are enforced.” But in Imperial China, the law did not facilitate commercial transactions but rather was designed

and enforced to promote state interests. As a result, merchants in China avoided the formal legal system. Where the state does not provide contract law or does not enforce it, then businesses “develop reputation-based alternatives to obtain the crucial predictability in commercial transactions.”<sup>20</sup> The practice of relying on family, extended families, and clans was carried by Overseas Chinese to Southeast Asia (where legal systems were underdeveloped) and served them well.

NETWORK DISTRIBUTION PRACTICES ALSO EXPLAIN WHY A NUMBER OF ASIAN COUNTRIES, BOTH IN NORTHEAST AND SOUTHEAST ASIA, INCLUDE “BUSINESS CONSUMER PROTECTION” PROVISIONS IN THEIR COMPETITION LAWS THAT DEAL WITH BARGAINING RELATIONS BETWEEN THE BUSINESS SUPPLIER AND THE BUSINESS BUYER

Klein & Murphy<sup>21</sup> provide a general model where a manufacturer induces a dealer to provide those services:

through a private enforcement mechanism by which active monitoring and the threat of manufacturer termination assures dealer performance. Within this framework, the manufacturer uses vertical restraints to decrease the short-run gain to non-performing dealers (by limiting their ability to expand output) and to increase the long-run gain to performing dealers (by creating a quasi-rent stream).<sup>22</sup>

So vertical restraints by firms without market power are simply part of efficient transacting rather than being anticompetitive. But with market power and substantial financial resources, these restraints may be used for anticompetitive purposes.

The network distributional practices built up historically in Southeast Asia in the absence of effective contract law enforcement explains, at least partly, why Singapore’s competition law does not apply to vertical restrictions unless imposed by a dominant firm. If vertical restraints are possibly imposed to overcome

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contractual problems, rather than for anticompetitive reasons, then there is a lesser case to prohibit them when the firm imposing the vertical restriction does not have market power. Another reason is that vertical restrictions are difficult to analyze for a new competition agency and it was felt it was better to focus on more likely egregious conduct, at least to begin.

Network distribution practices also explain why a number of Asian countries, both in Northeast and Southeast Asia, include “business consumer protection” provisions in their competition laws that deal with bargaining relations between the business supplier and the business buyer. These provisions, while mainly concerned with unfairness in business-to-business contracting and distribution arrangements, can also deal with competition issues such as price discrimination between business buyers.

Apart from contracting efficiency, another explanation for establishing distribution networks is to limit competition. Networks allow members to act together to engage in exclusionary conduct. Outsiders aware of network connections will not enter. Networks can price discriminate, giving other members

discounts to enable them to survive when facing new entry. Network members can collectively or individually subsidize predatory conduct by members against non-members. Conglomerates make this easier to accomplish. Anticompetitive motives are likely to be an important reason for the persistence of networks and conglomerates—particularly given their inefficiencies.

#### IV. THE INTRODUCTION OF COMPETITION LAW

Big business influences, particularly through their networks, considerably affected legislative outcomes, regulation, and resulting legal processes in both Indonesia and Thailand. This is partly due to the fact that in Southeast Asia (with the exception of Singapore) “all are governed by states that claim to be strong and lay wide claims but whose capacities are low.”<sup>23</sup> Many of the relationships are informal and so difficult to capture. While the awarding of licenses to families and friends is usually obvious, the true degree of cooperation between government and business is not transparent. As a result, determining the true forces supporting or opposing the introduction of competition law is difficult to determine.

In Indonesia, business-government relations were controlled by President Soeharto and were accompanied by the three sins of “corruption, collusion (or cronyism) and nepotism” (“KKN”). Soeharto used his presidential decree powers to benefit a limited number of cronies and members of his family; this small number of people controlled a considerable portion of the Indonesian economy. Indeed, the financial crisis in 1997 was largely blamed on KKN.

IN RETURN GOVERNMENTS ‘REPAID’ FINANCIAL SUPPORTERS FROM THE PUBLIC PURSE —AND IN THE PROCESS REDUCED BUREAUCRATIC CHECKS AND BALANCES.

However, Chinese-Indonesians had come to dominate big business following on from the economic liberalization in the 1980s and ‘90s. Chinese-Indonesians, who had formerly suffered considerable discrimination and violence, sought political alliances for protection, including with the military. But their minority status and wealth made them reluctant to engage publicly with politicians—instead relations were personal and non-transparent<sup>24</sup>—further underpinning the widespread perception that their relationships with politicians were a major contributing factor to the impact of the AFC in Indonesia.

And while Soeharto mainly developed alliances with Chinese-Indonesians, he also selectively favored the local *pribumi* Malays through preferential bank lending, the awarding of government contracts, and the promotion of strategic industry initiatives.

DESPITE INDONESIA BEING IN A BETTER FINANCIAL POSITION BEFORE THE CRISIS THAN OTHER SOUTHEAST ASIAN COUNTRIES, INCLUDING THAILAND, THE IMPACT OF THE CRISIS WAS GREATER IN INDONESIA

particular, the Chinese-Thai developed clientelistic rent-seeking relationships with the military and bureaucrats—and, similar to Indonesia, also to obtain political protection.<sup>25</sup> Chinese-Thais assimilated into Thai society to a much greater degree than in Indonesia. Part of this was due to religion—Chinese could more

easily accept Buddhism. Thai politicians increasingly turned to Chinese-Thai businessmen for financial support in running for election. In return governments ‘repaid’ financial supporters from the public purse<sup>26</sup>—and in the process reduced bureaucratic checks and balances.

### A. *The Introduction of Competition Law in Indonesia*

Hal Hill argues that there is a “deep-seated mistrust of market forces, economic liberalism and private (especially Chinese) ownership in many influential quarters of Indonesia.”<sup>27</sup> A former Chairman of the KPPU, Syamsul Maarif says that Indonesians are “trapped in harmony” which is associated with togetherness and sharing and not competition and individually winning.<sup>28</sup> So why introduce competition law?

Before 1999, competition provisions were included in certain statutes and several attempts were made to introduce competition law in the mid 1980s. In 1992 the Indonesian Democratic Party published a draft law called *Stimulation of Economic Competition Law*, but it never went to Parliament. These attempts were designed to curb the power of the Soeharto family and the conglomerates, but Soeharto’s dominance of politics meant the attempts had little chance of success.

Despite Indonesia being in a better financial position before the crisis than other Southeast Asian countries, including Thailand, the impact of the crisis was greater in Indonesia. In August 1997 the rupiah was floated and in October the IMF called in. The 1997 Asian Financial Crisis, together with allegations of election fraud and repression of the opposition, had led to the rupiah falling considerably against the U.S. dollar. As a result, domestic prices increased considerably, production fell, and many banks were at risk of failing. The Soeharto regime was blamed for the crisis by allowing the growth of large conglomerates (controlled by the Soeharto family and Chinese-Indonesians) and for allowing corrupt SOEs to become inefficient.

BUT AFTER 1997, THE PARLIAMENT, WITH A NEW-FOUND CONFIDENCE AFTER MORE THAN 30 YEARS OF RUBBER-STAMPING BILLS FROM THE EXECUTIVE, ASSERTED ITS POWERS AND STARTED TO INITIATE AND PASS LAWS INCLUDING A COMPETITION LAW

As a result, the IMF and Indonesian Government agreed on a *Letter of Intent* and a *Memorandum of Economic Policies* on July 29, 1998. However, Soeharto tried to protect his cronies from the impact of the financial crisis and the IMF policy recommendations; for example, by trying to use the central bank’s credit facility to prop up crony banks. Negotiations with the IMF for a new program began and, on September 11, 1998, in a new *Letter of Intent* the Indonesian Government committed to “submit to Parliament a draft law on competition policy” by the target date of December 31, 1998.<sup>29</sup> But as Haggard puts it:

The ease with which the second program was negotiated should have given the international financial institutions pause. Even more than the first one, the program cut deeply into the patronage networks that Soeharto had built up: the government agreed to essentially all of the IMF’s proposals.<sup>30</sup>

The Ministry of Trade and Industry began to prepare a competition bill. Under the New Order regime,

SMALL BUSINESS NOT ONLY OBJECTED TO THE PREFERENCES GIVEN TO LARGE BUSINESS GROUPS BUT ALSO TO THE WAY THESE LARGE COMPANIES BEHAVED ANTICOMPETITIVELY WITH IMPUNITY

the Indonesian Parliament had simply been a rubber stamp. But after 1997, the Parliament, with a new-found confidence after more than 30 years of rubber-stamping bills from the executive, asserted its powers and started to initiate and pass laws including a competition law, which was drafted within Parliament with input from the executive.

It is important to understand the background of business development in Indonesia before 1997. While Soekarno had tried to control business-government relations, Soeharto had gone further and established Kadin in 1968 as the only business organization accepted by his “New Order” government between 1968 to 1998.<sup>31</sup> This was formalized in Law No 1 of 1987 that designated Kadin as the sole (monopoly) representative of the business community in Indonesia. Kadin was used by the government to control business participation in government.

While big business, including the Sino-Indonesian conglomerates, maintained close links with government independently of Kadin, Kadin was still the sole official business representative. It covered many competing interest groups including small and big business and indigenous businessmen and the dominating Chinese business groups.

Under Soeharto, large Chinese-Indonesian business groups flourished, particularly during the 1980s when they obtained exclusive import licenses, etc. as a result of close relations with Soeharto. Indigenous business was not so lucky in gaining state protection and subsequently saw conglomerates as the most important contributor to the Asian Financial Crisis in 1997-98.

Small business not only objected to the preferences given to large business groups but also to the way these large companies behaved anticompetitively with impunity. For example, nine large cement companies formed a cartel through an industry association called the ASI. The forestry association was given the monopoly rights to export timber. One of Soeharto’s sons, Tommy, was given the monopoly right to control village co-operatives, and was also given exclusive contracts to distribute two chemical products from Pertamina—the state-owned oil and gas conglomerate.

Loughlin, et al. argued that the anticompetitive government intervention was largely justified by the government on the basis of overall public welfare:

Government intervention in the Indonesian economy is very extensive, and is justified by the Constitution of 1945, which declares that the state will control economic activities that can affect the welfare of the general public. This has been interpreted liberally by government throughout Indonesian history, often for its own political interest. During the Old Order it was used as justification for nationalizing foreign-owned enterprises. During the New Order it was used to justify the mixed-economy idea of government intervention, in which government intervenes not only to promote macroeconomic stability but also for economic planning purposes.

The latter rationale for government intervention has led to most of the government interventions that have distorted competition.<sup>32</sup>

FOLLOWING SOEHARTO'S RESIGNATION, ONE OF PARLIAMENT'S FIRST PRIORITIES WAS TO DRAW UP A COMPETITION LAW, DUE TO THE WIDESPREAD PERCEPTION THAT MANY OF THE ECONOMIC PROBLEMS WERE THE RESULT OF THE CONGLOMERATES THAT HAD GROWN UNDER THE CORRUPT SUKARNO AND SOEHARTO REGIMES

As the sole business organization, Kadin sometimes argued for the introduction of competition law. In an interview in 1987, Kadin's Chairman Sukamdani had called on the government to introduce an antimonopoly law. In 1989 the new chairman of Kadin, Sotion Ardjannggi, again called for an antimonopoly law and again at Kadin's national assembly in 1991. But, in general, doubts were expressed about the ability of Kadin to stand up to Soeharto.

In 1994, a new Kadin Chairman, Aburizal Bakrie argued that pribumi and small businessmen should be given preferential treatment and argued for control over conglomerates. In particular he was concerned with the vertical control by conglomerates of production processes from inputs to retail. So Kadin called for control of collusive business practices by Chinese conglomerates. However, Kadin failed in arguing for a competition law that was against the Soeharto's regime preferential treatment of (mainly Chinese) conglomerates and its tolerance (and encouragement) of anticompetitive practices.

DURING THE 1970S A GROUP OF MIDDLE-RANKING OFFICERS (TRAINED BY THE UNITED STATES AND WHO HAD FOUGHT IN VIETNAM) CAME TO THE FORE—THEY WERE ANTICOMMUNIST AND ANTICAPITALIST (BECAUSE THEY BELIEVED BUSINESSMEN MANIPULATED ELECTIONS).

Between 1993 and 1994, the Indonesian Department of Trade, together with the Faculty of Law at the University of Indonesia produced a draft law "Healthy Business Competition." The Indonesian Democratic Party ("PDI") produced a draft competition law in 1995—but nothing came of either. Before Law No 5 of 1999, there were several laws that had contained elements of competition law or unfair competition law. For example, Article 392 bis of the Indonesian Criminal Code said:

Whomsoever engages in an act of deception to mislead the public or a certain individual with the purpose of establishing or prospering his/her merchandise or his/her own company or the property of another person, will be sentenced for unfair competition, with imprisonment for a maximum of one year and four months or a fine of Rp. 13,500 if such an act might give rise to his/her own competition or the competition of any other person.<sup>34</sup>

Article 7 of Basic Law of Industry No. 5 of 1984 stated that:

"[t]he Government shall regulate, guide and develop industries in order to: . . . (2) develop fair and healthy competition and prevent unhealthy competition . . ."<sup>35</sup>

In addition Article 1365 of the Civil Code allowed for compensation as follow:

Each act that is unlawful and causes loss to other parties shall obligate the person causing such loss by their fault to compensate for such loss.”<sup>36</sup>

Following Soeharto’s resignation, one of Parliament’s first priorities was to draw up a competition law, due to the widespread perception that many of the economic problems were the result of the conglomerates that had grown under the corrupt Sukarno and Soeharto regimes—conglomerates that were mainly controlled by Chinese-Indonesian’s and members of the Soeharto family. There were also considerable concerns about inefficient state-owned enterprises. Greater business opportunities were sought by pribumi but this was impeded by many anticompetitive practices, often sanctioned by government, such as the many (exclusionary) cartels, exclusive licenses, etc. So the stage was set when, on July 29, 1998 the government of Indonesia signed a Letter of Intent with the IMF promising that the draft of a monopoly law would be submitted to parliament before the end of 1998.<sup>37</sup>

### ***B. The Introduction of Competition Law in Thailand***

In the late 1950s, the US brought together the military, businessmen and royalists – the three forces that had tussled since 1932 – in a powerful alliance. Together they resurrected and embellished the vision of a dictatorial strong state, demanding unity in order to achieve development and to fight off an external enemy – in this era, ‘communism’.<sup>38</sup>

Considerable economic and social changes occurred in Thailand during the 1960s and 1970s due to the extensive involvement of the United States during the American War in Vietnam, and afterwards. The U.S. involvement meant a shift towards a liberal market economy. Trade and financial market liberalization fuelled industrialization and urbanization together with the other Asian “tiger economies.” Bangkok and the middle class grew rapidly—and became more vocal politically.

PARLIAMENT BECAME A PLACE TO DO  
BUSINESS RATHER THAN REPRESENT  
CONSTITUENTS.

Thailand has been ruled by the military for most of its history since the introduction of a constitutional monarchy in 1932. During that time the generals and the bureaucratic elite organized to ensure social harmony and to “guide democracy” from above. During the 1970s a group of middle-ranking officers (trained by the United States and who had fought in Vietnam) came to the fore—they were anticommunist and anticapitalist (because they believed businessmen manipulated elections). They also:

believed that the problem of communism stemmed from capitalism because ‘some groups have been able to take advantage and build up monopolistic power which inflicts social injustice and material hardship on the people’.<sup>39</sup>

To overcome these problems a “guided democracy” was needed to eliminate social injustice and curb monopoly power. A *Price Fixing and Anti-Monopoly Act* in 1979 was designed to control prices. The antimonopoly provisions were used to identify sectors to be brought under price control. This gave the bureaucrats considerable power and options for corruption. Importantly, the sanctions introduced were

criminal (fines and imprisonment) together with personal liability for managing directors and managers of corporations. Similar penalties were introduced for the Competition Act in 1999.

During the 1980s and 1990s there were continual battles between the military and business to control Parliament. By 1988 businessmen comprised two-thirds of the lower house of parliament. Business resented both the appointments of generals to SOEs and the amount of the budget allocated to the military rather than for promoting economic growth. While, initially, most of these business-politicians came from Bangkok, over time Parliament came to be dominated by provincial businessmen. Parliament became a place to do business rather than represent constituents. About this time the World Bank recommended that Thailand liberalize its financial system. Thai bureaucrats agreed, believing that access to capital would allow for new businesses to grow and compete with existing powerful conglomerates.

CHUAN'S GOVERNMENT MADE NO FORMAL COMMITMENT TO THE IMF REGARDING INTRODUCING A COMPETITION LAW. INSTEAD THEY AGREED TO PROMOTE GREATER COMPETITION BY PRIVATIZING MONOPOLY SOES, ETC

than for promoting economic growth. While, initially, most of these business-politicians came from Bangkok, over time Parliament came to be dominated by provincial businessmen. Parliament became a place to do business rather than represent constituents. About this time the World Bank recommended that Thailand liberalize its financial system. Thai bureaucrats agreed, believing that access to capital would allow for new

Another coup in 1991 was intended to stop the alleged corruption and “money politics” resulting from the increased importance of provincial businessmen—politicians who were encroaching on the interests of the established wealth in Bangkok—including that of the military. The coup was supported by Bangkok businessmen who resented the rise of their provincial competitors. At the same time, there was also some concern among some rich Thais in Bangkok about the fact that European luxury car manufacturers had established national exclusive distribution arrangements—local businesses wanted to be able to buy these cars overseas and use local dealers for servicing, etc. Some important people felt that competition law should be introduced to stop these exclusive dealing arrangements.

Following the 1991 coup, the military appointed Mr. Anand Punyarachoon as Prime Minister, who introduced a number of free market economic reforms during his short tenure from March 1991 to April 1992. A draft competition law was approved by his Cabinet and submitted to the Parliament for deliberation, but before it could be passed a brutal crackdown on protestors in 1992 led to Parliament being dissolved and new elections called.

THAI ECONOMY SLOWED IN 1996 IN PART DUE TO A WIDENING CURRENT ACCOUNT DEFICIT AND CONCERNS WITH THE RECENTLY LIBERALIZED FINANCIAL SECTOR

The Democrat Party won the 1992 election (led by Chuan Leekpai). Appealing to businessmen, the middle class in Bangkok, and urban populations in the South, the Democrats proposed to modernize the Thai economy including their “law and institutions.”<sup>40</sup> In 1992, due to the lack of success of the 1979 price-control legislation and a recognition that economic circumstances were changing, the Chuan Government set up yet another Working Party to look at competition law under the Ministry of Commerce. However, no action was taken during his term of office from September 1992 to May 1995.

Arguments between the various factions continued. Bureaucrats argued that parliament was too

powerful and inefficient and had reduced the proper role and importance of the bureaucracy. However, following a land scandal in Phuket the Democrat party led coalition government fell in 1996 to be replaced by a coalition led by the Chart Thai Party (Prime Minister Banham Silpa-archa—a second generation Chinese who had initially made his money from a monopoly on the sale of chlorine for the water supply in his province). Following further elections in 1996, Chavalit Yongchaiyudh became Prime Minister leading yet another coalition government. MacIntyre notes the Chevalit government:

was subject to mounting vilification for immobilism, indecisiveness and corruption. Justified though these criticisms were, they were nothing new. Chavalit's government was not unusually incompetent, divided or corrupt. With some slight differences from one to the next, this broad characterisation applies to all fully elected governments in Thailand.<sup>41</sup>

Following a long period of strong economic growth fuelled by foreign capital, the Thai economy slowed in 1996 in part due to a widening current account deficit and concerns with the recently liberalized financial sector. The problems in the financial sector lay mostly with the finance companies, not the banks. The government failed to respond to increased speculation against the baht and continued to defend the pegged exchange rate against the U.S. dollar. However, the baht suffered a massive speculative attack on July 2, 1997, the fixed exchange rate was abolished, and so the AFC began.

PERHAPS IRONICALLY, GIVEN THAT THAILAND WAS NEVER COLONIZED AND MAINTAINS A HIGHLY INDEPENDENT POLICY STANCE ON MOST ISSUES, IT WAS THAILAND WHO MORE CLOSELY FOLLOWED INTERNATIONAL NORMS IN DESIGNING ITS COMPETITION LAW

The AFC led to a loss of faith in Chavalit's government and, in the middle of the crisis in November 1997, he was replaced by Chuan Leekpai. Chuan's Democrat Party led coalition government introduced a program of economic austerity and reforms in line with IMF recommendations. However, he was criticized for pandering to the big financial institutions and for being too welcoming of foreign investment. While the Democrat-led government accepted the IMF proposals:

For big business, which had come to expect government to provide a generally protective and friendly environment, this amounted to treachery ... Thailand's big business had big interests to protect ... after the 1997 crisis, it was motivated to control the state – in order to recover the protection the Thai state had traditionally provided for big business and to manage globalisation.<sup>42</sup>

Chuan's government made no formal commitment to the IMF regarding introducing a competition law. Instead they agreed to promote greater competition by privatizing monopoly SOEs, etc.<sup>43</sup> The Chuan Government was seen as relatively less corrupt than other Thai governments, and responding to criticisms that the 1997 AFC had been caused by crony capitalism, his Cabinet in 1998 approved the previous 1992 *Competition Act* draft, which ultimately led to

WHILE THIS ALLOWS FOR GREATER FLEXIBILITY IN THE RECRUITMENT OF PEOPLE WITH COMPETITION LAW EXPERTISE, THEIR EMPLOYMENT ON RELATIVELY SHORT-TERM CONTRACTS MEANS GREATER UNCERTAINTY BOTH FOR STAFF AND FOR THE KPPU

the enactment of the Competition Act on April 30, 1999.<sup>44</sup>

## V. A COMPARISON OF THE COMPETITION LAWS, INSTITUTIONS, & ENFORCEMENT

### A. *The Laws*

Given that (i) the AFC crisis prompted the introduction of competition law, (ii) the fact that wealth is heavily concentrated in both countries though networks closely linked to government, and (iii) the influence of the IMF, it could be expected that both countries would introduce similar competition laws. This was not the case. Perhaps ironically, given that Thailand was never colonized and maintains a highly independent policy stance on most issues, it was Thailand who more closely followed international norms in designing its competition law. Appendix 1 lists the details of Indonesia's competition laws; Appendix 2 lists Thailand's.

INDONESIA HAS HAD MANY CASES; HOWEVER, ALMOST HALF THE CASES DECIDED BY THE KPPU HAVE BEEN OVERTURNED ON APPEAL.

concentrated in both countries though networks closely linked to government, and (iii) the influence of the IMF, it could be expected that both countries would introduce similar competition laws. This was not the case. Perhaps ironically, given that Thailand was never colonized and maintains a highly independent policy stance

### B. *The Institutions*

In developing countries, competition law and economics expertise is limited.

#### 1. Indonesia

Article 30 sets up the KPPU and states that: “(2) The Commission shall be an independent institution free from the influence and authority of the government and parties” and “(3) shall be accountable to the President.” Members of the Commission are appointed for fixed five-year terms and can only be re-appointed for one term. Because all Members are appointed at the same time, there are no overlapping periods and so, at least in theory, all commissioners could be replaced at the same time. The Chairman and Vice-Chairman are elected annually by the Members.

EXEMPTIONS FROM THE TRADE COMPETITION ACT WERE GIVEN TO CENTRAL, PROVINCIAL, AND LOCAL GOVERNMENTS; STATE ENTERPRISES; FARMER'S CO-OPERATIVES, ETC.; AND BUSINESSES EXEMPTED BY MINISTERIAL REGULATION

The KPPU staff are not designated as “public servants” who are appointed through a central government employment agency. Instead, the KPPU appoints their own staff. While this allows for greater flexibility in the recruitment of people with competition law expertise, their employment on relatively short-term contracts means greater uncertainty both for staff and for the KPPU, particularly given higher salaries in the private sector.

In a review of Indonesia's competition law and policy, the OECD in 2012 noted that despite a rapid increase in staff (from 100 in 2006 to 450 in 2011):

... the KPPU remains constrained by insufficient resources, particularly insufficient qualified staff. The requirement to investigate all complaints imposes a heavy

requirement on the organisation's resources. Together with the prioritisation of enforcement, especially fighting bid-rigging in public procurement (a focus that the OECD strongly endorses) this leaves little available for advocacy or other non-enforcement work. Given the size and population of Indonesia, 450 is not a large number of people to work in the competition agency.<sup>45</sup>

## 2. Thailand

The Competition Act was a political compromise; for example, the regulator—the Trade Competition Commission (“TCC”)—is not an independent agency. The Chairman is the Minister of Commerce. Ex-officio members are senior bureaucrats (for example, the Secretary-General of the TCC is the Director-General of the Department of Internal Trade) and the staff of the TCC are officials of the Department of Internal Trade. There are also between eight and twelve “qualified persons” with backgrounds in law, economics, commerce, business administration, or public administration. Qualified persons must not be political officials or holders of political positions in a political party. The appointment of outside (part-time) Members must be approved by Cabinet, with a two-year term of office. Private sector experts are nominated by two trade associations (the Federation of Thai Industries and the Thai Chamber of Commerce)—dominated by big business.

The Commission works by appointing specialized sub-committees comprising between four and six persons, qualified in the various areas, to consider conduct relating to Sections 25, 26, 27, 28, 29 and mergers under Section 37. Criminal prosecutions are recommended to the public prosecutor.

The Office of the Competition Commission was established under the Department of Internal Trade, with the Director-General of the Department of Internal Trade as Secretary-General. The Office's powers include carrying out the work for the committees appointed by the Commission, monitoring the conduct of business operators, and conducting business studies. Certain officials have the power to issue written summons requiring persons to produce statements, etc. and to enter premises to search for evidence without a search warrant where offenses are “evidently being committed in the place.”

BIG BUSINESS EFFECTIVELY STOPPED THE INTRODUCTION OF THE ABUSE OF DOMINANCE PROVISION BY PREVENTING THE GOVERNMENT FROM INITIALLY ISSUING A MARKET DOMINANCE THRESHOLD FIGURE.

Exemptions from the *Trade Competition Act* were given to central, provincial, and local governments; state enterprises; farmer's co-operatives, etc.; and businesses exempted by Ministerial Regulation. However, export and import cartels are not exempt, nor are depression or small business cartels. Sakda Thanitcul notes that the exemption of state enterprises was the most controversial provision (as they competed with private companies in important sectors such as the electricity, telecommunication, and railway sectors).

### C. Enforcement

#### 1. Indonesia

Indonesia has had many cases; however, almost half the cases decided by the KPPU have been overturned on appeal. The KPPU has been affected by the successful conviction of Muhammad Iqbal, a Commissioner (and

former Chairman) of the KPPU for accepting bribes. Iqbal was sentenced to 4 ½ years in prison and a fine of about U.S. \$22,000 for taking a bribe to let Direct Vision, a subsidiary of First Media, have an exclusive right to broadcast the English Premier League in 2008 (affirmed by the Supreme Court).<sup>46</sup>

The KPPU has dealt with the difficult issue of business groups, using the single economic entity doctrine to extend the law to foreign firms.<sup>47</sup> The KPPU held in 2007<sup>48</sup> that Temasek constituted a single economic entity with two Indonesian companies because Temasek was: (i) involved in the management of both companies, (ii) was authorized to appoint directors or commissioners, and (iii) had access to confidential information. Subsequently, the position has become much clearer in Indonesia with the introduction of Government Regulation No. 57 of 2010, which provides that an entity is regarded as having control over another entity:

- If there is ownership or control of shares or voting rights above 50%; or
- If ownership is below 50%, the test revolves around whether a company has the ability to influence or determine management policy or actual management.

Undoubtedly, this seems to be a sensible recognition of the potentially anticompetitive conduct of business groups and conglomerates in Southeast Asia.

## 2. Thailand

The Act has not been effectively implemented, due to: (i) network politics, (ii) exemptions given to the large number of SOEs, and (iii) the fact that all penalties are criminal, which means that the Trade Competition Commission has to recommend to the Attorney-General to take action (the criminal standard of proof has meant the Attorney-General has never taken action, always asking for more evidence from the Trade Competition Commission).

It is difficult to know to what extent pressure from big business has had on decisions taken by both the Trade Competition Commission and Attorney-General. However, Poapongsakorn<sup>49</sup> argues that corporate lobbying and political intervention characterized early investigations. Big business effectively stopped the introduction of the abuse of dominance provision by preventing the government from initially issuing a market dominance threshold figure. In 2000 the TCC proposed a dominance market share threshold of 33.33 percent and one billion sales revenue in the relevant market. The Federation of Thai Industries opposed the percentage figure and argued for 50 percent. The domination threshold was finally set from February 2007 as follows:

AND, AS THE CRITERIA FOR MERGERS HAS NOT BEEN SET, OF COURSE THERE HAVE BEEN NO COMPLAINTS IN THIS AREA

introduction of the abuse of dominance provision by preventing the government from initially issuing a market dominance threshold figure. In 2000 the TCC proposed a dominance market share threshold of 33.33 percent and one billion sales revenue in the relevant market. The Federation of Thai Industries opposed

1. Business operator, in any goods or services, with market share in the previous year over 50 percent and at least 1,000 million baht turnover; or

2. The top three business operators, in any goods or services, with combined market share in the previous year over 75 percent and at least 1,000 million baht turnover.

A business operator with market share less than 10 percent, or turnover less than 1,000 million baht in the previous year, is exempted.<sup>50</sup>

In a paper funded by the World Bank, Suriyasai Takasila & Rajitkanok Chitmunchaitham<sup>51</sup> found considerable conflict-of-interest problems among the commissioners. As Deunden Nikomborirak summarizes:

The authors found that one of the commissioners considering the tied-sale case of whisky and beer in the year 2000 was a director of a company affiliated with the powerful whisky conglomerate. The conglomerate is known to be one of the largest contributors to all political parties, charities, and sports events and it is staffed with high-ranking retired bureaucrats that have strong links with the relevant regulatory authorities. Another commissioner was found to be a director of a company affiliated with the cable television monopoly accused of bundling cable services and charging excessive monthly fees. There is no evidence that these commissioners ever declared their conflict of interest and recused themselves from meetings during which these cases were discussed.<sup>52</sup>

From October 1999 until August 2013 there were 18 complaints of abuse of a dominant position (s 25), 22 restrictive agreements complaints (s 27), and 52 unfair trade practices complaints (s 29). However, there has not been a single successful prosecution. And, as the criteria for mergers has not been set, of course there have been no complaints in this area.

In 2010, the government starting examining ways to improve the TCC. However, as the review period closed in 2011, it appears little had changed. Nikomborirak explains why (in 2006), despite seven years of the Act's operation, enforcement has not been impressive:

The performance of the TCC has been dismal, especially after the January 2001 installment of the new government dominated by large businesses. The Committee met only nine times in six years, four of which took place during the inaugural year. The latest meeting took place on May 14, 2004.<sup>53</sup>

In the early days the TCC website provided details of complainants, etc. Now only the number of complaints is published. A number of early cases have been discussed including, Case *Whisky*, etc.<sup>54</sup>

But what of more recent cases? In the last five years there have been only four abuse of dominance complaints, five restrictive agreements complaints, and no unfair trade practices complaints. No official information is provided on their outcomes. But Dr. Jeffrey Race provides a good description of what happens to complaints by people with

HE WAS TOLD "WELL YOU COULD GO TO COURT BUT EVEN IF YOU WIN YOU WILL LOSE."

little status against those with power in Thailand. Dr. Race is fluent in Thai and has frequently appeared in Thai courts "in a variety of capacities and proceedings." While his comment below applies to foreigners, it also

applies to Thais without status as well:

A foreigner is usually treated with courtesy in the Thai law enforcement system, understood to include police, prosecutors, and courts. In litigation with a nobody he may expect justice; if with a state body or with the well-connected, that prospect recedes. Many find that complaints of even grave abuses are cheerfully ignored.<sup>55</sup>

To illustrate, this was the experience of a Thai restaurant company when making a complaint under Section 29—the unfair trade practices section of the *Competition Act*. The case involved a restaurant lease renewal. The tenant had signed a three plus three plus three tenancy agreement. The tenant was one of the first restaurants in the shopping center in Phuket and expected to make losses for 1-2 years as the spaces were mostly not yet tenanted. Losses were in fact made in the first two years but the restaurant started to do well and became profitable in the third year (in 2010). The shopping center sent a letter to the tenant in early 2010 asking whether the tenant wanted to renew. The tenant said yes and then asked for approval to renovate the restaurant, which was then given and the renovation carried out. The tenant then asked for the new lease several times as his restaurant license could not be renewed without the lease. The shopping center ignored the request. In November, business improved considerably. In December the tenant received a notice of termination allegedly because he had not paid rent since September. In fact two monthly rental payments had been made since September. The lease was not renewed—as it turns out because one of the other tenants close by (a wealthy family from Bangkok) wanted the space.

The tenant sought advice from his lawyer in Bangkok. He was told “well you could go to court but even if you win you will lose.” Essentially, there was little chance of winning in court due to his relatively low status. The owner of the shopping center is a Singaporean billionaire, Quek Beng Leng (who was on the Singaporean Economic Review Committee that recommended the introduction of competition law) and its honorary Chief Executive Officer is M.R. Chatu Mongkol Sonakul—a second-generation prince from one of Thailand’s most noble families. Sonakul was the also the Permanent Secretary for finance during the period from October 1, 1995 to July 28, 1997 but was subsequently dismissed by the Chavalit Yongchaiyudh government soon after AFC and the Thai devaluation in July 1997. During the Democrat-led government that followed, Sonakul was then appointed Governor of the Bank of Thailand, Thailand’s central bank. After the 2006 military coup his name was mentioned publicly as a potential prime minister. A powerful network indeed.

BACKED BY THE PALACE, THERE IS GREATER STABILITY IN NETWORK POLITICS IN THAILAND THAT HAS RESULTED IN NO COMPETITION LAW ENFORCEMENT. ELITE INSTABILITY IN INDONESIA, ON THE OTHER HAND, HAS MEANT THAT EVEN ELITES WANT COMPETITION LAW

Following this legal advice the tenant complained to the TCC. The complaint was heard over nearly two days. Months later the tenant was informed that there was no breach—no explanation was given except insufficient evidence. Networks win even in competition law enforcement in Thailand.

## VI. CONCLUSIONS

Without doubt Indonesia has been far more successful in introducing competition law than Thailand.

Although almost half of the KPPU's decisions have been overturned by the courts, the KPPU has grown in size and professionalism and has had some success, particularly in public bid-rigging. However, the weak Indonesian court system continues to undermine the KPPU's effectiveness.

In Thailand the act has proved to be non-effective, partly due to the numerous exemptions accorded to state-owned companies and, de facto, to companies owned by influential individuals, as well as the lack of enforcement of the Act due to pressure from big business and lack of concern by government. The absence of non-government organizations advocating competition has meant it has not been an issue for much public policy discussion.

Nikomborirak concludes that there is no “clear political mandate” to enforce the law. Because of an absence of rules and regulations to ensure transparency, the limited enforcement in Thailand “tends to be selective and arbitrary.” In particular, she characterized competition law as a “paper tiger” that “could not stand against the powerful lobbying of large businesses that have more recently become involved in politics.”<sup>56</sup> Major companies dominate the local economy and are protected and do not have a “competition culture.”

Another explanation for the relative success of competition law amounts to the stability of elite networks. Backed by the palace, there is greater stability in network politics in Thailand that has resulted in no competition law enforcement. Elite instability in Indonesia, on the other hand, has meant that even elites want competition law—if only to protect themselves against times when a competing elite is in power. As one of Indonesia's richest men (who made most of his wealth from exclusive licenses under Soeharto) told me over coffee several years ago, when I asked him why he supported competition law, said—the world has changed in Indonesia, competition is more important now and I need to know how to deal with it. Unfortunately, the world has not changed in Thailand, yet.

## APPENDIX 1: INDONESIA COMPETITION LAW

Prohibited practices can be divided into three kinds:

(a) Chapter III—Prohibited Agreements, which include: oligopoly, price-fixing, territorial division, boycotts, cartels, trusts, oligopsony, vertical integration, closed agreements (resale conditions) and agreements with foreign parties. The test for illegality is mainly that the agreement not “lead to monopolistic practices or unfair business competition;”

(b) Chapter IV—Prohibited Activities such as monopoly, monopsony, market control, and conspiracy; and

(c) Chapter V—deals with a dominant position including general provisions dealing with restricting technology, obstructing new entrants, etc. and preventing directors or commissioners of companies from assuming the same role in competing companies or owning a majority of shares in companies in the same market, multiple positions and share ownership. The section also deals with mergers, consolidations and acquisitions that “lead to monopolistic practices and or unfair business competition.”

Included in the Chapters are market-share thresholds and presumptions (unlike in Thailand where thresholds are left to separate government determination). For example, business agents are deemed to jointly control the “production and or marketing of goods and services” in the sections dealing with oligopoly and oligopsony if two or three “business actors” control over 75 per cent of the market (Article 4(2));

For monopoly or monopsony the threshold is if one “business actor” controls over 50 percent of the market (Articles 17(2)C and 18 (2)). For a dominant position the tests are whether one “business actor” controls over 50 percent or if two or three “business actors” control over 75 percent for a group of firms (Article 25(2)).

The tests are unusual in that the law makes horizontal agreements such as price-fixing, market division, and bid-rigging subject to what can loosely be called a rule of reason (that “may lead to monopolistic practices and or unfair business competition”) while making much of unilateral conduct *per se* illegal (“shall be prohibited”) including price discrimination, exclusive dealing, tying, and abuse of dominant position. This suggests the law was directed mainly at conglomerates.

However, the KPPU has been selective in enforcement. For example, “price discrimination is illegal *per se*. But in eight years, the KPPU has brought no case of price discrimination. Predatory pricing has been treated similarly.” (UNCTAD 2009, p. 4)

The Indonesian law is complex. Many of the articles dealing with similar kinds of anticompetitive conduct are in different sections. This means that all parts of the Act need to be examined in relation to

specific conduct as more than one article may deal with the same conduct. For example, Article 4 dealing with “oligopolies” says that:

Entrepreneurs are prohibited from making any agreements with other entrepreneurs with the intention to jointly control the production and/or the marketing of goods and services that can cause monopolistic practices and/or unfair business competition.

Obviously *intention* plays an important role in this prohibition. As well, market shares are used to define “control” as follows:

Any entrepreneur can be suspected or considered as jointly controlling production and/or marketing of goods and services ... if two or three entrepreneurs or groups of entrepreneurs own more than 75% ... of the market share of one type of certain goods or services.

Article 5 deals with price-fixing but only prohibits “any contract with other competing entrepreneurs in order to fix prices ...”. The use of the term “contract” makes enforcement difficult when combined with the KPPU’s lack of power to conduct raids on the premises of suspected infringers. Courts have been reluctant to accept circumstantial evidence because it is not considered to be “hard evidence.”

Article 11 has a separate cartel offense that prohibits entrepreneurs “from making any agreements with other competing entrepreneurs with the intention to influence the price by determining production and/or marketing of goods and/or services, that can cause monopolistic practices and/or unfair business competition.” This is a particularly troublesome section as it does not, like competition law in most other countries, judge agreements in relation to a competition test, such as with and without the agreement. It is not clear how an agreement can “cause monopolistic practices” and causing “unfair business competition” does not necessarily imply a bad economic outcome.

Vertical agreements are dealt with in Article 14, which says that:

entrepreneurs are prohibited from making any agreements with other entrepreneurs with the intention to control production of several products belonging to a chain of certain goods and/or services production in which each chain of production is a result of the continued process, either in one direct or indirect chain, which can cause unfair business competition and/or damages to the public.

Indonesia distinguishes between monopoly and abuse of a dominant position. In Article 17, monopolists are prohibited “from controlling any production and/or marketing of goods and/or services that can cause monopolistic practices and/or unfair business competition.”

Controlling production and/or marketing is “suspected or considered” where there are no substitutes or entry is not possible or if “one entrepreneur or one group of entrepreneurs controls more than 50%

... of the marketing share of one type of certain goods or services.” Article 19 deals in similar terms with monopsony.

Article 20 prohibits the supply of goods and services “without making any profits or by setting a very low price with the intention to eliminate or end their competitor’s business in the relevant market, thus causing monopolistic practices and/or unfair business competition.” Article 20 comes under Part 3 entitled “Market Controlling” rather than Part One “Monopoly” which incorporates Article 17. There is no market power requirement except for the indirect market power requirement in effect of ‘causing monopolistic practices and/or unfair business competition.’”

Article 25 deals with a dominant position. Using similar language to that of the Australian Competition Act “entrepreneurs are prohibited from taking advantage of their dominant position” to imposing terms with the intention to stop consumers from buying competitive products, restricting the market and the development of technology, preventing potential competitors from entering. Entrepreneurs are deemed dominant if they control 50 percent or more of market share “on one type of goods or services” (i.e. not relevant market) or two or more entrepreneurs control 75 percent or more of market share.

Articles 28 and 29 deal with mergers and acquisitions “that can potentially result in a monopoly practice or unfair business competition.”

There are a number of other provisions not normally found in other competition laws including: Article 16 deals with agreements with foreigners “that can cause monopolistic practices and/or unfair business competition.” Article 21 states “Entrepreneurs are prohibited from cheating in setting the production cost and other expenses which is part of the goods “and/or services” component, that can cause unfair business competition.”

Articles 22-24 deal with conspiracies to win tenders, obtaining competitors’ business secrets, and reducing supplied amounts.

Art. 26 prohibits interlocking directorates (i.e. directors or commissioners of companies) competing in the same market, or a closely related in the “field and/or type of business” or can jointly control the market share of certain goods and/or services, which could cause monopolistic practices and/or unfair business competition.” This article is clearly directed towards business groups and conglomerates.

## APPENDIX 2: THAILAND COMPETITION LAW

The *Trade Competition Act* includes a prohibition of the abuse of dominant position (Section 25); overly concentrative mergers (Section 26); horizontal and vertical restraints (Section 27), and various unfair trade practices (Section 29).

Abuse in Section 25 includes *exploitative* conduct (i.e. setting high prices), a number of vertical restraints, and interfering with other business operations. Section 25 is modeled on the South Korean MRFTA due to an assumption that the South Korean economy was similar to that of Thailand. Section 25 states that a dominant firm abuses its position by:

1. Unfairly fixing or maintaining the levels of sale or purchase prices of goods or services;
2. Setting conditions which, directly or indirectly, unfairly compel other business operators who are customers of the Business Operator to limit the provision of services, production, purchase or distribution of goods, or their opportunity to choose to buy or sell goods, accept or provide services, or obtain credit from other business operators.
3. Suspending, reducing, or limiting services, production, purchase, distribution, delivery, or importation in (Thailand) without reasonable grounds, to destroy or damage goods in order to reduce supply to less than market demand
4. Interfering with the business operations of other people without reasonable grounds.

Sections 3 and 8 authorize the TCC, with the approval of Cabinet, to prescribe the market share and sales turnover that presumes a firm to have a dominant market position. In January 2007, the Cabinet approved a new definition of dominant market position under the Act, so that a dominant market position occurs:

when a business operator sells any product or provides any service, the former having had a market share of 50% or more in the previous year, and whose sale proceeds amounted to 1 billion baht or above, or when the first three ranked business operators of any product or service, during the previous year, had a market share of 75% or more and, whose sales proceeds were 1 billion baht or more. This excludes a business operator whose market share in the past year was less than 10%, or a business operator whose sales proceeds in the past year were less than 1 billion baht.

Section 26 deals with mergers and is modeled after Article 6(1) of the Taiwan FTL. The TCC regulates business combinations, including mergers and the purchase of assets or shares. The Working Party intended that this provision would only apply to large business combinations. The TCC is authorized by Sections 26 and 28 to prescribe the criteria for a large business combination. The TCC has still not prescribed the criteria

as yet.

Section 27 prohibits certain horizontal and vertical agreements, in particular those which: fix sales or purchase prices, enter into an agreement to control or take over a market, bid-rigging, imposing certain geographical restrictions, tying, fixing output levels, maintaining or raising price while reducing quality, appointing sole distributors, and fixing conditions or methods of operation in the purchase or distribution of goods and services. Firms may seek authorization for some of these practices. This section combines the provisions dealing with undue collaborative activities in the South Korean MRFTA and Taiwan's prohibition of non-price vertical restraints and exclusionary practices.

Section 28 contains an unusual and unique provision. It says:

A business operator who has business relation[s] with business operators outside the Kingdom, whether it is on a contractual basis or through policies, partnership, shareholding or any other similar form, shall not carry out any act in order that a person residing in the Kingdom and intending to purchase goods or services for personal consumption will have restricted opportunities to purchase goods or services directly from business operators outside the Kingdom.

The provision was introduced to allow wealthy Thais to buy luxury cars directly from foreign manufactures without having to go through local Thai dealers. It effectively allows for parallel imports and so promotes competition by preventing foreign producers from price-discriminating against consumers in Thailand.

Section 29 is a “catch-all” provision dealing with unfair business practices—which can also cover exclusionary conduct and appears to be based on Article 24 of Taiwan's FTL. It provides that:

A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying our business or causing their cessation of business.

This section is broad and could seek to achieve other objectives such as the protection of small businesses rather than economic goals such as efficiency. Section 29 does not require market dominance, but it does cover practices where there is unequal bargaining power. Again the provision appears to borrow from South Korean law:

The South Korean MRFTA focuses primarily on regulating the behavior of the thirty largest Korean chaebols, but it also aims to regulate the unfair trade practices of a number of medium-sized firms. Article 23 of the MRFTA (Prohibition of Unfair Trade Practices) is patterned closely on the Japanese Anti-Monopoly Law. Between 1981 and 1990, there were only eleven complaints of abuses of market dominant firms while there were 22, 592 complaints against unfair trade practices.<sup>57</sup>

It should be noted that Section 29 is probably too vague to be effectively enforced. In contrast, the Japanese Antimonopoly Act and the South Korean MRFTA require the Japan Fair Trade Commission and the Korean Fair Trade Commission to specify the unfair trade practices. Currently, 16 kinds of business practices have been officially specified by the JFTC and 8 by the KFTC. The Thai Act is silent on this requirement.

Action taken by the Trade Competition Commission under Section 29 rather than Section 25 against Honda (who allegedly had an 80 percent market share and engaged in exclusive dealing by preventing retailers from selling competing brands), suggested that:

[t]he fact that this case was handled differently from the whiskey and beer abuse of dominance case raised [the] suspicion of selective enforcement of the competition law in favor of powerful local businesses and against foreign companies with little or no political connections.<sup>58</sup>

A controversial exemption from the *Trade Competition Act* was given to SOEs, which included SOEs that compete with private companies in the electricity, telecommunication, and railway sectors. Government ministries were opposed to the application of competition law to SOEs partly on public policy grounds (they were often subsidized) but also because they provided considerable profits to the Ministries and those who controlled them via well paid directorships. etc. Nikomborirak & Lertmanphainond note that SOE's and the affiliated companies "contribute to 52 per cent of the Stock Exchange of Thailand (SET) market capitalisation."<sup>59</sup>

No specific exemption is given to the monarchy's investment vehicle, the *Crown Property Bureau*, but it is extremely unlikely that any of its companies (particularly Siam Commercial Bank and Siam Cement Group) would be touched by competition law. In a country where status is everything a lowly Department within a Ministry would not dare. "So what exactly is the CPB? Ah, therein lies a mystery", as the book explains. "It is not part of the palace administration, nor is it a government agency, nor is it a private firm. It is a unique institution." Got that? Crucially, the bureau pays no business tax, and nor does Thailand have a land tax. Its tax-exempt status is enshrined in law. Yet it's not a charity or a public agency (or a sovereign wealth fund). ▲

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<sup>4</sup> GEORGE T. HALEY, C.V. USHA, & CHIN TIONG TAN, *NEW ASIAN EMPERORS: THE BUSINESS STRATEGIES OF THE OVERSEAS CHINESE* (2009) (hereinafter "Haley et al.") at 20.

<sup>5</sup> TIMOTHY GEITHNER, *STRESS TEST: REFLECTIONS ON FINANCIAL CRISIS* (2014).

<sup>6</sup> See STEPHEN HAGGARD, *THE POLITICAL ECONOMY OF THE ASIAN FINANCIAL CRISIS* (2000) (hereinafter "Haggard").

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