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Deunden Nikomborirak

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Deunden Nikomborirak[*]

I. INTRODUCTION

To many competition experts, the failure to include competition policy in the Doha Round of the World Trade Organization ("WTO") Trade Negotiation at the Cancun Ministerial Meeting in September 2003 marked the end of the only hope of establishing a global competition policy regime. Yet more and more countries are adopting national competition laws with or without a comprehensive agreement on competition policy from the WTO. The International Competition Network, an international body devoted exclusively to competition law enforcement, now boasts members consisting of ninety-three competition authorities from eighty-two countries. Of these, over twenty became members in 2004.[1] While some countries enacted competition laws to fulfill commitments made in bilateral free trade agreements, others did so voluntarily, often with the assistance of bilateral donors or international organizations such as the United Nations Conference on Trade and Development ("UNCTAD") and the World Bank.

The Association of Southeast Asian Nations ("ASEAN")[2] exemplifies this phenomenon quite well. By 1998, not one member of ASEAN had developed its own competition law. Today, Thailand, Indonesia, Singapore, and Vietnam all have full-fledged national competition laws in place.[3] To date, with the exception of Thailand, the enactment of competition laws in ASEAN countries resulted from international

[*] Thailand Development Research Institute.

[1] Ulf Böge, President of the Bundeskartellamt, Speech at Opening Ceremony of the Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Nov. 14–18, 2005), http://www.unctadxi.org/Sections/AntalyaConference/docs/Conference Presentations/tdrbpayt05039_en.pdf.

[2] ASEAN is comprised of Brunei, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

[3] Since 1979 Thailand has had a quasi-competition law but with limited substantive provisions on restrictive practices.

commitments rather than from domestic policy. Indonesia passed its law in 1999 to comply with certain conditions set by the International Monetary Fund ("IMF") imposed after the 1996 Asian financial crisis.[4] Singapore passed its law in early 2005 to fulfill its obligations under the U.S.-Singapore bilateral free trade agreement.[5] Vietnam enacted its law in June 2005 to fulfill WTO accession commitments.[6] The question is whether having a national competition law helps promote a more competitive market environment.

Thailand's experience illustrates that having a competition law may prove futile if enforcement cannot withstand political hurdles. Discriminatory and arbitrary implementation of the law may also serve to distort rather than promote effective competition in the market. Hopefully, lessons learned from Thailand can help identify prerequisites for successful competition law enforcement in countries considering adopting such a law.

This paper will address the political economy of competition law in Thailand. Section II will provide a historical perspective of Thai Competition Law. Section III will show what went wrong with the law's implementation since its promulgation in 1999. Section IV will assess the implications of the lack of competition law enforcement on business conduct and the establishment of a competition regime in Thailand. Section V will summarize major lessons learned in the Thai case that may be relevant to other developing countries considering adopting such a law or facing difficulties in its implementation. Finally, Section VI will draw conclusions on how a country can ensure successful enforcement of a competition law in the absence of a political will.

II. THE THAI COMPETITION LAW IN A NUTSHELL

Thailand has had a quasi-competition law since 1979, known as the Price Control and Anti-Monopoly Act.[7] At its inception, the law's

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[4] Conditionality provisions do not appear in Thailand's Letters of Intent. Letters from Bank of Thailand to the International Monetary Fund, http://www.imf.org/external/country/tha/?type=23.

[5] Free Trade Agreement, U.S.-Sing., May 6, 2003, Pub. L. 108-78, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf. Chapter 12 of the Agreement addresses anti-competitive business conduct, designated monopolies and government enterprises.

[6] The promulgation of the competition law was part of Vietnam's action plan on law building submitted to the WTO that included the legislation and amendments of thirty-six laws and ordinances. Vietnamese Ministry of Foreign Affairs, Vietnam in the Process of Accession to the World Trade Organization, http://www.mofa.gov.vn/en/tt_baochi/nr041126171753/ns050223102713 (last visited Feb. 10, 2006) (details regarding Vietnam's accession commitments).

[7] Price Fixing and Anti-Monopoly Act, Thailand, Apr. 22, 1979 (1979), http://r0.unctad.org/en/subsites/cpolicy/Laws/thailand.htm.

objective was to protect consumers from inflationary pressures and from widespread collusive practices among businesses that had led to excessive pricing. The provisions concerning anti-competitive practices were incomplete, as they did not cover mergers and many important vertical restrictive practices. Implementing a price control mechanism was easy, but the Department of Internal Trade, a part of the Ministry of Commerce, hardly enforced the anti-monopoly provisions. This limited enforcement situation existed because the law required that the Department of Internal Trade officially declare a business accused of anti-competitive practices a "controlled business" before the law could be enforced. During the two decades that the law was in effect, the competition authority only declared one such business, an ice manufacturing company, a "controlled business" because there were no clear rules or guidelines for officially classifying such anti-competitive businesses as "controlled businesses."

In 1999, two years after the Asian economic crisis, the Parliament passed the national competition law. As mentioned earlier, the promulgation of the national competition law in Thailand was voluntary. It was not part of the IMF conditions, as in Indonesia, or part of a bilateral free trade commitment, as in Singapore, or a WTO accession commitment, as in Vietnam. Hence, the law received minimal technical assistance from international organizations such as the World Bank or UNCTAD. According to Suthee Supanit, a law professor at Thammasat University in Bangkok who was part of the drafting committee, the adoption of the New Constitution in October 1997 enabled the ratification of the Trade Competition Act.[8] Article 50 of the New Constitution ensures citizens the right to engage in free and fair competition, while Article 87 stipulates that the State shall pursue a free economic system through market forces, ensure and supervise fair competition, prevent direct and indirect monopolies and refrain from engaging in businesses in competition with the private sector. The promulgation of the competition law was seen as a necessary tool to fulfill the mandate established by the New Constitution to advocate for free and fair competition.[9]

The Thai Trade Competition Act of 1999 established the Trade Competition Commission responsible for the implementation of the law and the Office of Trade Competition Commission as the secretariat body. The office resides within the Ministry of Commerce. The Act contains all of the major substantive provisions found in most competition laws, including abuse of dominance provisions in Section 25, merger control provisions in

[8] Thailand Report from Sutee Supanit to the Fair Trade Commission of Japan (2002) (on file with the Fair Trade Commission of Japan), *available at* http://www.jftc.go.jp/eacpf/02/thailand_r.pdf.

[9] Constitution of the Kingdom of Thailand, Thailand (1997), *available at* http://www.krisdika.go.th (in English).

Section 26, collusive practice provisions in Section 27 and unfair trade practice provisions in Section 29.[10] Besides a few horizontal restrictions, such as price fixing, quantity fixing, and bid rigging, other restrictive practices are governed by a rule of reason.[11] Section 4 of the law also provides exemptions for state enterprises, co-operatives and agricultural co-operatives, central and regional government agencies, and other businesses prescribed by Ministerial Regulations.[12] In part, these exemptions were unnecessary because of the lack of enforcement of the aforementioned Ministerial Regulations.

Interestingly, certain provisions of the law, namely those that concern abuse of dominance and mergers, were not immediately enforceable once the law took effect. The law requires that the Trade Competition Commission ("TCC") propose a threshold market share and/or sales figure that determines whether an enterprise is "dominant," or whether a planned merger would need to submit a pre-merger notification. The Cabinet must endorse the proposed threshold figures before they can become law. After six years, the Commission has not yet passed these threshold figures. This is due mainly to strong opposition from large businesses and the government's own lack of interest in enforcing the law because of its strong ties to such businesses. Today, the business conduct of dominant players in the market and all mergers and acquisitions essentially remain unregulated.

The TCC is composed of four bureaucrats and at most twelve experts.[13] The Minister of Commerce, a politician, chairs the TCC, which does not bode well for its autonomy from politics. The law, oddly enough, stipulates that at least half of the twelve expert commissioners must be from the private sector. Even more strangely, instead of conducting a search for qualified and impartial representatives from the private sector, the Department of Internal Trade requested three recommendations each from the Federation of Thai Industries and the Thai Chamber of Commerce.[14] As

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[10] Thai Competition Act 1999, Thailand, Mar. 26, 1999 (1999), *available at* http://www.apeccp.org.tw/doc/Thailand/Competition/thcom2.htm [hereinafter Thai Competition Act 1999].

[11] In case of abuse of dominance, words such as "unreasonably" and "without justifiable reasons" provide a basis for a rule of reason approach. For the case of merger and certain collusive practices, the notification requirement provides the administrative authority with the discretionary power to assess the merit of practices on a case-by-case basis.

[12] Ministerial Regulations are regulations passed by Ministries as prescribed in a particular section of a particular Act. It has the status of a law. Section 5 of the Trade Competition Act 1999 stipulates that the Minister of Commerce and the Minister of Finance are vested with the power and duty to pass Ministerial regulations required by the Act. Thai Competition Act 1999, *supra* note 10, §5.

[13] The composition of the Trade Competition Commission is stipulated in Section 6 of the Trade Competition Act 1999. Thai Competition Act 1999, *supra* note 10, §6.

[14] Nipon Poapongsakorn, Institutional Arrangements for the Competition Authority in Thailand 93 (Dec. 2003) (on file with the APEC-OECD Cooperative Initiative), *available at*

big businesses tend to dominate these trade associations, the probability of representatives of small- and medium-sized businesses obtaining a nomination for commissioner is low. Consequently, large businesses are over-represented on the Commission. Other experts on the Commission, whether academics, professionals, or other private sector representatives, are nominated by the Minister of Commerce and appointed by the Cabinet. Therefore, it is likely that only those that are friendly, or at least not hostile, to the government of the day are selected. The selection process is closed to the public. The names of candidates, their qualifications, the selection criteria, and the selection results are not disclosed.

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.[15]

According to the information provided on the Department of Internal Trade's website, in June 2004, the Trade Competition Office reviewed nineteen competition cases since its inception in 1999. It has deliberated on three cases, seven cases are reportedly under investigation, and nine more are awaiting submission for consideration and deliberation by the TCC. The website neither provides details about the nature of the alleged anti-competitive practices nor does it disclose the progress made in each case.[16] The information available in English summarizes the performance of the TCC from 1999 to February 2002, but there have been no updates since then.[17]

The level of transparency with which the TCC operates deteriorates in parallel with its performance. Recently, the Department of Internal Trade decided to remove the record of complaints filed with the Office of Trade Competition Commission ("OTC") from its website. Perhaps the list of cases awaiting deliberation and consideration by the Commission was getting too long, as the Commission has not met in eighteen months. Although the minutes of each of the nine meetings of the TCC became available on the Department of Internal Trade's website in 2005, they are only one to two pages in length.

The Thai competition regime is currently in its darkest hours. But

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http://www.apeccp.org.tw/doc/APEC-OECD/2003-12/005.pdf.

[15] Department of Internal Trade, Ministry of Commerce, Thailand (2006), *available at* http://www.dit.go.th (available in Thai) (last visited Feb 10, 2006) [hereinafter Department of Internal Trade website].

[16] *Id.*

[17] Department of Internal Trade, Summary of the Work on Trade Competition Act, Thailand (2006), *available at* http://www.dit.go.th/eng/contentdetail.asp?typeid=15&catid=108&ID=344 (last visited Feb. 15, 2006).

even during its brightest days, the implementation of the law was already problematic, as evidenced by the four cases that were at the center of public attention during the first two years that the law was in effect. These cases include:

1. The cable television monopoly;
2. Whiskey and beer tied-sales;
3. Unfair trade practices in large retail trade; and
4. Exclusive dealings in the motorcycle market.

A. Case Study # 1: The Cable Television Monopoly

In the first case, the Consumer Foundation filed a complaint that the cable television monopoly, the United Broadcasting Corporation, charged an excessive monthly subscription fee.[18] The company argued that it was not a monopoly and that cable television was in direct competition with local cable operators and many other substitutes such as video rental services, movie theaters, satellite dishes, and free television channels. The subcommittee investigating the case confirmed that the cable operator was a monopoly in the Bangkok region, where other cable operators were absent, but was not able to establish whether the fee charged was excessive. However, it found that the company's failure to offer a lower-priced package with fewer channels, known as the "silver-package," constituted a breach of the concession contract.[19]

The Commission concurred with the subcommittee that the cable operator was a monopoly, but decided that the case was not within its jurisdiction because cable television is a regulated industry.[20] The Commission handed over the case to the Mass Communication Organization of Thailand ("MCOT"), which regulates the cable television industry, on the premise that complaints about the rates and packages offered should be handled by a sector-specific regulatory body rather than the general competition authority. The MCOT confirmed that the tariff was not excessive because the company was facing an operating loss.[21] The MCOT made no attempt to scrutinize the expense and cost figures of the

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[18] Unpublished Report of the Subcommittee Investigating the Cable Television Competition Case (2001), *available at* http://www.info.tdri.or.th/reports/unpublished/ubc_pdf/content.pdf.

[19] *Id.*

[20] The Trade Competition Act 1999 does not address the issue concerning the overlap of jurisdiction between the general competition authority and the sector-specific regulatory body.

[21] It should also be noted that the MCOT enjoys a 6% revenue share generated by the particular cable television operator. In many developing countries, such conflicts of interest that can hamper a regulator's impartiality are commonplace.

cable monopoly, a normal procedure for a well functioning regulatory body. The company, however, began to offer the less expensive option in order to comply with the conditions stipulated in the concession. But the channels available in the less expensive package were so unattractive that it did not present subscribers with a real choice. It was only in March 2005 that the company effectively launched different packages in order to widen its customer base after the market became somewhat saturated with other competitors.[22]

B. Case Study # 2: Whiskey and Beer Tied-Sales

In the second case, the Surathip Group, manufacturer of Chang Beer and Elephant Brand Beer, and holder of an exclusive concession to produce liquor/whiskey, allegedly tied the sale of its beers to the sale of a highly demanded whiskey/liquor in order to take market share from its competitor in the beer market.[23] While the Commission found that the practice of tying beer to whiskey sales constituted an obvious breach of Section 25 of the Trade Competition Act, which addresses abuse of dominance, it also found that retailers, rather than the manufacturer, were guilty of tying the products. This finding is odd, given that retailers had no incentive to pursue such a practice unless the manufacturer demanded it. The Commission also ignored the fact that the manufacturer held a 25% equity share in many retail stores, meaning that these retailers were likely to have acted on behalf of the major shareholder. Despite the finding of a violation of the Act, the Commission did not undertake legal actions against the retailers because Section 25 of the law was unenforceable in the absence of a dominance threshold.[24]

C. Case Study # 3: Unfair Trade Practices in Large Retail Trade

In the third case, local suppliers and smaller retail stores filed complaints against large foreign multinationals such as Tesco of the UK and Carrefour and Casino[25] of France.[26] While foreign retail companies

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[22] Naspers, Ltd., Annual Report (Form 20-F), (Sept. 30, 2005), *available at* http://www.naspers.com/pdfs/20-F.pdf.

[23] U.N. Conf. on Trade & Dev. [UNCTAD], *Review of the Recent Experiences in the Formulation and Implementation of Competition Law in Selected Developing Countries*, 23, U.N. Doc. UNTAD/DITC/CLP/2005/2 (2005), *available at* http://www.unctad.org/en/docs/ditcclp20052_en.pdf.

[24] Deunden Nikomborirak, *Thailand*, *in* COMPETITION POLICY AND DEVELOPMENT IN ASIA (Douglas H. Brooks & Simon J. Evenett eds., 2005).

[25] In late 2005, a Thai partner bought back all equity shares of the "Big C" discount stores from the Casino group of France.

[26] *See* Department of Internal Trade website, *supra* note 15 (list of complaints available in Thai); Nikomborirak, *supra* note 24, at 264–65 (table 8.7 lists complaints cases).

compete rigorously among themselves, their extremely aggressive business culture had caused tremendous friction with both large and small domestic suppliers. The complainants alleged that some of these aggressive business practices, such as mandatory enrollment in price promotion schemes, preferential treatment for house brand products, and various fees including a marketing fee or slot allowance, were unfair trade practices.

In January 2003, to appease a public outcry about unfair trade practices of the large hypermarkets, the TCC proposed to set the sector-specific threshold market share for dominance at 25%. Academics, businesses, and civil society heavily criticized the proposal as discriminatory, claiming it would apply only to retail businesses. A year later, a new Minister with close family ties to a large local conglomerate involved in the retail business withdrew the proposed threshold while it was still awaiting approval of the Cabinet.[27]

According to the minutes of the Commission's meeting in May 2004, the Commission held that the sector-specific dominance threshold was inappropriate and instead a general threshold should apply across all industries.[28] While this view is certainly correct, the move was a mere tactic to further delay the establishment of the definition of dominance and, hence, the enforcement of the law. The secretariat office again was tasked to study and propose the optimum threshold market share and sales value. The whole process had to begin anew, and no real progress was made.

Once again, to appease the persistent public discontent about large retail stores' trade practices, the Thai Trade Competition Commission decided to issue a "Retail Industry Code of Ethics." The Code, a guideline for retailers rather than a law, describes practices considered "unfair," including sales of products below prices quoted on the invoice, retail price maintenance, refusals to deal and price discrimination, exclusive dealings, and product linkage. The Code is very broad in nature, merely listing types of practices considered unfair in the absence of a valid efficiency defense. It does not shed light, however, on what types of defenses would be acceptable to the Commission. As expected, the voluntary Code has had very little impact on the conduct of large retailers.[29]

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[27] Kallaya Laohaganniyom & Noah Brumfield, *Thai Competition Law*, *in* GLOBAL COMPETITION REVIEW: THE 2005 ASIA PACIFIC ANTITRUST & TRADE REVIEW (2005), *available at* http://www.globalcompetitionreview.com/sr/sr_fullpage.cfm?page_id=124.

[28] *See* Department of Internal Trade website, *supra* note 15 (minutes of the meeting available in Thai).

[29] *See id.* (Code available in Thai); Mark William, *Competition Law in Thailand: Seeds of Success or Fated to Fail?*, 27 WORLD COMPETITION 459 (2004) (English translation of the Guideline).

D. Case Study # 4: Exclusive Dealings in the Motorcycle Market

The fourth and last study is a landmark case. It is the first case where the TCC found an infraction of the law and decided to take legal actions against the defendant. In December 2004 Honda, a motorcycle manufacturer that holds approximately 80% of the market share, allegedly practiced exclusive dealing by prohibiting retail stores from exhibiting and selling competing brands in the same store. Such an act, when pursued by a supplier with significant market power, constitutes an abuse of dominance, an infraction of Section 25 of the competition law. Retailers complained that the manufacturer threatened to cease the supply of its products and to open competing stores next door if they refused to become an exclusive agent, meaning that retailers could not sell other competing brands.

Interestingly, the Commission found that the company had violated section 29 of the law, which concerns unfair trade practices, rather than section 25. Section 29 concerns trade practices associated with unequal bargaining power between a seller and a buyer, such as that between a large discount store and a small-scale supplier, or a franchisor and a franchisee. Moreover, unlike section 25, section 29 is enforceable without establishing the market dominance of the alleged business. The fact that this case was handled differently from the whiskey and beer abuse of dominance case raised suspicions of selective enforcement of the competition law in favor of powerful local businesses and against foreign companies with little or no political connections.

In sum, competition law in Thailand played almost no role in enhancing the competitive environment in the domestic market during the past six years. Its implementation has been opaque, selective and arbitrary. Authorities do not investigate complaints properly and they make decisions without supporting evidence or reasoning. The 1999 Trade Competition Act has had a negligible impact on the trade practices of local enterprises and on the overall competition in the domestic market.

III. WHAT WENT WRONG?

The Thai case illustrates that many things can go wrong with the implementation of a competition law. The three contributing factors of this apparent failure are: (1) the existence of strong political intervention; (2) the lack of "due process" in the administration of the law; and (3) the absence of interest in and support for the competition law from non-government stakeholders, such as non-government organizations ("NGOs"), academics, and the media.

By design, the TCC is vulnerable to political intervention. The Minister of Commerce is the chairperson of the Commission and the Minister nominates while the Cabinet approves other commissioners. The Office of Trade Competition Commission relies entirely on the annual

budget allocated by the government. Moreover, the closely interconnected relationship between politics and business exacerbates this lack of independence from the executive power, which leads to impartiality. Unfortunately, big businesses have always been the major source of campaign financing for all political parties in Thailand.[30] Recently, big businesses have entered directly into politics,[31] entrenching their grip on the country's policy.

According to Nipon Poapongsakorn,[32] political interventions and corporate lobbying—both explicitly and behind the scenes—occurred throughout the existence of the Trade Competition Act, in particular during the investigation periods. Perhaps the most blatant and damaging lobbying by big businesses was the delay in promulgating the dominance threshold that will make the provision on abuse of dominance enforceable.[33] In June of 2000, the TCC proposed a threshold dominance of 33.33% market share and 1 billion baht sales revenue in the relevant market. With the prevalent abuse of dominance cases being investigated at the time, it was hoped that passing the threshold would ensure that the relevant provision would be enforced. But opposition by the Federation of Thai Industries ("FTI") did much to prevent the cabinet from approving the proposed definition of market dominance.[34] The new government that came into office in early 2001 decided to return the proposed dominance threshold to the Trade Competition Office for review. A 50% market share threshold was the counter-proposal by the business sector. The higher market share threshold would severely circumscribe the scope of application of the law as only a handful of companies would be classified as dominant. At this time, the dominance threshold has not made it through the Cabinet, rendering the provisions on abuse of dominance and mergers still ineffective.

Another study, by Suriyasai Takasila and Rajitkanok Chitmunchaitham,[35] attributes the lack of enforcement and the selective enforcement of the competition law to conflict-of-interest problems inherent among competition commissioners. The authors found that one of the commissioners considering the tied-sale case of whisky and beer in the year

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[30] Nipon Poapongsakorn, *Monopolies under Thai Capitalism*, *in* ROO TAN THAKSIN 89–131 (Jirmsak Pinthong ed., 2004) (in Thai).

[31] Thailand's Prime Minister, Thaksin Shinawatra, is a telecommunications tycoon. His cabinet consists of several well-known businessmen from large businesses from the automobile, entertainment and food industries.

[32] Nipon Poapongsakorn, *The New Competition Law in Thailand: Lessons for Institution Building*, 21 REV. INDUS. ORG. 185 (2002).

[33] *Id.*

[34] BANGKOK POST, Oct. 2, 2000.

[35] Suriyasai Takasila & Rajitkanok Chitmunchaitham, *Monopolies and Politics, in* BUILDING CONSTITUENCY FOR COMPETITION POLICY AND COMPETITION LAW 3-1, 3-16 (2002) (unpublished manuscript), *available at* http://www.info.tdri.or.th/unpublished.

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 recused themselves from meetings that discussed the cases in which they had a direct or indirect financial interest.

This brings us to the next factor that has a significant bearing on the ultimate success or failure of competition law: administrative due process. A transparent and objective enforcement procedure can, to a great extent, protect itself from undesirable political interventions and lobbying. Due process in Thailand's administrative branch is prescribed by the Administrative Law, the Public Information Law, and various provisions found in the competition law itself. For example, the Administrative Law:

- Prohibits officials with financial and non-financial (i.e., family and other relatives) interests from being involved in the administrative procedure.
- Requires that both parties involved in the proceeding be given the chance to present evidence and offer counter-evidence to the administrative officials.
- Requires that all government committees' decisions that have a bearing on the private sector be recorded with details describing the minority views and opinions, as well as the signatures of every commissioner. The decisions must also be made publicly available according to the Public Information Act 1997.
- Requires that all government agencies set a specific time frame for responding to inquiries or complaints.[36]

Most of these provisions were imported into the Trade Competition Act. Those that have been left out should apply nevertheless since the Administrative Law stipulates clearly that the standard of administrative procedures specified in other *sui generis* laws must, at a minimum, contain all the provisions specified in the Administrative Law. Unfortunately, the Office of Trade Competition Commission has failed to comply with most of the provisions stated above.[37] For example, as mentioned earlier, certain commissioners were deliberating in cases in which they had a conflict-of-interest. Commission decisions never specify the views of any of the commissioners, let alone the minority views. Complainants are not

[36] Nipon Poapongsakorn, *Institutional Arrangements for the Competition Authority in Thailand* (2003), *available at* http://www.apeccp.org.tw/doc/APEC-OECD/2003-12/005.pdf.
[37] *Id.*

informed about how the Trade Competition Office handles the cases and how long each steps will take.

As mentioned earlier, a Commission's written decision on a particular competition case offers no finding-of-fact reports[38] or rationale supporting the decisions of the Commission.[39] The views of each commissioner are also unavailable, let alone a record of who is in attendance at these meetings. In fact, for the first few cases under deliberation in the year 2000, records of any formal decisions could only be found in newspaper interviews given by the Secretary of the Commission. Furthermore, no evidence, statistics, data, or interviews resulting from the investigations were available to the public. The minutes for those meetings became available to the public online only in 2005. But, as mentioned earlier, these minutes provided no information to support the Committee's decisions in the competition cases. It is likely that the posting of the minutes was done simply to comply with disclosure obligations stipulated in the Administrative Law. The appalling lack of information available on the TCC's website is clear testimony of the lack of transparency of the competition regime.[40]

It is interesting to note that many developing countries are quick to adopt western-style institutional structures and procedures when designing their regulatory regimes, be it the composition of the commissioners or the structural and financial independence of the organization. International advisors as well have a tendency to benchmark new competition regimes against those already established in more advanced economies. The problem is that many developing countries operate under a very different political, legal, social, and governance environment. Corruption and political intervention may run broader and deeper than what developed countries are accustomed to. Often rules, social and legal sanctions against favoritism and patronage, or conflicts-of-interest in the administration of a

[38] In fact, the Subcommittee responsible for the cable television case produced a relatively comprehensive report that was submitted to the Competition Commission in the year 2000. It found that the cable operator did abuse its monopoly power by denying consumers the choice of a less expensive package, the silver package. It also questioned the need to increase monthly subscription rates given the company's massive financial savings from a merger with its only other competitor in the market in 1998. The committee failed to address any of the subcommittee's findings, besides that the cable television operator is indeed a monopoly in the relevant market. As mentioned earlier, it later decided to transfer the case to the sector regulator. The OTC also failed to inform the public about the existence of the particular report, which is currently available at http://www.info.tdri.or.th/unpublishedpapers/.

[39] Department of Internal Trade website, http://www.dit.go.th, which provides no details regarding the Commission decisions to pursue or not to pursue a case, let alone investigation reports. The commission's deliberation on a particular case is normally three lines long.

[40] Trade Competition Commission, http://www.dit.go.th/eng (last visited February 21, 2006). The minutes of each of the nine Commission's meetings are available only in Thai.

law are absent, weak, or lack compliance.

For example, the Thai Administrative Act, despite its relatively advanced status, is silent on rules concerning communication between commissioners and parties involved in a proceeding.[41] Thus, commissioners are able to arrange private meetings with either party without any documentation of what information was submitted or exchanged. Such laxity leaves the administration particularly vulnerable to lobbying. Deunden Nikomborirak and Somkiat Tangkitvanich also found that the law concentrates mainly on procedures concerning the issuance of an administrative order that is binding on the parties but does not cover procedures involving the making of an administrative rule that is binding on all businesses.[42] This explains why there has been very little transparency in the process of proposing the dominance threshold—an administrative rule—by the TCC.

The need to establish transparency is not limited to the enforcement procedure. Equally important is the selection process of commissioners. One of the most difficult tasks facing a developing country in setting up a regulatory regime is how to design a selection process that will beget commissioners that are immune to political influence and business lobbying. In such an environment, where the risk of regulatory capture is high, transparency and due process in both the selection of commissioners and the administration of the law is critical to the integrity and the effectiveness of the competition regime.[43]

It is unfortunate that governance issues are often neglected in the process of drafting a competition law. International benchmarking of laws is often focused on the substantive law and fails to examine whether the institution is independent from the executive power. An independent competition authority that lacks transparency and accountability can potentially inflict greater damage to the economy and individual businesses than one that is subject to ministerial oversight. This is because at the end of the day, while a politician is accountable to his or her electorate, commissioners of an independent institution are not held accountable to

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[41] This is known as the "ex parte" rule. The rule states that no party or participant in the proceeding shall submit ex parte communications to the administrator of the law and its employees regarding any matter pending before the authority. *See* FDIC Law, Regulations, Related Acts § 308.9, *available at* http://www.fdic.gov/regulations/laws/rules/2000-1900.html#2000part308.9.

[42] Deunden Nikomborirak & Somkiat Tangkitvanich, *Research Paper: Building Credibility for a Telecommunication Regulator* 2–3, 28 (Thailand Development Research Institute, Thailand's Telecommunication Sector Reform Project, August 2002).

[43] Regulatory capture describes a situation where a state regulatory body is influenced by the interest of the industry which it regulates. A detailed description of the term can be found in M.E. Levine, *Regulatory Capture*, 3 NEW PALGRAVE DICTIONARY OF ECON. AND LAW 267, 267–71 (1998).

anyone.[44]

In the clear absence of political will and the administration's inability to withstand the interference of its political superiors to enforce the competition law, the fate of Thailand's competition law is in the hands of non-government stakeholders—i.e., the academics, the NGOs, civil societies, and the media. In an environment where money dominates politics, only public pressure can ensure the successful enforcement of a law that threatens the interests of powerful businesses.

This brings us to the third factor contributing to the failure of the competition regime in Thailand: the lack of public support for, and interest in, the law. Upon the inception of the law in 1999, public awareness and support for the law was clearly absent. Most NGOs at the time focused mainly on health and environmental issues, where the effects on the public are more clear, visible, and immediate. Competition law, on the other hand, was perceived as being about "business disputes" that did not involve NGOs. Worse, the word "competition" is often negatively associated with capitalism and free-trade, which left-leaning organizations stand against.

In the academic circle, knowledge of industrial organization is very limited. One study found that in the year 2000 only fifteen universities nationwide offered a course on industrial organization at the undergraduate level and only five at the graduate level.[45] From 1997 to 2001, there were approximately three to five dissertations that concerned industrial organization issues each year. With extremely limited education in the field, it is therefore of no surprise that there is very little research work on competition-related issues and very little comprehension of the subject among policy makers and law enforcers in Thailand.

The media, the private sector, and the average person also have little knowledge about Thailand's competition law and policy. Most could not, and still cannot, distinguish between "competitiveness" and "competition." Most will mistake competition policy for government measures that help promote the competitiveness of the local industry. In the complete absence of support and interest from the state, NGOs, academics, and the media, the law was doomed to fail.

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[44] For example, Nikomborirak & Tangkitvanich found that the independent telecommunications regulator is not accountable to any one since it has its own revenue from licensing fees and the law only requires it to report to parliament once a year. Commissioners can only be dismissed by a two third majority vote of all commissioners, rather than by the senate or the parliament to whom the commission submits annual reports. Nikomborirak & Tangkitvanich, *supra* note 42, at 2–3, 28.

[45] Deunden Nikomborirak, *A Survey of Industrial Economics*, 4 THAMMASAT ECON. J. 116 (Dec. 2004).

IV. IMPLICATIONS OF THE LACK OF ENFORCEMENT

The lack of enforcement of the competition law has left small- and medium-sized enterprises ("SMEs") and consumers at the mercy of large incumbents with market power. Obvious anti-competitive practices in the whisky and beer tied-sale case expanded to include the tying of soda and bottled drinking water to whisky and other liquors at the expense of hundreds of large and small competitors in these markets. To counter the unfair practices, small local bottled water producers collectively placed a national television advertisement to condemn such acts. In the absence of strong enforcement or an official remedy by the state oversight body, this costly stunt by the local bottled water producers resulted in only a temporary restraint on such practices, which have since continued.[46]

In the case of the cable television monopoly, a series of price increases took place with impunity as the regulatory body, the MCOT, never took the initiative to scrutinize the provider's cost figures or examine whether the content offered in each package was commensurate with the fee charged. Because the company was unprofitable, the regulatory body presumed that the price charged to customers was not excessive and thus dismissed the claims of monopoly pricing. As a result, subscribers have been forced to pay increasingly higher monthly subscription fees as the operator continues to add new and very expensive channels, such as the Premiership Soccer League Channel, of which subscribers cannot opt out.[47]

More broadly, the absence of an authority that advocates competition implies that laws, regulations, and government policies that are fundamentally anti-competitive are not being questioned. For example, the Telecommunications Act was passed with a section that limited foreign ownership in local telecom companies to only 25%. This foreclosed competition from smaller local operators that had hoped to partner with strong foreign telecom companies from overseas. The law served only to protect large incumbents with strong financial backing that need not rely on foreign capital or expertise. Meanwhile, several mergers that led to more concentrated markets were allowed to proceed. These include a merger between two major movie theaters,[48] pulp and paper manufacturers,[49] and

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[46] Sairung Thongplon & Saowalak Cheevasittiyanon, *Building Consumers' Alliance against Monopolies*, *in* BUILDING CONSTITUENCY FOR COMPETITION POLICY AND COMPETITION LAW 8-1, 8-12 (unpublished manuscript), *available at* www.info.tdri.or.th/unpublished.

[47] As mentioned earlier, according to a Subcommittee Report the alternative package, the silver package, did not represent a real choice for subscribers given the channels available and the tariff charged. This package was later called the "Bronze" package with a price reduction in March 2005. *See supra* note 18, at 29.

[48] *Competition to Fuel Mergers*, THE NATION, Jan. 6, 2005, http://www.nationmultimedia.com/2005/01/06/business/data/business_15980936.html.

[49] Keith Barney, *At the Supply Edge: Thailand's Forest Policy* (2001), http://www.forest-

newspapers.[50] The inability to control mergers and hence market concentration today will likely create competition problems down the road, as merged entities with market power may abuse their newly acquired market dominance to fend off competition from smaller competitors or new entrants.

Needless to say, the public image of the effectiveness of the OTC and the TCC has been reduced to nothing. The fact that the Commission's reputation had been tarnished even before it has had a chance to establish one does not help promote a competition culture in Thailand.

It is not only the public that has lost faith in this agency; the OTC's own staff appears to have lost morale. The officers and employees of the OTC have developed the technical and analytical skills required to deal with competition cases and have put the acquired skills to use in preparing competition cases for the Committee. But all their efforts appear to be in vain as the Committee has failed to regularly meet to discuss these issues, which reflects the general lack of interest in seeing the law enforced.[51] Additionally, the list of complaint cases awaiting the Committee's deliberation was removed from the website and a number of competent officers were transferred to other activities. There seems to be no sign of any progress. The lack of enforcement has harmed the Thai economy, as it leaves SMEs vulnerable to the unfair practices of larger competitors, buyers, and suppliers.

V. LESSONS LEARNED

Despite the lack of implementation of the competition law by the government, the Thai case study offers several lessons that may be of some relevance to other countries considering passing such a law. First, in the absence of a clear political mandate to implement the law, it is unlikely that the law will be enforced. Second, if and when the law is enforced, it tends to be selective and arbitrary in the absence of rules and regulations that ensure transparency and accountability of administrative procedures. Third, in the absence of a political will to enforce the law, a country needs to adopt a bottom-up approach to advocating the law and must rely instead on public pressures to promote a competition regime. Building awareness and

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trends.org/programs/pacific_rim.htm.

[50] *Media Upheaval*, THE NATION, Sep. 14, 2005, http://www.nationmultimedia.com/specials/mediaupheaval/p1.php.

[51] More recently, some of the qualified staff at the Office of Trade Competition Promotion were assigned new tasks of promoting the franchise of low-cost fast food cart vendors by the Department of Internal Trade in which it resides. The project is promoted by the Ministry of Commerce to help keep down the cost-of-living during high oil-prices periods. *See* The Elephant Talks 3 (2005), http://research.mulliscapital.com/products/dailynotes/The%20Elephant%20Talks_DA_05.08.18.pdf.

appreciation of a competition law is a difficult and time-consuming process that requires close coordination among academics, NGOs, and the media.

The Thai experience shows clearly that having a competition law is no panacea in the absence of a political will to see the law properly enforced. The promulgation of the law for the sake of fulfilling the spirit of the Constitution does not bode well for the future enforcement of a paper tiger. It could not stand against the powerful lobbying of large businesses that have more recently become directly involved in politics. Political interventions, big businesses' opposition, and institutional limitations prove to be major hurdles in law enforcement. In such an environment, the prospect of having a successful competition regime is indeed bleak. The question is then, should a country where business and politics are closely linked bother to have a competition law at all? And if so, what are the pre-requisites that would help ensure an effective implementation of such a law?

In hindsight, perhaps Thailand should not have passed a competition law in 1999 when the political and social environment was not conducive to successful implementation. Nevertheless, the law has contributed positively toward the building of a competition constituency in Thailand among politicians, academics, NGOs, and businesses, albeit still limited in scale. Its mere existence puts politicians in a defensive position. The lack of implementation of the competition law has always been one of the key issues that the opposition party raises in a censure debate.[52] Business and academic communities have also become more aware of the law despite its lack of enforcement over the years. For example, the Director Certificate Program offered by the Thai Institute of Directors[53]—a program aimed at training corporate directors to be aware of and knowledgeable of their rights, responsibilities, and accountability—includes a separate module on competition law and policy. More universities, such as Bangkok University, now offer courses on competition law and policy in their graduate law schools.[54]

The law also helps promote capacity building in this field. The Trade Competition Office, despite its inertia, continues to receive bilateral and multilateral technical assistance from countries such as Japan, Taiwan, and Australia and from organizations such as the World Bank and UNCTAD.[55]

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[52] *Adisai Under Siege*, THAI RATH, May 29, 2003, http://www.thairath.com/thairath1/2546/page1/may/29/p1_3.asp.

[53] Thai Institute of Directors Home Page, http://www.thai-iod.com (last visited Feb. 21, 2006).

[54] Bu.ac.th, Admissions Manual, http://admission.bu.ac.th/gs_ms_thai_laws_course_descriptions_courses_subject.htm.

[55] Nipon Poapongsakorn, *Thailand Trade Competition Act* (2003), http://www.apeccp.org.tw/doc/APEC-OECD/2003-12/013.pdf.

Lastly, NGOs, civil societies, bureaucrats, academics, the private sector, and the media have also grown accustomed to making references to the law despite its inertia.

So, if a country were to pass a competition law for the first time, how should it proceed? It is impossible to prescribe a general formula given that each country has a unique economic, social, and political environment. It is probably better to elaborate on what Thailand's case may have to offer in terms of its experience. Certain countries may find that the Thai situation closely resembles their own. Others may not be able to associate with the kind of political, institutional, and social environment relevant to the Thai case study.

A. Draft a Relatively Detailed Competition Law

The first observation is that in designing competition authority and drafting a competition law, it is important to assess the integrity and capability of various institutions that may be involved in the drafting and implementation of the law. For example, in the case of Thailand, the legislative process is generally much more transparent than the political process, as it is subject to parliamentary scrutiny, while cabinet meetings and decisions are often made with little monitoring and participation by outsiders, be they the opposition party, the media, or the public. Under such circumstances, it would be preferable to draft a relatively detailed competition law to minimize the discretionary power of the administrative authority, in particular when it is prone to political influences.[56] It was perhaps a mistake that the Thai competition law leaves a vital element of the law—i.e., the dominance and mergers thresholds—at the discretion of the administration.

B. Ensure Effective Checks and Balances Within the Regime

One may argue in this case that, even if the thresholds required for implementation were available, the law would have never been enforced or enforced only selectively. That is why it is also important to establish effective checks and balances within the system. An appellate body that is independent from the commission may help to ensure impartiality of the decisions of the Commission. In Thailand, members of the appellate body are also appointed by the cabinet,[57] which does not bode well for

[56] In Thailand, the Minister alone nominates the candidate for the highest ranking bureaucrat, the Permanent Secretary, for Cabinet approval. The Permanent Secretary then nominates the second-highest ranking bureaucrats, the Director-Generals of various Departments within the Ministry, with the endorsement of the Minister, for Cabinet approval.

[57] Trade Competition Act, § 42 (1999), *available at* http://www.apeccp.org.tw/doc/Thailand/Competition/thcom2.htm.

independence from politics. However, Thailand has had a relatively respectable and independent Administrative Court that can help check that procedures taken by the competition authority comply with the due process and transparency prescribed by the Administrative Law.[58]

Recently, Thais have grown accustomed to resorting to the Administrative Court when the administration issues orders or make decisions that are in clear conflict with public interest.[59] It is only a matter of time before the TCC's neglect of its duty to enforce the law and its non-compliance with the governance standard prescribed in the Administrative Law will be challenged in the Administrative Court.

C. Prescribe Procedural Transparency, Accountability, and Due Process in the Competition Law

Most administrative laws provide only general rules designed for broad application to all sorts of administrative procedures and thus are inadequate to guarantee an effective and objective implementation of the competition law. It is therefore recommended that the competition law contain provisions concerning the governance standard of the implementing procedures, such as those concerning information disclosure, procedures for handling complaints, handling of conflict-of-interest issues of commissioners and staff of the Competition Office, and *ex parte* communications with outsiders. A competition authority in a developed country is likely to comply with higher governance standards already in their general working environment. This is usually not the case for most developing countries. That is why one needs to spend much time and effort in building good administrative governance to ensure a successful competition regime.

D. Build a Strong Competition Constituency at the Grassroots Level

In a country like Thailand, where political will to enforce the competition law is clearly absent, reliance on public pressures from consumer organizations, civil societies, academic institutions, NGOs, and the media is vital for a competition law to succeed.

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[58] Tulsathit Taptim, *Person of the Year—Ackaratorn Chularat: Defender of the Charter*, THE NATION, Dec. 30, 2005.

[59] For example, in November 2005, the Consumers Foundation succeeded in securing an injunctive relief order from the Administrative Court to postpone the initial public offering of shares of the state electricity generation company. The Foundation accused the government of failing to hold public hearings and alleged that the process was in contradiction with the local law. The injunctive order came just one day ahead of the government's planned flotation of the shares. Kenneth Crawford, *Court Short-circuits Giant Thai Energy IPO*, ASIA TIMES ON-LINE, Nov. 15, 2005, http://www.atimes.com/atimes/Southeast_Asia/ GK17Ae02.html.

In this regard, building public awareness about competition law and policy becomes a prerequisite. One must realize that while a competition law can be passed overnight, an effective implementation will take much longer where local political, legal, institutional, and social environments do not yet support it. It is important that the academics work closely with NGOs and the media. The academic role is to provide education and information on the issues at hand to other parties, while NGOs and civil societies are activists. They are vocal and have the special capability of organizing social movements on a grand scale. Well-informed NGOs are a formidable force facing the government. The public and the media, on the other hand, have their own specialized role in reaching out to the masses. A journalist can usually communicate with the public better than an academic. Hence, academics and journalists make a very effective team if they work closely together.

There are also positive signs that, six years from the promulgation of the competition law, a competition culture has begun to take root in Thailand, albeit with little contribution from the competition regime itself. For example, a planned privatization of the state-owned electricity generating authority was abruptly halted one day before the planned IPO in November 2005 by the Administrative Court.[60] A planned hostile takeover of Matichon, a newspaper with a reputation for being independent, by a politically connected entertainment conglomerate called "Grammy" was cancelled due to massive public protests.[61] In another case, the application to list on the Thai stock exchange by Thai Beverage Co. Ltd., the producer of Chang Beer who was involved in tied-selling, was blocked by protests from civic and religious groups.[62] Companies with notorious competition records that may have eluded state sanctions in the past, now face public sanctions.

In the case of the IPO by the state-owned electricity company, several NGOs filed the case in Administrative Court on the grounds that the government was privatizing a state monopoly without a proper regulatory body in place and that the process was illegitimate. Three years ago, these groups were against any sales of state assets. Today, they appreciate the importance of competition and regulation. It is a great milestone for Thailand, indeed. Similarly, a merger was once considered a business decision that did not concern the public. Today, critics cite the need to

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[60] *A Needed Ruling in Favour of Caution*, THE NATION, Nov. 16, 2005, http://www.thaiwac.ias.chula.ac.th/Thai/Preview_E.php?qID=247.

[61] *Matichon Takeover Canceled*, THE NATION, Sep. 15, 2005, http://www.komchadluek.net/breaking/ read.php?lang=en&newsid=82397.

[62] *Thai Beverage PLC: Brewer Aiming for Dual Listing*, THE NATION, Jan. 4, 2006, http://www.nationmultimedia.com/2006/01/04/headlines/index.php?news=headlines_19568099.html.

implement the competition act in order to systematically prevent mergers and acquisitions that lead to excessive market concentration.[63]

Passing a competition law and implementing it is always an uphill battle. This is because the law not only runs against the interests of large and powerful businesses, but it is also often associated with western capitalism or free-market propaganda. It can easily fall prey to nationalistic fervor that is, in some cases, drummed up by local monopolists themselves. Thus, competition policy advocacy will be as important, if not more important, than competition adjudication. A country needs to build a wide competition constituency among the academics and civil society, as well as the media. It is indeed a Herculean task that is worth undertaking.

VI. CONCLUSION

Competition law and competition institutions are one of the most important elements that helps promote economic development and equality in developing countries. This is because this particular law serves to dissipate "rents,"[64] which tend to accumulate among a privileged few in countries where the rule of law is weak and cronyism is widespread. The accumulation of rents can be particularly detrimental to developing countries that are undergoing rapid economic growth. The concentration of wealth can easily lead to widening income inequality, a major problem facing many developing countries that threatens the sustainability of economic growth. More importantly, concentration of wealth often leads to concentration of political power where money matters in political pursuits. This is likely to undermine the budding democracy found in many countries.

The experience of Thailand shows that once big businesses are able to take the political rein, they can easily entrench their monopoly strongholds by influencing government policy. At this point, where the law is captured by the state and big businesses, the chance of introducing competition in the domestic market would be bleak. It is therefore of utmost urgency that a developing country equip itself with a competition constituency that could counter the formidable (financial and political) strength of incumbent supplier/operators that would like to fend off competition in order to secure their own private interests.

The lesson learned in this paper is that an unenforced competition law can nevertheless yield valuable experiences and help build an effective

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[63] *Planned Merger Awaiting Discussion with Matichon*, THAI RATH, Sept. 15, 2005, http://www.thairath.co.th/thairath1/2548/page1/sep/16/p1_2.php.

[64] Rents in economics refer to profits or investment returns that are excessive compared to those available in a competitive market. *See* Armen Alchian, *Rent*, NEW PALGRAVE: A DICTIONARY OF THEORY AND DOCTRINE 141, 141–43 (J.Eatwell, M. Millgate & P. Newman eds., 1987).

competition constituency among NGOs, academics, and the media. Without the law, one can never come to learn and appreciate its importance when a competition-related case arises in the economy. As various non-government stakeholders become more informed and active in public affairs, it is only a matter of time before they will challenge an inert competition regime, either legally or through public pressures.

On a final note, foreign technical assistance can indeed help many developing countries to veer off this dangerous path. Foreign assistance programs, however, need to be targeted at the right activities and the right groups of people, subject to the political, legal, and social environments in each country. The most important thing is that the assistance does not end with the promulgation of the competition law itself, but that it extends into the community. Building a competition law and policy constituency among the various non-government stakeholders of the economy is the only way to ensure an effective and sustainable competition regime in a country like Thailand.