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Article

From Divergence to Convergence: The Role of Intermediaries in Developing Competition Laws in ASEAN

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ABSTRACT

Despite the diversity of contexts and circumstances in which competition laws are developed and exist, many countries have enacted competition laws that are broadly similar. To learn more about the dynamics shaping the development of competition law at the national, regional, and international levels, this article investigates the development of competition law in the Association of Southeast Asian Nations (ASEAN) region, a region whose competition laws remain underexplored. This article undertakes a case study on the drafting of competition law in the ASEAN member states with the most recently drafted and/or enacted new comprehensive competition laws, that being Brunei Darussalam, Cambodia, Lao PDR, Myanmar, and the Philippines. It finds that, while there were differences in the processes of drafting and enacting competition law in these countries as well as in their local contexts, their competition laws are similar in many respects. The case study also finds that intermediaries facilitated the processes of translation and adaptation that occurred in developing competition law in these ASEAN member states. This article argues that the important role that intermediaries played in developing competition laws was a key reason for the broad convergence of these competition laws across their diverse local settings.

KEYWORDS: Competition law, ASEAN, intermediaries
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I. INTRODUCTION

The expansion of competition law to more than 130 countries with different political, economic, and societal underpinnings is a powerful example of the impact of increasing globalization and marketization on the law. Even more remarkable is the fact that, despite the lack of formal obligations to do so, many countries have enacted competition laws that are broadly similar. This phenomenon of convergence has generated substantial research and debate on the reasons for and dynamics underlying the proliferation and development of competition law in countries around the world and its internationalization. It has, however, mostly focused on the competition laws and experiences of developed countries and/or those countries with more mature competition laws and shows that convergence has been largely driven by those same countries as well as international organizations and networks.

This article contributes to this discussion by examining the competition laws of the Association of Southeast Asian Nations (ASEAN) region. This is a region whose competition laws remain underexplored even though there has been increasing activity. Competition law has experienced a renaissance of sorts in ASEAN, with four of the nine competition laws in the region being adopted in 2015, two member states undertaking substantial revisions to their competition laws in the past few years, and one member state currently drafting its competition law. In addition to competition laws at the member state level, ASEAN is developing a regional competition policy to support the goal of regional economic integration.[1] As competition law continues to develop throughout ASEAN, not only will member states encounter issues and challenges within their own borders, they will also be subject to regional dynamics and pressures. ASEAN is also increasingly important to and involved in the global economy and trade,[2] which means that it is also becoming more exposed to global competition law issues and challenges. As such, ASEAN presents a compelling case study to learn more about the dynamics shaping the proliferation and development of competition law at the national, regional, and international levels.

Further, as Harding points out, ASEAN is 'an ideal laboratory'[3] to examine legal reforms and development. It is a region of great diversity, with ten member states[4] that vary in terms of their language, culture, religion, political, legal, and governance systems, and levels of development, and the legal systems of the ASEAN member states are each the result of multiple legal influences and borrowings over centuries.[5] Even though ASEAN is a regional intergovernmental organization with legal personality and some degree of institutionalization,[6] cooperation and coordination amongst ASEAN member states are voluntary only. There is no intention to limit the

1 ASEAN Secretariat, *ASEAN Economic Community Blueprint 2025* (November 2015) art 26.

2 For example, ASEAN was the fifth largest economy in the world in 2019: ASEAN Secretariat, *ASEAN Key Figures 2019* (October 2019) 29.

3 Andrew Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001), 199, 199.

4 Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic ('Lao PDR'), Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

5 See, generally, Harding (n 3) 199.

6 *Charter of the Association of the Southeast Asian Nations*, 20 November 2007, art 3; Christopher B Roberts, *ASEAN Regionalism: Cooperation, Values and Institutionalization* (Routledge 2012), ch 3; Geoffrey

sovereignty of ASEAN member states[7] and the institutions, governance, and decision-making processes of ASEAN and the relations among ASEAN member states are based on consensus, informality, and flexibility grounded in respect for diversity and national sovereignty.[8] Additionally, as Deinla observes, 'regionalism . . . remains anchored in ASEAN member states' efforts at nation-state building'.[9] Therefore, while ASEAN is a regional grouping, the ASEAN member states can differ vastly in their positions on various laws, policies, and issues.

In this article, the development of competition law in ASEAN is examined by undertaking a case study on the drafting of competition law in those ASEAN member states with the most recently drafted and/or enacted new competition laws. These ASEAN member states are Brunei Darussalam, Cambodia, Lao People's Democratic Republic (Lao PDR), Myanmar, and the Philippines (collectively referred to as the 'ASEAN Case Study Countries'), and they are the latest "wave" of newcomers to competition law in ASEAN. The findings and insights provided by this case study will deepen our knowledge of how competition law has newly expanded in a region that has been underexplored to date. It is also hoped that these findings and insights will broaden discussions of competition law internationally, which has been largely dominated by the competition laws and experiences of Western and developed jurisdictions.

This article is structured as follows. Section II discusses how competition law has developed and expanded around the world. A case study on the drafting of competition law in the ASEAN Case Study Countries is undertaken in Section III, with a focus on the processes of drafting and learning about competition law. Section IV draws out the key findings of the case study, and their implications for our understanding of competition law development more broadly are considered in Section V.

This article will demonstrate that, while each ASEAN Case Study Country had differences in their processes of drafting, learning about, and enacting competition law, their competition laws are similar in many respects. This article will argue that a key reason for the broad convergence of competition laws across the ASEAN Case Study Countries was that intermediaries played important roles in facilitating the processes of translation and adaptation that was undertaken in drafting, learning about, and enacting competition law in these ASEAN member states.

II. THE PROLIFERATION AND DEVELOPMENT OF COMPETITION LAW GLOBALLY

The number of countries with competition laws has grown rapidly since the 1990s. Whereas competition law used to be the domain of Western and/or developed

Cockerham, 'Regional Integration in ASEAN: Institutional Design and the ASEAN Way' (2010) 27(2) *East Asia* 165.

7 Imelda Deinla, *The Development of the Rule of Law in ASEAN: The State and Regional Integration* (CUP 2017) 6.

8 This is referred to as the 'ASEAN Way'. In particular, it reflects the principles of, *inter alia*, mutual respect for independence, sovereignty, equality, territorial integrity, and national identity of all nations; the right of each member state to be free from external interference, subversion, or coercion; and non-interference in the internal affairs of one another: see *Treaty of Amity and Cooperation in Southeast Asia* (1976) art 2. For further discussion of the ASEAN Way, see, Taku Yukawa, 'The ASEAN Way as a Symbol: an Analysis of Discourses on the ASEAN Norms' (2018) 31(3) *The Pacific Review* 298; Deinla (n 7) 7–11.

9 Deinla (n 7) 3-4.

countries with market economies, today, over 130 countries—including developing countries, countries with mixed economies, and those that are transitioning from planned to market-based economies—have enacted competition laws.[10]

A few reasons lie behind the expansion of competition laws worldwide. Bilateral and multilateral free trade agreements may require that parties have a competition law.[11] Countries have also adopted competition laws as part of their accession negotiations and/or undertakings to join the World Trade Organization (WTO).[12] It may also be a condition of loans from international lenders like the World Bank and the International Monetary Fund (IMF).[13] Apart from international commitments mandating the adoption of competition laws, countries have also voluntarily enacted competition laws to facilitate the transition of planned economies to market economies, to respond to growing pressures related to globalization, to attract foreign investment, and to promote development.[14] There are, however, no formal competition rules that apply globally,[15] and even where countries have adopted competition laws to comply with international obligations, they have usually been afforded a certain degree of autonomy to determine the content of those laws.[16]

Despite the diversity of contexts and circumstances in which competition laws are developed and exist, many aspects of the competition laws around the world are similar. Most competition laws address anticompetitive agreements, unilateral conduct, and mergers—which are the three pillars of competition law—and use similar rules, practices, theories, and analytical tools to address them.[17] There are differences between competition laws, mostly in relation to their objectives, the institutional arrangements that underpin their enforcement, and the types of industries and businesses that are exempt from the law,[18] and these matters are more likely to reflect the different legal, economic, social, and political contexts that exist between countries. These differences are therefore not necessarily unexpected or unusual, and even then, they tend to fall within an expected range.

The voluntary, soft convergence of national competition laws that is a key feature of the global expansion of competition law is not a coincidence. Convergence has

10 Franz Kronthaler and Johannes Stephan, 'Factors Accounting for the Enactment of a Competition Law – an Empirical Analysis' (2007) 52(2) *The Antitrust Bulletin* 137, 140–42.

11 François-Charles Laprévote, 'Competition Policy Within the Context of Free Trade Agreements' (Background paper for the OECD Global Forum on Competition, DAF/COMP/GF(2019)5, 17 October 2019) 8–15.

12 Robert D Anderson and others, 'Competition Policy, Trade and the Global Economy: An Overview of Existing WTO Elements, Commitments in Regional Trade Agreements, Some Current Challenges and Issues for Reflection' (Background paper for OECD Global Forum on Competition, DAF/COMP/GF(2019)11, 5 November 2019) 16.

13 David J Gerber, *Global Competition: Law, Markets, and Globalization* (OUP 2010), 88, 242, 250, 255.

14 Kronthaler and Stephan (n 10) 143–50; Maher M Dabbah, *International and Comparative Competition Law* (CUP 2012), 290–91.

15 There have been a number of attempts to formulate an internationally binding framework for competition law, most recently through the World Trade Organization, but none have succeeded. For a discussion, see Gerber (n 13) 19–54.

16 See, eg, Laprévote (n 11) 8–17.

17 Dabbah (n 14) 13–14.

18 See, eg, Anu Bradford and others, 'Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets' (2019) 16(2) *Journal of Empirical Legal Studies* 411, 420–24.

been actively pursued and promoted by the USA, the European Union (EU), the Organisation for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the International Competition Network (ICN), amongst others.[19] This strategy has been adopted in part as a response to the increasing number of competition laws around the world and incidences of anticompetitive conduct with transnational effects, and it is aimed at reducing conflict and inconsistency between those laws.[20] Convergence, and the expansion of competition law around the world more broadly, have been furthered in several ways: through the emergence of international competition law norms, provision and use of legal technical assistance, and references to US antitrust and EU competition laws as being model competition laws that are transplanted into the legal systems of other countries.

Fostering an international consensus on competition law norms

The OECD, UNCTAD, and the ICN have undertaken considerable efforts to build an international consensus on various aspects of competition law. They have developed international norms and promoted convergence through providing a forum for members and non-members to discuss competition law issues and exchange enforcement experiences, publishing best practice recommendations, guidelines, and other research on a wide range of competition law and policy matters, and conducting peer reviews.[21] Although their membership bases are different—the OECD comprises developed countries, a majority of the members of the UNCTAD are developing countries, and the ICN is a network of over 130 competition authorities around the world—the international norms that they have created are broadly similar. Moreover, the international norms that these international organizations and networks have fostered are strongly influenced by the competition laws and perspectives of developed countries and are largely based on US and EU paradigms.[22] Consistency with these international norms is encouraged not only by the OECD, UNCTAD, and ICN but also experienced competition law jurisdictions such as the USA and EU.

Legal technical assistance

The global expansion of competition law and convergence has also been supported by legal technical assistance.[23] Legal technical assistance is the transfer of skills,

19 International Competition Network, *Assessing Technical Assistance for Competition Policy: Preliminary Results* (May 2005) 10; Gerber (n 13) 88, 111–17; Thomas Cheng, 'Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law' (20132) 12 *Chicago Journal of International Law* 433, 436. For the USA, convergence is expressly stated as a goal of its international engagement activities: Timothy T Hughes, Russell W Damtoft, and Randolph W Tritell, 'International Competition Technical Assistance: The Federal Trade Commission's Experience and Challenges for the Future' in Eleanor Fox, Harry First, and Nicolas Charbit (eds), *Antitrust in Emerging and Developing Countries: Featuring Africa, Brazil, China, India, Mexico* (Concurrences 2015), 189, 192.

20 Gerber (n 13) 90–95; Cheng (n 19) 434–38.

21 Cheng (n 19) 444–45; Dabbah (n 14) 133–53.

22 For further discussion, see Wendy Ng, 'Changing Global Dynamics and International Competition Law: Considering China's Potential Impact' (2019) 30(4) *European Journal of International Law* 1409.

23 Cheng (n 19) 446–47.

knowledge, and/or capacity from one institution or jurisdiction to another.[24] It includes activities such as providing training, helping draft laws and regulations, providing long-term advisers, peer reviewing laws, and sharing best practices and experiences. Legal technical assistance is often provided by developed countries, development banks, international organizations, and non-governmental organizations to developing countries.

Legal technical assistance is a channel through which providers of such assistance can directly and indirectly influence the competition laws of recipient countries, including by promoting their competition laws and norms to recipient countries. In competition law, legal technical assistance has often been provided by developed countries with established competition regimes (such as the USA, EU, UK, Germany, Japan, South Korea, and Australia) and organizations such as the OECD, the UNCTAD, and the World Bank. Such assistance is typically provided through development aid programs, pursuant to free trade agreements, and as part of competition authorities' outreach efforts, including under competition cooperation agreements. These activities aim to support the development of competition law regimes, the building of competition law knowledge and capacity, and competition advocacy.

US and EU models of competition law and transplantation

US antitrust law and EU competition laws are often referred to as models of competition law that can be adopted by other countries. The exalted status accorded to US antitrust law and EU competition laws is both a function of their lengthy experience with competition law and enforcement as well as their political and economic influence. The USA and EU themselves also actively promote their antitrust/competition laws as being models that are suitable for adoption by other countries.[25] Additionally, the USA and EU are very influential at the OECD and the ICN, which means that they have strong voices that can shape the international consensus that is being forged.

The promotion of US and EU competition laws as leading competition law models has facilitated convergence. It does appear that many countries have based their competition laws largely on the US model and especially the EU model of competition law.[26] Even though it has been very common for countries, especially those with developing and/or transitioning economies, to tailor competition law to suit their particular circumstances,[27] that tailoring has generally been in relation to the competition law's objectives, underlying institutional arrangements, and procedures, whereas the substantive competition law principles, prohibitions, and analytical and

24 International Competition Network (n 19) 1.

25 Anu Bradford and others, 'The Global Dominance of European Competition Law Over American Antitrust Law' (2019) 16(4) *Journal of Empirical Legal Studies* 731, 733; Dabbah (n 14) 293–95.

26 See generally, Bradford and others (n 25); Susan Joekes and Phil Evans, *Competition and Development: The Power of Competitive Markets* (International Development Research Centre 2008), 14.

27 See, eg, Michal Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries' in Ana María Alvarez and others (eds), *Competition, Competitiveness and Development: Lessons from Developing Countries* (United Nations Conference on Trade and Development 2004); William E Kovacic, 'Getting Started: Creating New Competition Policy Institutions in Transition Economies' (1997) 23 *Brooklyn Journal of International Law* 403.

enforcement approaches of the USA and EU have usually been adopted.[28] As such, the metaphor of legal transplantation—of US and EU competition laws—has often been invoked to describe how competition law has developed and moved around the world.[29]

III. CASE STUDY: RECENT EXPERIENCES OF DRAFTING AND ENACTING NEW COMPETITION LAWS IN ASEAN

The story of the expansion and development of competition law around the world is largely centred upon Western and developed countries and their competition laws and perspectives, as well as international organizations and networks. This article expands the lens of enquiry to examine the recent experiences of drafting and enacting competition law in ASEAN. It does so by undertaking a case study on the experiences of Brunei Darussalam, Cambodia, Lao PDR, Myanmar, and the Philippines in drafting and/or enacting their new competition laws.

These ASEAN member states were selected for several reasons. They have the most recent experiences in ASEAN of drafting and/or enacting their first comprehensive competition laws. Brunei Darussalam, Lao PDR,[30] Myanmar, and the Philippines[31] enacted their competition laws in 2015, and Cambodia is currently drafting its competition law. Competition law was largely a new and foreign legal concept to these ASEAN member states as they had limited to no experience with competition law prior to drafting their competition laws. The drafting of their competition laws is also broadly contemporaneous. Brunei Darussalam, Lao PDR, and Myanmar began to draft their competition laws in 2011/2012, and while there have been various attempts to draft and adopt a competition law in the Philippines since the 1990s, the most recent (and successful) efforts began in 2013. In Cambodia, the current draft of the competition law that is being considered builds upon drafts prepared after 2009.

Scope and aims of the case study

The case study focuses primarily on the process of drafting competition law in the ASEAN Case Study Countries to understand more about the way in which competition law has developed. Most of the research on the development of competition law (whether on a national, transnational, or global level) tends to focus on the outcome,

28 Kathryn McMahon, 'Competition Law and Developing Economies: Between "Informed Convergence" and International Convergence', in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (2012), 209, 215.

29 See, eg, Michal S Gal and A Jorge Padilla, 'The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy' (2010) 76 *Antitrust Law Journal* 899; Dabbah (n 14) 3; McMahon (n 28).

30 Lao PDR had adopted a *Competition Decree* in 2004 but it was never implemented—no competition authority was ever established under the *Competition Decree* and no implementing regulations were adopted: see Steven Van Uytsel and Somsack Hongvichit, 'Competition Law in Laos: Evaluating its Potential for Effective Enforcement' in Steven Van Uytsel, Shuya Hayashi, and John O Haley (eds), *Research Handbook on Asian Competition Law* (Edward Elgar, 2020), 281, 284.

31 Prior to the adoption of the Philippines Competition Act in 2015, the Philippines had a number of laws that contained various competition-related provisions that were enforced by the Office of Competition under the Office of the Secretary of Justice, but it was not a comprehensive or unified regime that regulated all aspects of anti-competitive conduct: United Nations Conference on Trade and Development, *Voluntary Peer Review of Competition Law and Policy: Philippines* (Report Number UNCTAD/DITC/CLP/2014/1, 2014) 6, 18.

that is, the text of competition laws and decisions. By contrast, this case study examines the drafting process, it being a principal way that competition law is developed. In particular, it highlights learning and how it facilitates drafting, as the people responsible for drafting competition law in the ASEAN Case Study Countries had little to no prior experience with or knowledge of competition law. While this article does analyse the ASEAN Case Study Countries' enacted competition laws and compare them to one another, to the competition laws of other countries, and to international norms, such analysis and comparison is aimed at understanding the drafting of the law. Relatedly, this case study does not undertake a detailed consideration of the political, economic, and social context of each ASEAN Case Study Country, evaluate the impact, effectiveness or quality of any legal technical assistance received by drafters, or assess how these matters may have influenced or been reflected in the enacted competition law.

The scope of the case study is limited to examining the drafting of the competition law itself. This is because the ASEAN Case Study Countries are in different stages of progressing the enactment, implementation, and enforcement of their competition laws. Not all the ASEAN Case Study Countries have released implementing regulations or guidance documents, established a competition authority, or started to enforce the competition law. For example, the Philippines has issued implementing regulations and is enforcing the competition law, whereas Cambodia is still drafting its competition law. The drafting of the competition legislation is therefore the common experience across the ASEAN Case Study Countries.

It is also beyond the scope of this article to examine in detail the drafting and adoption of new competition laws by the remaining ASEAN member states, that is, Indonesia, Malaysia, Singapore, Thailand, and Vietnam. While their drafting experiences would provide insights into the development of competition laws in ASEAN during its earlier phases, the focus of this article remains on the most recent experiences of drafting and adopting competition laws. The competition laws of Indonesia, Malaysia, Singapore, Thailand, and Vietnam were enacted during a time period that is quite separate from the largely contemporaneous experiences of the ASEAN Case Study Countries, beginning with Indonesia and Thailand in 1999 and ending with Malaysia in 2010. The drafting and enactment of their competition laws also occurred during a time where there was no to limited knowledge and experience of competition law within ASEAN. Further, these member states had already either enacted (Indonesia, Thailand, Vietnam, and Singapore) or committed to enact (Malaysia) competition law prior to the ASEAN member states' commitment to establish the ASEAN Economic Community and to introduce competition policy by 2015,[32] whereas the ASEAN Economic Community was a key impetus for the drafting and adoption of competition laws in the ASEAN Case Study Countries.

This case study draws substantially from qualitative empirical research. I conducted interviews with people involved in the drafting of competition law in each of the ASEAN Case Study Countries. This includes people working at the country level and at the ASEAN Secretariat.[33] Nearly all the interviewees were directly involved in

32 ASEAN Secretariat, *ASEAN Economic Community Blueprint* (November 2007) art 41(i).

33 Thirteen people were interviewed. A substantial majority of the interviewees are current government officials, and most of them were government officials during the drafting of the competition law. These

the drafting of their country's competition law from the very early stages of the drafting process, and there is at least one such interviewee from each ASEAN Case Study Country. Interviews were semi-structured and interviewees were asked a series of open-ended questions about the drafting of competition law in their country, including the aims, concerns, and challenges of the drafters, how they approached and undertook the task and process of learning about and drafting competition law, and their engagement with legal technical assistance. Not only do these interviews provide valuable insights into the drafting process, they also help to overcome some of the opacity that is typical of the drafting of laws in most of the ASEAN Case Study Countries, as drafts and the deliberations made on them are not generally made available to the public. However, as a relatively small number of people were interviewed for this case study, this does limit the ability to draw more concrete conclusions from this empirical research. This article has therefore sought to, where possible, test, verify, and corroborate the observations, information, and other matters discussed in the interviews across multiple interviewees and with publicly available information, as well as carefully frame the observations and findings drawn from the case study and recognize their limitations.

Some background on competition law in ASEAN

The first comprehensive competition laws in ASEAN were adopted by Indonesia and Thailand in 1999. Since then, nine out of ten ASEAN member states have enacted competition laws. In addition to the national competition laws of member states, ASEAN has released several non-binding regional guidance documents on competition law and policy,[34] established the ASEAN Experts Group on Competition (AEGC) to be a regional forum 'to promote exchange of information, experience, and cooperation on competition policy in the region',[35] and adopted some cooperation mechanisms.[36] For example, the AEGC has adopted the ASEAN Regional Guidelines on Competition Policy ('ASEAN Competition Guidelines'). These guidelines are a non-binding general framework referential guide for member

interviews were conducted over the course of 2017 and 2018 in Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Myanmar, and the Philippines. Interviewees spoke in their personal capacity and not as representatives of their agencies. The interviews were conducted on the basis that interviewees would remain anonymous. Therefore, interviewees are not referred to individually (whether by name or by pseudonym) and the experiences of a specific country are referred to only where necessary.

34 ASEAN Experts Group on Competition, *ASEAN Regional Guidelines on Competition Policy* (2010); ASEAN Secretariat, *Handbook on Competition Policy and Law for Business* (2010); ASEAN Secretariat, *Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN* (2012); ASEAN Secretariat, *Handbook on Competition Policy and Law for Business 2013* (2013); ASEAN Secretariat, *Toolkit for Competition Advocacy in ASEAN* (2016); ASEAN Expert Group on Competition, *ASEAN Self-Assessment Toolkit on Competition Enforcement and Advocacy* (2017); ASEAN Secretariat, *Handbook on Competition Policy and Law in ASEAN for Business 2017* (2017); ASEAN Secretariat, *Competition Compliance Toolkit for Businesses in ASEAN* (2018); ASEAN Secretariat, *ASEAN Competition Law and Policy Peer Review: Guidance Document* (2020); ASEAN Secretariat, *Trainers' Guide to Market Studies* (2020); ASEAN Secretariat, *Handbook on Competition Policy and Law in ASEAN for Business 2019* (2020).

35 'Joint Media Statement of the Thirty-Ninth ASEAN Economic Ministers' (AEM) Meeting Makati City, Philippines' (Media Statement, 24 August 2007) para 22.

36 ASEAN Secretariat, 'ASEAN Establishes Competition Enforcers' Network, Regional Cooperation Framework, and Virtual Research Centre' (*ASEAN Secretariat News*, 11 October 2018) <www.asean-competition.org/read-news-asean-establishes-competition-enforcers-network-regional-cooperation-framework-and-virtual-research-centre> accessed 3 September 2021.

states, set out different policy and institutional options and considerations for member states, and are quite broad and open-ended because they recognize that the member states are at different stages of competition policy development.[37] The next step in ASEAN's competition law agenda is achieving greater harmonization of national competition laws by 2025 through promoting convergence, eliminating contradictions between the national laws, improving regional guidelines on competition law, and formulating a model law framework.[38]

The ASEAN member states adopted competition laws for a variety of reasons. For example, Indonesia enacted competition law in part to fulfil its commitments to the IMF[39] and Singapore was obliged to adopt a competition law under its bilateral free trade agreement with the USA.[40] More recently, the establishment the ASEAN Economic Community in 2015 was a key impetus for ASEAN member states to enact competition laws. Competition law is regarded by ASEAN as essential to its goal of regional economic integration. Pursuant to the *ASEAN Economic Community Blueprint 2007*,[41] the ASEAN member states committed to introducing competition policy in all member states by 2015.[42] When the blueprint was adopted in 2007, Indonesia, Singapore, and Vietnam had implemented comprehensive competition laws, Thailand's *Trade Competition Act*[43] was considered toothless,[44] Lao PDR's *Competition Decree*[45] was never implemented, and Malaysia had committed to adopting a competition law.[46] Subsequent to the adoption of the blueprint, Malaysia adopted its competition law in 2010, Brunei Darussalam, Lao PDR, Myanmar, and the Philippines enacted competition laws in 2015, and Thailand and Vietnam substantially revised their competition laws in 2017 and 2018, respectively. Cambodia remains the only ASEAN member state without a competition law, though it is currently drafting one.

37 ASEAN Experts Group on Competition, *ASEAN Regional Guidelines on Competition Policy* (n 34) paras 1.2, 1.3.

38 ASEAN Secretariat (n 1) art 27(v); ASEAN Secretariat, *ASEAN Competition Action Plan (2016-2025)* (2016) 8.

39 Indonesia committed to submitting a draft law on competition policy to Parliament by 31 December 1998: Letter of Intent from the Government of Indonesia to the International Monetary Fund, 13 November 1998.

40 *United States-Singapore Free Trade Agreement*, signed 6 May 2003 (entered into force 1 January 2004) art 12.2.

41 *Declaration on the ASEAN Economic Community Blueprint* (20 November 2007). Art 1 stated that the blueprint was adopted to facilitate the transformation of ASEAN into 'a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy.'

42 ASEAN Secretariat, *ASEAN Economic Community Blueprint* (November 2007) art 41(i).

43 *Trade Competition Act 1999* (Thailand), BE 2542, 22 March 1999 (Thai Trade Competition Act 1999).

44 Thailand's *Trade Competition Act 1999* has remained largely unenforceable due to the lack of relevant regulations, and while there were some investigations, no violations of the act were ever found. See, eg, generally, Sakda Thanitcul, 'Competition Law in Thailand: In Transition to an Operational Law' in Steven Van Uytsel, Shuya Hayashi, and John O Haley (eds), *Research Handbook on Asian Competition Law* (Edward Elgar 2020), 118, 121; Deunden Nikomborirak, 'Thailand's Competition Law Dead Since Arrival' (*East Asia Forum*, 21 May 2019) <www.eastasiaforum.org/2019/05/21/thailands-competition-law-dead-since-arrival> accessed 3 September 2021.

45 *Decree on Trade Competition* (Lao People's Democratic Republic) Ministry of Industry and Commerce, No 15/PMO, 4 February 2004.

46 Cassey Lee and Yoshifumi Fukunaga, 'ASEAN Regional Cooperation on Competition Policy' (2014) 35 *Journal of Asian Economics* 77, 80.

ASEAN and its member states have received, and continue to receive, legal technical assistance from a wide range of sources in support of their efforts to develop competition laws. The governments of developed countries with established competition laws (such as Australia, New Zealand,[47] Germany,[48] Japan,[49] South Korea, and the USA[50]) have provided legal technical assistance to facilitate the preparation and drafting of competition laws, implementing regulations, and guidelines, to build capacity of competition authorities and courts, and to support competition advocacy. Other providers of legal technical assistance to ASEAN member states include development banks, international organizations (such as the UNCTAD and the OECD), and non-governmental organizations (including the Friedrich Neumann Foundation and the Consumer Unity and Trust Society). Legal technical assistance activities and other support have been provided and delivered at the international, regional, subregional, and bilateral levels, depending on the partner and activity.

Brunei Darussalam

Brunei Darussalam began drafting its competition law in May 2012.[51] The Prime Minister's Office was in charge of preparing the draft law. A working group was formed to lead drafting efforts, which included representatives from the Department of Economic Planning and Development under the Prime Minister's Office,[52] the Ministry of Foreign Affairs and Trade, and the Attorney General's Chambers, and other government authorities. During the drafting process, Brunei Darussalam received some legal technical assistance, mostly from the UNCTAD and Germany, with working group members attending some local and ASEAN-wide training workshops, taking a study visit to Germany, and receiving informal comments on a draft law.[53] The *Competition Order*[54] was adopted on 7 January 2015.

47 Through the Competition Law Implementation Program (CLIP) established pursuant to the free trade agreement between ASEAN, Australia, and New Zealand and implemented by the Australian Competition and Consumer Commission and the New Zealand Commerce Commission.

48 With the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) as the implementing agency.

49 Through the Japan International Cooperation Agency and the Japan-ASEAN Integration Fund, with the assistance of the Japan Fair Trade Commission.

50 Chiefly through the United States Agency for International Development, with the assistance of the US Federal Trade Commission and the US Department of Justice.

51 Brunei Darussalam, 'Development of Competition Law in Brunei Darussalam' (Document number 2014/SOM1/CPLG/027, Presentation at the Asia-Pacific Economic Cooperation Competition Policy and Law Group Meeting, Ningbo, China, 21–22 February 2014).

52 During the drafting of the competition law, the Department of Economic Planning and Development was situated under the Prime Minister's Office. In January 2018, cabinet was reshuffled and the Department of Economic Planning and Development was moved to be under the Ministry of Finance and Economy.

53 Interview with government official from Brunei Darussalam; Brunei Darussalam (n 51); United Nations Conference on Trade and Development, *Pre-Technical Assistance Dialogue to Develop a Competition Policy and Law Framework for Brunei Darussalam* (23–25 May 2012) <https://unctad.org/meeting/pre-technical-assistance-dialogue-develop-competition-policy-and-law-framework-brunei> accessed 3 September 2021; United Nations Conference on Trade and Development, *Workshop on the Appropriate Design and Formulation of Competition Policy and Law in ASEAN Member States* (23–24 September 2014) <https://unctad.org/meeting/workshop-appropriate-design-and-formulation-competition-policy-and-law-asean-member-states> accessed 3 September 2021.

54 *Competition Order 2015* (Brunei Darussalam) 7 January 2015 (Brunei Competition Order).

The *Competition Order* is, overall, substantially similar to Singapore's *Competition Act 2004*. The structure of the *Competition Order*, its substantive prohibitions, its procedural requirements, and even the precise language it uses are close to the Singaporean competition statute. For example, the grounds for exempting anticompetitive agreements and abuse of dominance conduct under both competition laws are very similar in both their wording and substance, and both are set out in the Third Schedule of the respective competition laws. Both competition laws carve out activities carried out by the government and statutory bodies from the operation of the competition prohibitions.[55] Neither the *Competition Order* nor Singapore's competition law applies to vertical agreements[56] or requires the mandatory notification of mergers that meet a particular threshold; both approaches are not commonly found in other countries' competition laws, including within ASEAN.[57] Further, like in Singapore, the *Competition Order* creates a Competition Commission to administer and enforce the competition law and a Competition Appeals Tribunal to hear appeals of decisions made by the Competition Commission.[58] The *Competition Order* is not an exact replica of Singapore's competition law, however. It expressly states the objectives of the law,[59] allows undertakings to seek individual exemptions for anticompetitive agreements,[60] provides for a leniency regime for cartel conduct,[61] and grants specific power to the Competition Commission to conduct market studies[62]; these matters are not expressly stipulated in Singapore's competition statute.

The resemblance between Brunei Darussalam's and Singapore's competition laws is unlikely a coincidence. It is not uncommon for Brunei Darussalam to refer to Singaporean laws when drafting new laws.[63] The legal systems of Brunei Darussalam and Singapore share common roots, both being former British colonies and having inherited British laws when they became independent, and the British common law system and

55 Brunei Competition Order, art 10(4); *Competition Act 2004* (Singapore) Act 46 of 2004, s 33(4) (Singapore Competition Act).

56 Brunei Competition Order, Third Schedule art 8; Singapore Competition Act, s 35, Third Schedule s 8.

57 See Rachel Burgess, *Commonalities and Differences Across Competition Legislation in ASEAN and Areas Feasible for Regional Convergence* (2020) 41, 53.

58 Brunei Competition Order, art 3, 60, 61; Singapore Competition Act, ss 3, 72, 73.

59 Brunei Competition Order, art 1(3). It provides that it is an order 'to promote and protect competition in markets in Brunei Darussalam, to promote economic efficiency, economic development and consumer welfare'. The objectives of Singapore's competition law are indirectly stipulated through the roles and functions of the Singapore Competition and Consumer Commission (Singapore Competition Act, s 6(1)).

60 Brunei Competition Order, art 13. Individual exemptions from the prohibition on anticompetitive agreements are not available under the Singapore Competition Act.

61 Brunei Competition Order, art 44. The Singapore Competition Act itself does not expressly or specifically provide for a leniency program for cartel conduct. The Singaporean competition authority does implement a leniency program, however, and it has leniency guidelines (Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases 2016).

62 Brunei Competition Order, art 62. The Singapore Competition Act does not expressly or specifically provide the Singaporean competition authority with a power to carry out market studies. The Singaporean competition authority does carry out market studies pursuant to the more general powers granted to it under s 6 and the Second Schedule of the Singapore Competition Act.

63 Attorney General's Chambers, 'Law Making Process' (Presentation, Understanding the Law: Role and Responsibilities of the Government Workshop, Brunei Darussalam, 16 and 18 February 2019) <www.agc.gov.bn/Lists/News/ItemDisplayForm.aspx?ID=480> accessed 3 September 2021.

legislation continue to influence law in Brunei Darussalam and Singapore.[64] Singapore is often regarded as a "benchmark jurisdiction" for Brunei Darussalam.[65]

Further, according to a government official involved in the drafting of the *Competition Order*, there were several reasons why the working group ultimately chose to draft a competition law that was significantly similar to Singapore's competition law.[66] First, the working group believed that it would better facilitate the provision of legal technical assistance by Singapore to Brunei Darussalam if their competition laws were similar. It would not be unusual for Brunei Darussalam to approach Singapore for legal technical assistance as the two countries have a close relationship and cooperate in a range of areas.[67] Second, the working group thought that it would help Brunei Darussalam comply with its international treaty obligations, including those expected under the Trans-Pacific Partnership and the Regional Comprehensive Economic Partnership agreements that were being negotiated at that time, because the working group members believed that Singapore's competition law met international standards.[68] Third, Brunei Darussalam engaged an expert legislative drafter from Singapore to lead the drafting of the competition law, in consultation with the working group. They had apparently been involved in the drafting of a number of other laws for Brunei Darussalam and had the trust and confidence of the senior leader within the Prime Minister's Office who was responsible for leading the competition law drafting efforts.[69] The interviewee recalled that the Singaporean expert's main frame of reference when discussing the drafting of the *Competition Order* with the working group was Singapore's competition law.[70]

Lao PDR

The *Law on Competition*[71] came into effect in January 2016. The Ministry of Industry and Commerce (Lao MoIC) was responsible for preparing the initial draft of the competition law. A competition law drafting committee, comprising representatives from Lao MOIC and other line ministries, was established in June 2013,[72] though discussions and some groundwork on drafting competition law began in 2011.[73] The drafting committee consulted with relevant line ministries, other

64 Kerstin Steiner, 'Comparative Law in the Syariah Courts: A Case Study of Singapore, Malaysia, and Brunei' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015) 595, 596–97.

65 Attorney General's Chambers (n 63).

66 Interview with government official from Brunei Darussalam.

67 Interview with government official from Brunei Darussalam; Ministry of Foreign Affairs Singapore, *Brunei* <www.mfa.gov.sg/SINGAPORES-FOREIGN-POLICY/Countries-and-Regions/Southeast-Asia/Brunei> (accessed 3 September 2021).

68 Interview with government official from Brunei Darussalam.

69 ibid.

70 ibid.

71 *Law on Competition 2015* (Lao People's Democratic Republic) National Assembly, No 60/NA, 14 July 2015 (Lao PDR Competition Law).

72 Khouanchay Iemsouthi, 'Competition Law and Policy in Lao PDR' (Presentation at the 12th East Asia Top Level Officials' Meeting on Competition Policy, 9 September 2016, Seoul, South Korea); Interviews with government officials from Lao PDR.

73 Van Uytsel and Hongvichit (n 30) 284; William M Butterfield, Chanyut Nitikitpaiboon, and Thuy Thi Bich Nguyen, *Outlawing Monopoly: A Programmatic Evaluation of USAID's ASEAN Competition and*

stakeholders, and the public. The National Economic Research Institute also conducted a regulatory and budgetary impact assessment of the proposed law. The draft law, along with the impact assessment, were submitted to the Ministry of Justice and then the Prime Minister's Office for their respective reviews. The Prime Minister's Office then submitted the draft law to the National Assembly for its review and enactment in June 2015.[74] The *Law on Competition* was enacted on 14 July 2015.

According to officials involved in the drafting of the competition law, while the drafting committee learned about the competition law experiences of countries outside of ASEAN, they were most interested in learning from other ASEAN member states. In particular, they wanted to know more about the competition law experiences of ASEAN member states with similar levels of development and/or with more experience with competition law.[75] As such, the drafting committee looked specifically to the competition laws of Indonesia and Vietnam, as its members thought that these countries' experiences would be helpful in figuring out a competition law that is suited to Lao PDR's local conditions.[76] In particular, the interviewees noted the similar political, economic, and development systems that exist in Vietnam and Lao PDR.[77] The drafting committee also looked at the ASEAN Competition Guidelines.[78]

The *Law on Competition* reflects a combination of approaches that are found in Vietnam's 2004 competition statute and international competition law norms.[79] The *Law on Competition* incorporates some provisions and approaches found in Vietnam's 2004 competition statute but which were less commonly found in other jurisdictions.[80] For example, both laws clearly distinguish between a dominant market position and a market monopoly[81] and have presumptions of dominance based on market shares (though Vietnam's 2004 competition statute had a non-rebuttable presumption and Lao PDR's competition law is silent on whether that presumption is rebuttable).[82] Their lists of the types of agreements that restrict competition are very similar and there is no clear distinction between horizontal and vertical

Consumer Protection Program from a Development Perspective (US Agency for International Development, September 2011) 5.

74 Iemsouthi (n 72). Drafting of laws and regulations are required to follow the procedures set out in the *Law on Lawmaking 2012* (Lao People's Democratic Republic) National Assembly, No 19/NA, 12 July 2012.

75 Interviews with government officials from Lao PDR.

76 ibid. This may explain why the drafting committee undertook study trips to these countries.

77 Both Vietnam and Lao PDR are Leninist states that have implemented reforms to move to market economies.

78 Interviews with government officials from Lao PDR.

79 See also Van Uytsel and Hongvichit (n 30) 284–85.

80 Over the period that the *Law on Competition* was being drafted, Vietnam's competition law was the 2004 *Law on Competition*. Vietnam repealed and adopted a new competition law in 2018, with substantial revisions made. In Vietnam's 2018 competition law, a number of the less conventional aspects of Vietnam's 2004 competition law were removed and replaced by approaches that are more commonly taken in other countries.

81 Lao PDR Competition Law, art 30; *Law on Competition 2004* (Vietnam) National Assembly, No 27-2004-QH11, 3 December 2004, arts 11–12 (Vietnam Competiton Law 2004).

82 Unspecified market share in Lao PDR's competition law and 30 per cent in Vietnam's 2004 competition law: Lao PDR Competition Law, art 30; Vietnam Competition Law 2004, art 11.

agreements.[83] The two laws also prohibit mergers if they result in a combined market share over a particular threshold,[84] provide some protection for mergers of small and medium sized businesses,[85] and do not expressly allow the competition authority to approve a merger conditionally. Both laws also contemplate that competition law violations could potentially be criminal offences, but that determination is left to other laws and regulations.[86] Additionally, like the Vietnamese 2004 competition law, Lao PDR's competition law also covers unfair competition practices.[87]

The *Law on Competition* also seems to have learned from some of Vietnam's enforcement experiences and challenges. For example, while Lao PDR's competition law refers to market share thresholds in determining market dominance and merger prohibition, these thresholds are not specified in the competition statute itself but are instead set by the Lao Competition Commission, giving Lao PDR more flexibility in adjusting those thresholds to reflect changing and different market and economic conditions. By contrast, Vietnam's 2004 competition statute did specify the market thresholds for merger prohibition and mandatory merger notification and the number of mergers notified to the relevant Vietnamese competition authority was small and seemed to be disproportionate to the levels of merger activity in Vietnam, and the competition authority had not prohibited any mergers.[88] Similarly, while the list of anticompetitive agreements caught under Lao PDR's competition law is nearly the same as that under Vietnam's 2004 competition law, unlike Vietnam's statute, the *Law on Competition* does not condition the prohibition of any of those agreements on the reaching of a particular market share threshold. Vietnam's 2004 competition law had provided that certain types of anticompetitive agreements would be prohibited only if the parties to the agreement had a combined share of 30 percent or greater in the relevant market,[89] and this requirement had been a significant barrier to cartel enforcement for the Vietnamese competition agency.[90]

83 Lao PDR Competition Law, arts 21–29; Vietnam Competition Law 2004, art 8. The Lao Competition Commission has not yet issued any implementing regulations (which could potentially distinguish between horizontal and vertical agreements). The implementing regulations adopted in Vietnam in 2005 did not clearly make such a distinction. However, the revisions that were made to Vietnam's competition law in 2018 did include a distinction between horizontal and vertical agreements.

84 Unspecified market share in Lao PDR's competition law and 50 per cent in Vietnam's 2004 competition law: Lao PDR Competition Law, art 38; Vietnam Competition Law 2004, art 18.

85 In Lao PDR, mergers of small and medium businesses are exempt from the pre-merger notification requirement (but they need to make a post-merger notification), and under the 2004 Vietnamese competition law, where the post-merger entity remains a small and medium sized business as stipulated by law, it is exempt from prohibition: Lao PDR Competition Law, art 39; Vietnam Competition Law 2004, art 18.

86 Lao PDR Competition Law, arts 72, 74. To date, Lao PDR has not yet determined whether any breaches of the competition law will be criminal offences. For Vietnam's 2004 competition law, the Penal Code provided that certain types of cartel conduct were criminal offences: *Penal Code* (Vietnam) National Assembly, No 100/2015/QH13, 27 November 2015, arts 217, 222.

87 Lao PDR Competition Law, arts 8–17; Vietnam Competition Law 2004, arts 39–48. For a discussion of the unfair competition provisions in Lao PDR's competition law and how it compares to Vietnam's 2004 competition law, see Van Uytsel and Hongvichit (n 30) 286–89.

88 OECD, *OECD Peer Reviews of Competition Law and Policy: Viet Nam* (2018) 50.

89 Vietnam Competition Law 2004, art 9(2).

90 OECD (n 88) 43.

Lao PDR's competition law also includes some aspects of international best practice that were absent from Vietnam's 2004 competition statute.[91] It is increasingly common for countries to have leniency programs to encourage businesses to report their cartel conduct, however there was no provision for leniency under Vietnam's 2004 competition statute.[92] By contrast, there is reference to a leniency policy in the *Law on Competition*, which is also consistent with the ASEAN Competition Guidelines and international best practice, though additional guidance is required to implement it.[93] Similarly, Vietnam's 2004 competition statute does not specify whether unannounced inspections (known as dawn raids) can be conducted during investigations,[94] whereas Lao PDR's competition law expressly provides that dawn raids can be used in investigations and that there is no need to notify the investigated parties in advance.[95] The institutional arrangements also differ. The 2004 Vietnamese competition law established two administrative enforcement agencies with two-stage enforcement, whereas Lao PDR adopts the single agency administrative enforcement model.[96] At the time the 2004 Vietnamese statute was drafted and enacted, there were a few other countries (such as the UK and Brazil) that also had a two-agency model. By the time that Lao PDR began drafting its competition law, those countries had changed to a single agency model and other ASEAN countries with competition law also had a single agency model.

Therefore, on the whole, it appears that Vietnam's 2004 competition law and enforcement experiences were quite influential on Lao PDR's *Law on Competition*, as well as certain aspects of international best practice.

Lao PDR did receive legal technical assistance before and during the drafting process. Drafting committee members went on study trips to Indonesia, Thailand, and Vietnam to find out more about their experiences with competition law and attended specifically convened workshops and lectures to learn about competition law from foreign experts.[97]

91 When Vietnam revised its competition law in 2018, the revised competition law addressed a number of these issues.

92 Voluntarily provided evidence and information relating to the impugned conduct are considered to be extenuating circumstances under the implementing regulations: see *Decree on Competition* (Vietnam) Government, Decree No 116-2005-ND-CP, 15 September 2005, art 85(a), (c) (Vietnam Decree on Competition 2005).

93 Lao PDR Competition Law, art 62; ASEAN Experts Group on Competition, *ASEAN Regional Guidelines on Competition Policy* (n 34) 30–32.

94 A similar power is provided under the implementing regulations, however, the investigated party must be informed of the decision authorising the search prior to the search taking place. The OECD observes that this requirement renders the search power ineffective. See Vietnam Decree on Competition 2005, arts 94, 100; OECD (n 88) 57.

95 Lao PDR Competition Law, art 85(3).

96 The Lao Competition Commission is a non-standing commission and comprises of representatives from particular ministries, government related institutions, a chamber of commerce, and the Lao Bar Association, and its Secretariat sits within the Ministry of Industry and Commerce: ibid, arts 48, 48, 51.

97 ibid; Max Büge, 'ASEAN-German Cooperation Project: "Competition Policy and Law in ASEAN" (CPL II) Project' (Intergovernmental Group of Experts on Competition Law and Policy Roundtable on Capacity Building in Competition Law and Policy, 19–21 October 2016, Geneva) <https://unctad.org/meetings/en/Presentation/cicplp2016c29_ccMaxBuege_en.pdf> accessed 3 September 2021; Van Uytsel and Hongvichit (n 30) 284. See, eg, Economic Research Institute for ASEAN and East Asia, 'ERIA Capacity Building Seminar 2013 in Lao PDR on RCEP, Competition Law, Consumer Protection, IPR, 21–22 November 2013, Vientiane, Lao PDR' (Press Release, 22 November 2013).

Germany provided a local adviser to assist the Lao MOIC and the drafting committee with coordination and translation activities, and they also supported a competition assessment and some stakeholder consultation workshops held during the drafting process.[98] Foreign experts commented on a draft of the competition law.[99] Throughout the drafting process, drafting committee members also attended regional and international workshops and conferences on competition law organized and/or held by various development partners.[100] As such, the legal technical assistance received by Lao PDR both directly supported drafting activities as well as built up competition law knowledge and capacity more generally.

Myanmar

The drafting of Myanmar's *Competition Law*[101] began in 2012.[102] The Ministry of Commerce (Myanmar MoC) was responsible for preparing the initial draft of the competition law, and it consulted with other relevant ministries and organizations, including chambers of commerce, to prepare the draft.[103] Once the initial draft was ready, it was first submitted to the Union Attorney-General's Office, and then to the President's Office and the Cabinet, for review and approval.[104] Thereafter, the draft law was submitted to the Pyidaungsu Hluttaw, Myanmar's parliament, which enacted the *Competition Law* on 24 February 2015. The law came into effect on 24 February 2017.

Overall, it appears that Myanmar's competition law is a product of a mix of influences and understandings of competition law.

According to an official involved in the drafting of Myanmar's competition law, the main references for the drafting team at the Myanmar MoC were the competition laws and experiences of Vietnam and Thailand.[105] Of the countries in ASEAN with competition laws at that time, the drafting team believed that Thailand and Vietnam were most similar to Myanmar and that learning about their competition laws and experiences would be useful in helping to prepare a draft competition law that was suited to Myanmar. This interest in and learning from Vietnam and Thailand seems to have been reflected in some aspects of Myanmar's *Competition Law*. Like both Vietnam's 2004 competition law and Thailand's 1999 competition law,[106] Myanmar's competition law covers unfair competition and restrictions on competition.

98 Interviews with government officials from Lao PDR; *Competition Law and Policy in ASEAN* (CUTS Hanoi Research Centre) <https://cuts-hrc.org/competition-policy-and-law-in-asean-2> accessed 3 September 2021.

99 Interviews with government officials from Lao PDR.

100 Such events were held by the ASEAN Secretariat, the UNCTAD, OECD, CLIP, GIZ, and Japan, amongst others: ibid.

101 *Competition Law 2015* (Myanmar) Pyidaungsu Hluttaw, Law No 9, 24 February 2015 (Myanmar Competition Law).

102 Interviews with government officials from Myanmar; Steven Van Uytsel, 'A Legal Transplant Made Unnecessarily Complex: the Myanmar Competition Law' in Steven Van Uytsel, Shuya Hayashi, and John O Haley (eds), *Research Handbook on Asian Competition Law* (Edward Elgar 2020) 303, 303.

103 Interviews with government officials from Myanmar.

104 ibid.

105 ibid. See also Van Uytsel (n 102) 304, 307.

106 Thai Trade Competition Act 1999, art 29.

It also has other similarities with Vietnam's 2004 competition statute, such as the almost identical grounds for exempting anticompetitive agreements, prohibiting mergers where the combined market share of the merging parties exceeds a particular threshold, and exempting mergers where the post-merger entity remains a small and medium sized business.[107] In addition, breaches of the prohibitions on acts that restrict competition or that lead to monopolization (which cover conduct that is mostly discernible as either coordinated or unilateral conduct) and anticompetitive mergers contained in Myanmar's competition law may be criminal offences.[108] This was the same approach taken in Thailand's 1999 competition statute,[109] but it is not one that was common within ASEAN (with the exception of Indonesia[110]) or internationally.

The drafting team also looked beyond Thailand and Vietnam to ASEAN's guidance documents and international best practice.[111] The institutional arrangements for the *Competition Law*, in particular, appear to reflect a combination of learning from Vietnam, Thailand, and international norms, adapted for Myanmar. While Myanmar adopts the single-agency model that is now common in ASEAN and internationally, like the enforcement agencies created pursuant to Vietnam's 2004 and Thailand's 1999 competition laws, the Competition Commission is not independent and is comprised of representatives from, inter alia, various ministries and government bodies.[112] Myanmar's competition law also requires that an investigation committee be established within the Competition Commission,[113] which is not dissimilar to the express provision in Thailand's 1999 competition law for the creation of subcommittees by the competition authority.[114] Myanmar's *Competition Law* also refers to a leniency program[115] and prohibits mergers that intend to either decrease competition in a market where there is only one or a few competitors or excessively increase market dominance for a period of time, which seems to be a variation of the dominance test.[116]

At the same time, there are several approaches in Myanmar's *Competition Law* that are quite distinct and not necessarily referable to learning from any other countries' competition laws. The regulation of unilateral conduct under the *Competition Law* is quite complex, as it can potentially be prohibited as an act that leads to monopolization (Article 15), as an act of unfair competition (as an abuse of influence under Article 27), and as an act that restricts competition (Article 13). The conduct set out under Articles 15 and 27 is similar to various types of abuse of dominance conduct found in

107 Myanmar Competition Law, arts 14, 32, 33(a); Vietnam Competition Law 2004, arts 10, 18.

108 Myanmar Competition Law, arts 39, 41.

109 Thai Trade Competition Act 1999, art 51. When the 1999 competition law was repealed and replaced in 2017, criminal sanctions remained for hardcore cartels and abuse of dominance, with administrative penalties for other breaches.

110 *Law No 5 of 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition* (Indonesia) The People's Legislative Assembly, Law No 5, 5 March 1999, art 48.

111 Interviews with government officials from Myanmar; Van Uytsel (n 102) 304, 307.

112 Myanmar Competition Law, art 5. When Vietnam's competition law was revised in 2018, although a single-agency model was adopted, the competition authority was situated within the Ministry of Trade and Industry. When Thailand replaced its competition law in 2017, a new independent competition authority was established.

113 Myanmar Competition Law, arts 11–12.

114 Thai Trade Competition Act 1999, arts 11–17.

115 Myanmar Competition Law, art 53.

116 ibid, art 31.

many other countries' competition laws, and Article 13 contains a general prohibition on abuse of dominant position and market restriction by an individual or organization. There is no further guidance provided in the competition law, however, to help determine when unilateral conduct might be more likely to fall within one provision than another (for example, monopolization and influence are not defined). Further, it appears that Article 13 can apply to both coordinated and unilateral conduct, which could potentially mean that the same prohibition standard (per se) could apply to both types of conduct, but again this is not sufficiently clarified in the law itself. Myanmar's *Competition Law* also differentiates between a 'person' and a 'businessman',[117] which is uncommon, and subjects them to different prohibitions. For example, persons are subject to Article 13 whereas businessmen are subject to Article 15.[118]

According to officials involved in the drafting process, Myanmar did not make use of any specific drafting-related legal technical assistance in preparing the competition law.[119] They noted that the drafting team did receive an offer of drafting-related legal technical assistance, but it was not taken up as there were concerns that it would prolong the drafting process and result in Myanmar not meeting its commitment to ASEAN of enacting a competition law by 2015.[120] Instead, the drafting team opted to continue their participation in more general legal technical assistance activities to build up competition law knowledge and capacity, such as attending training and other capacity building workshops and seminars organized at both the country level and the ASEAN level.[121] Officials from Myanmar also participated in legal technical assistance activities prior to drafting.[122]

The Philippines

Various discussions and attempts to draft and enact a comprehensive competition law for the Philippines have been ongoing since the early 1990s.[123] In the

117 'Businessman means the person who carries out any business or service business. In this expression, an organisation that operates business or service is also included': ibid, art 2(j).

118 Article 15 prohibits businessmen from engaging in market monopolisation by: (a) controlling the price of goods and services; (b) restricting services or production, restricting opportunities to purchase and sell goods, or specifying compulsory terms for other businessmen, with the aim of controlling prices; (c) suspending, reducing, or restricting services, production, purchases, distribution, transfer, or import of goods without appropriate reason, or destroying goods or causing damage to them to lower their quality and reduce market demand; (d) controlling and restricting the area where goods or services are traded to prevent entry and control market share; and (e) interfering in another business in an unfair manner.

119 Interviews with government officials from Myanmar. See also Van Uytsel (n 102) 304. It should be noted that, by contrast, Myanmar has received quite a lot of drafting assistance for the preparation of implementing regulations and guidance documents, from quite early in the drafting process: see, eg, Interviews with government officials from Myanmar; ASEAN Experts Group on Competition, *2017 Annual Report 2017*, 20.

120 Interviews with government officials from Myanmar.

121 ibid. See, eg, 'Myanmar Readies for a Competition Law' (*ASEAN Expert Group on Competition*, 4 June 2014) <www.asean-competition.org/read-news-myanmar-readies-for-a-competition-law> accessed 3 September 2021; Economic Research Institute for ASEAN and East Asia, 'ERIA Capacity Building Seminar 2013 on RCEP, SME, Competition Law, Consumer Protection, IPR, 28-30 November 2013, Nay Pyi Taw, Myanmar' (Press Release, 30 November 2013).

122 See, eg, Hiroshi Nakazato, 'JFTC's Effort in Technical Assistance for East Asia' (Asian Competition Forum 6th Annual Conference, Hong Kong, 6–7 December 2010).

123 United Nations Conference on Trade and Development (n 31) 15–16.

Philippines, the drafting of competition law has been led by members of Congress, with government departments and authorities advising them during the process.[124] A number of different competition bills were sponsored by members in the Senate and the House of Representatives of the Sixteenth Congress of the Philippines, which began its term in 2013. The Senate and House of Representatives each produced and approved their own version of a consolidated competition bill in December 2014.[125] A bicameral conference committee was convened in early June 2015 to resolve the differences between the Senate and House bills and to consolidate them into one bill.[126] That consolidated bill was passed by the Senate and the House of Representatives on 10 June 2015 and then signed into law by the President on 21 July 2015. The *Philippine Competition Act*[127] (PCA) came into effect on 8 August 2015.

EU competition law and US antitrust law were the main references for lawmakers in the House of Representatives and Senate when they prepared their versions of consolidated bills.[128] Lawmakers also referred to guidance documents issued by ASEAN and the UNCTAD model on competition law.[129]

Many aspects of the PCA are similar to provisions and approaches taken in the EU and USA. For example, Article 15 of the PCA, which relates to abuse of dominance, covers types of exclusionary and exploitative conduct that are also regulated by Article 102 of the *Treaty on the Functioning of the European Union*, and the PCA, like in the EU, adopts a rebuttable presumption of market dominance where an entity has a market share of more than 50 per cent.[130] The influence of US antitrust law can be seen in, for example, the PCA's approaches to merger notification[131] and leniency.[132] The PCA does not apply to collective bargaining agreements between employees and employers and other conduct that affect conditions of employment,[133] which is consistent with the overall approaches taken in the USA and EU

124 ibid; Interviews with government officials from the Philippines.

125 Senate Bill No 2282 was the product of consolidating seven bills. For the legislative history of this bill, see '16th Congress, Senate Bill No 2282, Fair Competition Act of 2014' (*Senate of the Philippines*) searchable at <http://legacy.senate.gov.ph/lis/leg_sys.aspx?congress=16&type=bill> accessed 3 September 2021. House Bill No 5286 was result of the consolidation of 12 bills. For the legislative of this bill, see 'House/Bill Resolution History, House Bill/Resolution No HB05286' (*Republic of the Philippines House of Representatives*) searchable at <http://congress.gov.ph/legisdocs/?v=bills> accessed 3 September 2021.

126 '16th Congress, Senate Bill No 2282, Fair Competition Act of 2014' (*Senate of the Philippines*) searchable at <http://legacy.senate.gov.ph/lis/leg_sys.aspx?congress=16&type=bill> accessed 3 September 2021.

127 *Philippine Competition Act* (The Philippines), Sixteenth Congress of the Republic of the Philippines, Republic Act No 10667, 21 July 2015 (Philippine Competition Act).

128 Interviews with government officials from the Philippines; Alizedney M Ditucalan, 'The Philippine Competition Law Dilemma: US-EU Fusion to Tension?' in Steven Van Uytsel, Shuya Hayashi, and John O Haley (eds), *Research Handbook on Asian Competition Law* (Edward Elgar 2020), 233, 268–70.

129 Interviews with government officials from the Philippines; Ditucalan (n 128) 268–69.

130 Philippine Competition Act, s 27; Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-3359, para 60.

131 Philippine Competition Act, s 17; Rules and Regulations to Implement the Provisions of Republic Act No 10667 (Philippine Competition Act), Philippine Competition Commission, 31 May 2016, s 3.

132 Philippine Competition Act, s 35.

133 ibid, s 3.

on this matter. Moreover, the PCA provides for the establishment of a national competition policy, an initiative that was influenced by Australia's national competition policy.[134]

At the same time, the PCA contains provisions that are quite specific to the Philippines. This is perhaps most clearly demonstrated by its regulation of hard-core cartel conduct. Under the PCA, price fixing and bid rigging are prohibited per se whereas output restriction and market sharing are only prohibited if the conduct has the object or effect of substantially preventing, restricting, or lessening competition,[135] and these four types of hard-core cartel conduct are subject to the same administrative and criminal penalties.[136] On the one hand, the USA, EU, and many other jurisdictions' competition laws also prohibit these four types of hard-core cartel conduct, and usually strictly. However, it is uncommon to apply dissimilar prohibition standards to different types of hard-core cartel conduct, and this is not an approach that is adopted in the USA or EU, or recommended under international norms. Further, while a number of countries have criminalized hard-core cartel conduct (including the USA), criminal sanctions are not usually applied to conduct that is subject to a competition test. This approach to hard-core cartel conduct regulation was the result of a compromise struck during the consolidation of the Senate and House competition bills at the bicameral conference committee,[137] where the committee combined the different approaches taken by the House and Senate to cartel conduct.[138] However, by doing so, it resulted in a somewhat internally inconsistent approach to hard-core cartel conduct, suggesting that perhaps the lawmakers did not fully understand the nature of the prohibition, the different approaches taken by other jurisdictions, and the consequences of making such a compromise.[139] Another example of a provision that is more specific to the Philippines is Article 41, which provides that if the breach of the PCA involves the trade or movement of basic necessities and prime commodities as defined by the *Price Act*,[140] the fine imposed for the breach will be tripled.

Legal technical assistance was provided during the drafting of the PCA.[141] Legislators went on a study trip to visit the Japan Fair Trade Commission and

134 Interviews with government officials from the Philippines.

135 Philippine Competition Act, s 14(a), (b).

136 ibid, ss 29, 30.

137 Interviews with government officials from the Philippines; Ditucalan (n 128) 270–72.

138 The Senate bill prohibited, *inter alia*, price fixing, output restriction, and market sharing if that conduct had the object and effect of unreasonably and substantially preventing, restricting, or lessening competition, whereas the House bill prohibited such conduct on a per se basis: Fair Competition Bill (The Philippines) (Senate, Sixteenth Congress of the Philippines) Bill No 2282, ch 3 s 1; Philippine Competition Bill (The Philippines) (House of Representatives, Sixteenth Congress of the Philippines) Bill No 5286, s 5(a).

139 Interviews with government officials from the Philippines; Ditucalan (n 128) 272–73.

140 *Price Act* (The Philippines), Eighth Congress of the Republic of the Philippines, Republic Act No 7581, 27 May 1992.

141 It should be noted that the Office for Competition under the Office of the Secretary of Justice, which was established by the President in 2011, did receive technical assistance during the time that the competition bills were being drafted, however it was not directly involved in the actual drafting other than as a consulted party. See United Nations Conference on Trade and Development (n 31) 29–31; Interviews with government officials from the Philippines.

foreign experts held workshops and provided comments on draft competition bills.[142] A development partner also provided funding for three local consultants (two lawyers and an economist, at least one of whom had competition law expertise) to advise members of the Senate and the House of Representatives on the drafting and advocacy of the competition bill.[143] As the same consultants advised both the Senate and the House of Representatives, they would have had knowledge of the concerns and issues being debated in both houses. This may have helped in reconciling and consolidating the House and Senate versions of the competition bill.

Cambodia

Cambodia is the only ASEAN member state without a competition law. Since 2001, there have been various discussions to enact a competition law, with several rounds of drafting efforts.[144] In addition to general capacity building, Cambodia has received legal technical assistance from various development partners, international organizations, and other competition agencies to directly support its drafting work.[145] In particular, foreign experts from South Korea, France (through the UNCTAD), the USA and Canada (funded by the Asian Development Bank (ADB)), and Australia were engaged to help prepare drafts, at times in consultation with the Ministry of Commerce (Cambodian MoC).[146] Apart from the most recent and current effort to draft the competition law, which has continued working on the previous ADB-supported draft, the prior drafts were all prepared from scratch and without reference to their predecessors.[147]

The way that Cambodia has engaged with the competition law drafting process and foreign experts seems to have evolved over time. In the earlier stages, Cambodia took a

142 Interviews with government officials from the Philippines; US Federal Trade Commission, 'Fiscal Year 2015 Performance Report and Annual Performance Plan for Fiscal Years 2016 and 2017', 94.

143 Interviews with government officials from the Philippines.

144 Kem Saroeung, 'Development of Draft Law on Competition in Cambodia' (The 12th East Asia Top Level Officials' Meeting on Competition Policy, Seoul, South Korea, 9 September 2016); David Fruitman and Meng Songkheang, 'The Journey to the Cambodian Competition Law' in Steven Van Uytsel, Shuya Hayashi, and John O Haley (eds), *Research Handbook on Asian Competition Law* (Edward Elgar 2020), 321, 322–25.

145 Interviews with government officials from Cambodia. See, eg, UNCTAD Secretariat, 'Capacity-building and Technical Assistance on Competition Law and Policy' (Report number TD/B/C.I/CLP/43, 26 April 2017).

146 Om Dararith, 'Challenges in Introducing Competition Law in Cambodia' (ASEAN Competition Conference, Bali, Indonesia, 15 November 2011); Kem (n 144); United Nations Conference on Trade and Development, 'Capacity-building on Competition Law and Policy for Development: A Consolidated Report' (Report Number UNCTAD/DITC/CLP/2007/7, United Nations, 2008) 19; Technical Assistance Grant Agreement (Special Operations) (Competition, Regulation, and SME Technology (CREST) Project) between Kingdom of Cambodia and Asian Development Bank, 22 October 2010; Kenneth Davidson, 'A Structure for Plain Language Competition Laws: Insights for Transitional Economies from the Draft Cambodia Law' (American Antitrust Institute Working Paper Series, 2 October 2012).

147 Interviews with government officials from Cambodia; Fruitman and Meng (n 144) 322–24; Davidson (n 146) 6.

relatively hands-off approach. When competition law drafting efforts were supported by South Korea (2001) and the UNCTAD (2005–2007), Cambodia relied on foreign experts to produce initial drafts, with limited interaction between the foreign experts and the Cambodian MoC.[148] The draft competition laws that resulted from these earlier drafting efforts therefore tended to be based upon the foreign experts' background and knowledge.[149] For example, according to officials involved in the drafting process, the UNCTAD-supported draft, which was prepared by French experts, was based mostly on French and Indonesian experiences with competition law.[150] However, Cambodia's approach started to change when the ADB supported its drafting efforts between 2009 and 2012. Even though the ADB-supported draft was still prepared by the US expert, there was some input from the Cambodian MoC, who provided periodic comments as the draft progressed, and two Cambodian lawyers (though they were not competition law experts).[151] Perhaps as a result of this increased interaction between the foreign expert and Cambodian counterparts, compared to previous drafts, the ADB-supported draft incorporated some elements of Cambodian law and adjustments to reflect the Cambodian institutional and policy environment.[152]

With the latest and current round of drafting, instead of mainly relying on foreign experts to prepare the initial draft, the drafting work is being led by the Cambodian MoC, with foreign experts and Cambodian legal experts providing comments and advice to the drafting team.[153] According to officials involved in the drafting of this most recent draft, the drafting team wants to ensure that the competition law is sufficiently tailored to Cambodia's needs. At the same time, it is referring to the competition laws of other countries for guidance.[154] In particular, the drafters are referring to the competition laws and experiences of other ASEAN member states, in particular Malaysia, who the drafting team viewed as the ASEAN member state most similar to Cambodia, as well as the recommendations and guidelines released by ASEAN, the ICN, and the UNCTAD.[155]

IV. ASEAN'S RECENT EXPERIENCES OF DEVELOPING NEW COMPETITION LAWS: KEY OBSERVATIONS FROM THE CASE STUDY

The ASEAN Case Study Countries took quite different paths to drafting and enacting their competition laws. This is unsurprising given the diversity in their legislative processes, legal systems and traditions, political and economic structures, histories, and language, amongst other matters. At the same time, there were some shared experiences and challenges across the ASEAN Case Study Countries. This section draws out four key observations of this case study.

148 Interviews with government officials from Cambodia.
149 ibid; Fruitman and Meng (n 144) 321.
150 Interviews with government officials from Cambodia.
151 ibid; Davidson (n 146) 5–8.
152 Davidson (n 146) 5–8, 10.
153 Interviews with government officials from Cambodia; Australian Competition and Consumer Commission, 'Return Visits Support Cambodia Progress its Draft Competition Law' (CLIPPINGS Newsletter, Issue 4, August 2017) 3; Fruitman and Meng (n 144) 326.
154 Interviews with government officials from Cambodia. See also Fruitman and Meng (n 144) 335.
155 Fruitman and Meng (n 144) 326.

Similarities and differences across the ASEAN Case Study Countries' competition laws

The competition laws adopted by Brunei Darussalam, Lao PDR, Myanmar, and the Philippines share a number of similarities. They address the three pillars of competition law, and although the exact conduct regulated under each pillar and the definitions and terminology used[156] are not the same across the laws, overall, the conduct covered and approaches taken are quite similar. They prohibit various forms of hard-core cartel conduct and provide for leniency regimes, but they adopt slightly different tests for prohibiting cartel conduct.[157] There is some divergence with respect to vertical agreements as Brunei Darussalam expressly excludes them from the scope of its competition law whereas Lao PDR, Myanmar, and the Philippines do not. For mergers, the standards of prohibition are broadly similar, but each competition law stipulates different merger notification requirements and thresholds.[158] In relation to abuse of dominance, while there are some differences in whether and how the laws define dominance and determine the types of unilateral conduct that constitute an abuse of dominance, all the competition laws address various forms of exclusionary conduct and Brunei Darussalam, Lao PDR, and the Philippines also regulate some types of exploitative conduct.[159]

There is a greater degree of variation between the four ASEAN Case Study Countries' competition laws in terms of their stated objectives, institutional arrangements, and exemptions and exclusions. Even then, their approaches still fall generally within a not unexpected range and there are some overlaps and commonalities. For example, the range of stated objectives in the competition laws of the ASEAN Case Study Countries are not out of the ordinary. Nearly all their competition laws aim to protect and promote competition, promote economic development, and protect and promote the rights, interests, and/or welfare of consumers. In addition, enhancing economic efficiency is an objective of the competition laws of Brunei Darussalam and the Philippines, Myanmar and the Philippines recognize the link between competition law and domestic and international trade in their objectives, and Lao PDR and Myanmar have objectives that take into account the public interest or the interests of the state. The institutional arrangements for the enforcement of competition law in Brunei Darussalam, Lao PDR, Myanmar, and the Philippines are also not dissimilar to those that exist in other countries. Some competition authorities are independent (Brunei Darussalam and the Philippines) whereas others are not (Lao PDR and Myanmar), and in Brunei Darussalam, Lao PDR, and Myanmar, the secretariat

156 At least as they appear in the English translations of the competition laws of Lao PDR and Myanmar (the competition laws of Brunei Darussalam and the Philippines do not require translation).

157 A per se test is adopted in the Philippines (for price fixing and bid rigging), an object/effect test is used in Brunei Darussalam and the Philippines (for output restriction and market sharing), and there is no clear test stipulated in Lao PDR's and Myanmar's competition legislation.

158 Brunei Darussalam adopts a voluntary merger notification regime. The Philippines requires mandatory pre-merger notification. In Lao PDR, mergers of large enterprises need to be notified for review pre-merger, and mergers of small and medium enterprises need to be notified post-merger. Myanmar's competition law does not specify notification requirements.

159 Burgess (n 57) 47–48.

for the competition authority sits within the relevant ministry.[160] Exemptions and exclusions from competition law is perhaps the area where there is the most divergence between the four ASEAN Case Study Countries. Brunei Darussalam and the Philippines exclude certain conduct from the scope of their competition laws but the competition laws of Lao PDR and Myanmar do not, and Myanmar is the outlier in not specifically allowing for exemptions for abuse of dominance conduct. Even so, it appears that the default position under these four ASEAN Case Study Countries' competition laws is that they apply to state-owned or government-linked enterprises.[161] The countries also appear to take slightly different approaches as to how exemptions are granted. In Lao PDR and Myanmar, it seems that conduct is exempt if an exemption is granted by the competition authority, but in Brunei Darussalam and the Philippines, an individual exemption system sits alongside a self-assessment regime. Nonetheless, in spite of these differences, there are some grounds for granting exemption that are common across some or all of the countries, such as fostering technological progress,[162] promoting small and medium sized enterprises,[163] promoting exports,[164] improving the production or distribution of goods and services,[165] and the failing firm defence.[166]

Learning from within and outside of ASEAN

While all the ASEAN Case Study Countries learned about and referred to competition laws and experiences from jurisdictions within and outside of ASEAN, they found some jurisdictions more directly useful and relevant to them than others.

Brunei Darussalam, Lao PDR, and Myanmar referred primarily to competition laws and experiences within ASEAN during drafting, and Cambodia has started to look more at competition laws and experiences within ASEAN in its most recent drafting efforts too. According to government officials who were involved in the drafting of competition law in these ASEAN Case Study Countries, the drafting teams preferred to learn about the competition laws and experiences of other ASEAN member states because they viewed them as being more relatable and comparable to their own country.[167] In particular, they learned from ASEAN member state/s that they regarded as being most similar to their country, whether that be from a legal, political, economic, cultural, and/or developmental perspective.[168] Both Lao PDR and Myanmar looked to Vietnam as a useful example of how a country in a similar situation to theirs had adapted competition law to suit their environment, and Brunei Darussalam referred mainly to Singapore's competition law in part due to the close relationship between the two countries.[169] Their learning from these

160 For Brunei Darussalam, that is the Ministry of Finance and Economy, for Lao PDR that is the Ministry of Industry and Commerce, and for Myanmar that is the Ministry of Commerce.
161 Burgess (n 57) 49–50.
162 Brunei Darussalam, Lao PDR, Myanmar, and the Philippines.
163 Lao PDR and Myanmar.
164 Lao PDR and Myanmar.
165 Brunei Darussalam and the Philippines.
166 Lao PDR, Myanmar, and the Philippines.
167 Interviews with government officials from Brunei Darussalam, Cambodia, Lao PDR, and Myanmar.
168 For Brunei Darussalam, that was Singapore; for Lao PDR that was Vietnam; for Myanmar, those countries are Vietnam and Thailand; and for Cambodia, that country is Malaysia.
169 Interviews with government officials from Brunei Darussalam, Lao PDR, and Myanmar.

other ASEAN member states seemed to be reflected in the enacted competition laws. As discussed in Section III, there are many aspects of Brunei Darussalam's *Competition Order* that are similar to Singapore's competition legislation, including its voluntary merger notification system, the exclusion of vertical agreements and activities of the government and statutory bodies from the scope of the law, and administrative enforcement arrangements. Lao PDR and Myanmar incorporated some of Vietnam's 2004 competition law approaches into their competition laws. For example, they all prohibit mergers based on market share thresholds, provide some protection for mergers of small and medium sized enterprises, and cover unfair competition practices, and the grounds for exempting anticompetitive agreements in Myanmar's and Vietnam's 2004 competition law are almost the same.

The Philippines, on the other hand, predominantly referred to and engaged directly with US and EU competition laws during drafting, and this was reflected in the PCA. As discussed, the PCA contains a number of provisions that seem to have been significantly influenced by the USA (for example, merger notification), the EU (such as abuse of dominance), or was a fusion of both (namely, the PCA's approach to hard-core cartel conduct). By contrast, interviewees from Lao PDR and Myanmar said that, although the drafters learned about the competition laws and experiences of the USA and EU, they did not make much reference to them when drafting, and interviewees from Cambodia expressed similar views in relation to their most recent drafting efforts. Interviewees noted that, because the drafters wanted a competition law that would be suited to their country, the significant contextual differences between their country, on the one hand, and the USA and EU, on the other, meant that US and EU competition laws and experiences were viewed by the drafters as being less directly useful and relevant to them.[170]

There are some differences between the Philippines and the other ASEAN Case Study Countries that might help to explain why the legislative drafters in the Philippines took a different approach to the drafters in the other ASEAN Case Study Countries. First, there is a historically close and strong multifaceted relationship between the Philippines and the USA, in part a legacy of half a century of US occupation of the Philippines in the 20th century. Secondly, English is the language of law and commerce in the Philippines and the legislative drafters would have been comfortable with and accustomed to working in English. This meant that they could directly engage with materials on US and EU competition law (which tend to be in English) and foreign experts (who tend to provide training and other assistance in English). By contrast, this language barrier exists in Cambodia, Lao PDR, and Myanmar and this would have posed some constraints on the capacity of the drafters in these ASEAN Case Study Countries to learn from US and EU competition law and absorb and translate that understanding to their local context. Third, the legislative drafters in the Philippines were assisted by local advisers with expertise in competition law, which, as discussed further below, would have helped the drafters in their efforts to understand and tailor competition law to suit the Philippines. The other ASEAN Case Study Countries did not have such assistance.

170 Interviews with government officials from Cambodia, Lao PDR, and Myanmar.

International and regional norms also played some role in the drafting of competition law in the ASEAN Case Study Countries. All the ASEAN Case Study Countries referred to the competition law guidelines issued by the ASEAN Secretariat in the drafting of their competition laws. Consistency with international norms was one factor in Brunei Darussalam deciding to largely follow Singapore's competition law, and documents issued by the UNCTAD were also references for drafting in the Philippines and Cambodia. Similarly, Lao PDR's and Myanmar's competition laws each provide for a leniency regime and adopt a single-agency administrative enforcement model, which reflect international norms.

Local advisers facilitated interactions between the local and external

Apart from legal technical assistance provided by foreign experts, the drafters in Lao PDR and the Philippines were also aided by local advisers. In the Philippines, lawmakers were assisted by local advisers with competition law and related subject matter expertise, whereas in Lao PDR, the local adviser was a liaison between the drafting team, on the one side, and the German development partner and foreign experts on the other. In each case, despite differences in their roles and backgrounds, the local advisers facilitated the interaction between local knowledge, contexts, and perspectives with foreign laws and expertise.

In the Philippines, the local advisers had the combined knowledge of local context and subject matter expertise and could advise the lawmakers accordingly. They would have been able to advise on the potential implications of competition law for the Philippines, the relevance of other countries' experiences for the Philippines, and also on the advice and training provided by foreign experts to the lawmakers. Essentially, these local advisers would have been able to relate the foreign concept of competition law to the lawmakers in a manner that was cognizant of and adjusted to the local knowledge and context. This could help, in part, to explain why the lawmakers in the Philippines were comfortable with primarily referring to competition laws and experiences outside of ASEAN, in contrast to the drafters in other ASEAN Case Study Countries who were not assisted by local advisers with competition law or related expertise. For example, an interviewee from Brunei Darussalam commented that, had the Bruneian drafting team been assisted by a local adviser with competition law knowledge, this would have likely improved the drafting team's ability to make choices about the type of competition law that would be suitable for Brunei Darussalam.[171] Relatedly, interviewees from several ASEAN Case Study Countries commented that they were generally more receptive to foreign competition law experts who had knowledge of local conditions and realities and could deliver tailored and non-prescriptive advice.[172]

Finding competition law expertise in a country with little to no prior experience with competition law, however, is often very difficult. Lao PDR's experience shows that it may nonetheless be helpful to have a local adviser who, while they may not have competition law expertise, can act as a liaison between the drafters of competition law and the local settings, on the one side, and providers of legal technical

171 Interview with government official from Brunei Darussalam.

172 Interviews with government officials from Cambodia, Myanmar, and the Philippines.

assistance on the other. The local adviser would have likely strengthened communication and understanding between the two sides and may have also helped the providers of legal technical assistance to better tailor their activities, assistance, and advice to Lao PDR's context and the needs of the drafters.

Different approaches to engaging with legal technical assistance

The ASEAN Case Study Countries appeared to take somewhat different approaches to engaging with legal technical assistance. On the one side, while Myanmar, Lao PDR, and the Philippines made use of the legal technical assistance that was provided, it was more of an input into the drafting process that facilitated the drafters' learning about competition law; these countries' competition laws also look like they reflect varying degrees of learning and influences from various countries and international best practices. On the other side, in Brunei Darussalam and, up until relatively recently, Cambodia, the focus seemed to be more on producing an actual draft law and foreign experts appeared to have quite some influence in the drafting process. Brunei Darussalam's competition law is very similar to Singapore's competition law and in Cambodia, earlier versions of the competition law drafts were based mostly on foreign laws and experiences.

The case study does not show or suggest that one approach is necessarily better than the other. For example, Myanmar's and the Philippines' competition laws both contain, to varying degrees, some inconsistent provisions that are perhaps a result of not fully understanding particular competition law concepts and their consequences. At the same time, Cambodia's past reliance on foreign experts to prepare the initial competition law drafts did not result in an enacted law, and it is still drafting its competition law, some 20 years after it first started the process.

Further, Cambodia's engagement with legal technical assistance might be related to the wider issue of political will supporting the adoption of a competition law. Competition law has progressed slowly in Cambodia even though it had committed to enacting a competition law by 2006 (as part of its WTO accession negotiations)[173] and then again by 2015 (pursuant to the establishment of the ASEAN Economic Community). Each time, legal technical assistance was provided to help Cambodia to meet that commitment. However, even in the face of external pressures and with the help of legal technical assistance, Cambodia has not yet been able to adopt a competition law. This suggests that there has been limited domestic political support for its enactment, perhaps because competition law is regarded as a law that is foreign to Cambodia and one that is required by external parties. Cambodia's previous reliance on foreign experts to prepare the drafts seems to reinforce this perception of competition law being a foreign law. However, with the change in Cambodia's approach to drafting and legal technical assistance in the past few years, it could potentially help to gradually shift domestic political support for competition law if it is seen as coming from Cambodia and suited to Cambodia's needs.

173 *Report of the Working Party on the Accession of Cambodia*, WTO Doc WT/ACC/KHM/21 (15 August 2003).

V. IMPLICATIONS OF THE CASE STUDY: THE ROLE AND IMPORTANCE OF INTERMEDIARIES IN FACILITATING THE DEVELOPMENT OF COMPETITION LAW

This case study on the drafting of competition laws in the ASEAN Case Study Countries has demonstrated that they fit quite well into the broader picture of global competition law development. The competition laws of the ASEAN Case Study Countries are broadly convergent with each other as well as the competition laws of the other ASEAN member states,[174] and their drafting was supported by references to regional and international competition law norms and legal technical assistance.

Further, this article argues that the case study highlights the valuable and important—and to date underexamined and overlooked—roles that intermediaries play in facilitating the drafting and enactment of competition law. As Merry observes, as international and transnational legal ideas and norms such as competition law travel to local communities, they are adapted to local contexts, and a key aspect of this process of adaptation are the intermediaries that translate ideas and norms from the international and transnational arena into the local setting.[175] Two types of intermediaries were influential in the drafting of competition law in the ASEAN Case Study Countries: the countries from whom learning about competition law was obtained, and the local and foreign advisers who supported the drafting process. As will be discussed further below, their presence and role in bridging between different contexts can help to explain why and how the divergent processes and environments in the ASEAN Case Study Countries could nonetheless lead to broadly convergent outcomes. This provides valuable insights into the broader question of how competition law ideas, institutions, and norms move from one context to another.

Intermediary jurisdictions and expanding the canon

As discussed, the drafters in Brunei Darussalam, Cambodia, Lao PDR, and Myanmar generally preferred to learn about the competition laws and experiences of other ASEAN member states because they could relate to and identify with other ASEAN member states. They tended to find the competition laws and experiences of the USA and EU, which are usually held up as model laws that other countries should learn from and follow, to be less directly relevant to them as their contexts were too different. It appeared that, for these ASEAN Case Study Countries, looking at the competition laws and experiences of other ASEAN member states, and in particular Singapore, Thailand, and Vietnam, helped to translate the new and foreign concept of competition law into something that was more understandable to them and suitable to the local context.

Their experiences suggest that "intermediary jurisdictions" can play important roles in the drafting of competition law. An intermediary jurisdiction is one that another jurisdiction considers to be similar, comparable, or relatable to itself.[176] This

174 Burgess (n 57) 69.

175 Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108(1) *American Anthropologist* 38, 39.

176 'Intermediary jurisdictions' are similar to the concept of 'reference groups' in law and policy diffusion and transfer literature. See, eg Zachary Elkins and Beth Simmons, 'On Waves, Clusters, and Diffusion: A

could be based on factors such as being part of the same regional grouping and/or perceived similarities in legal, economic, cultural, linguistic, and/or political traditions and systems and/or levels of development. For countries with economic, legal, cultural, political, and/or governance contexts that are quite different to that of the USA, EU, and other developed countries with long histories of competition law, they might prefer to refer to intermediary jurisdictions to see how a country in a similar situation to theirs had adapted and enforced competition law, which might provide them with some guidance and learning as to how they might also adjust competition law to suit their country. For example, Vietnam's competition law and enforcement experiences appeared to serve as a proxy of sorts for the drafters in Lao PDR for how to draft a competition law that was suited to Lao PDR's context. In effect, an intermediary jurisdiction can be the bridge that helps drafters to adapt foreign and international competition law concepts and norms into local settings.

Of course, not all countries may refer to and rely upon intermediary jurisdictions in their learning, drafting, implementation, and enforcement of competition law. Whether a country might choose to learn from an intermediary jurisdiction will ultimately depend on the circumstances of each country. For instance, although the Philippines is a developing country, lawmakers referred significantly to competition laws of developed countries such as the USA and EU in the drafting of the PCA. Suitable intermediary jurisdictions also need to be available to the country that is looking to learn. For example, the fact that there was a growing body of competition law experience and guidance within ASEAN when the ASEAN Case Study Countries were drafting their competition laws meant that it was feasible for them to look to the competition law guidance issued by the ASEAN Secretariat and AEGC and other ASEAN member states' competition laws. By comparison, when Indonesia, Malaysia, Singapore, Thailand, and Vietnam enacted their competition laws, there was none to very limited competition law experience and guidance documents within ASEAN, and this meant that these early adopters of competition law in ASEAN would have needed to look beyond ASEAN to learn about competition law.[177]

The notion of intermediary jurisdictions also expressly recognizes that sources of learning on competition law extend beyond the canon of developed countries with established competition law regimes. Countries that are new to or less experienced with competition law are more likely to have developing, small and/or transitioning economies, and they might choose to learn about competition law from countries that reflect some of their characteristics. Intermediary jurisdictions are therefore more likely to be countries with developing, small, and/or transitioning economies and represent a wider range of competition law experiences as well as legal, economic, political, cultural, and linguistic contexts than countries with developed

Conceptual Framework' (2005) 598 *The Annals of the American Academy of Political and Social Science* 33, 45.

177 For example, Thailand based its 1999 competition statute on the competition laws of South Korea and Germany, and Vietnam learned from the competition laws of more than 30 countries during the drafting of its 2004 competition law: see Thanitcul (n 44) 119; Tran Anh Son, 'The Progress of Drafting Competition Law' (The Second APEC Training Course on Competition Policy, Ministry of Trade Vietnam and Japan Fair Trade Commission, Hanoi, 5–7 August 2003) 1; Ly Huong Luu, 'Vietnam's Competition Law Adoption: From Passive to Active' in Steven Van Uytsel, Shuya Hayashi, and John O Haley (eds), *Research Handbook on Asian Competition Law* (Edward Elgar, 2020) 134, 136.

market economies that have long histories and experiences with competition law and enforcement from whom competition law learning is typically obtained. At the same time, this does not necessarily mean that the competition laws of the EU, USA, and other developed countries with well-established competition laws and international norms are not relevant to countries that choose to refer to intermediary jurisdictions. As the case study has shown, even where intermediary jurisdictions were relied upon, the competition laws and experiences of the USA and EU continued to be reference points for those ASEAN Case Study Countries, albeit in a secondary way. Further, they can indirectly shape competition laws in situations where an intermediary jurisdiction itself referred to and/or adopted aspects of these established competition law regimes or international norms into its own competition law and enforcement practice. For example, Brunei Darussalam's competition law was drawn predominantly from Singapore's competition law, which was in turn modelled on the UK's competition statute and EU competition law.[178]

Advisers as intermediaries

In addition to intermediary jurisdictions, the case study illustrates how local and foreign advisers can act as intermediaries to support the drafting of competition law and the adaptation and translation of competition law ideas, norms, and practices into local settings and for local audiences. Advisers who have competition law and related subject matter expertise as well as familiarity and knowledge of the local circumstances of the country they are advising can help to translate exogenous competition law concepts and norms into terms that are more likely to be understood by competition law drafters, adapt their advice to local settings, and navigate between local, regional, and transnational systems of meaning. For example, lawmakers in the Philippines were assisted by local advisers with competition law expertise who were able to undertake this form of translation and adaptation, and the advice of foreign competition law experts who also had a good understanding of the local conditions was generally well-received by competition law drafters in several ASEAN Case Study Countries. Advisers can also facilitate the drafting process by acting as a channel of communication between the drafters, on the one side, and external parties such as development partners and foreign experts, on the other; this was demonstrated by the role that the local adviser in Lao PDR played in liaising between the drafters and the German development partner.

At the same time, the ability of advisers to act as intermediaries may be constrained or enabled by those who receive their assistance. In particular, the case study shows that the level of political support for competition law and/or the adviser may be an important factor. For example, advisers supporting competition law drafting efforts in Cambodia are working in an environment where there has been, to date, insufficient political support for competition law. By contrast, in Brunei Darussalam, the foreign adviser had prior experience drafting several other laws in Brunei Darussalam, was given a leading role on the drafting team, and was trusted by the senior government official responsible for shepherding the enactment of the

178 Burton Ong, 'The Origins, Objectives and Structure of Competition Law in Singapore' (2006) 29(2) *World Competition* 260, 282–83.

competition law. These factors, in particular the high-level political support the adviser enjoyed, would have likely enhanced their role in the drafting of competition law.

VI. CONCLUSION

Voluntary convergence across divergent contexts has been one of the defining trends of the expansion and development of competition law around the world. This article has demonstrated that the most recent experiences of drafting and enacting new competition laws in ASEAN follow this same trend. Even though the ASEAN Case Study Countries have different processes for drafting and enacting competition laws and exhibit a variety of legal, economic, political, social, development, and governance traditions and contexts, there are many similarities in how they regulate agreements, abuse of dominance conduct, and mergers. Further, even in those areas where differences in their competition laws do exist, similar patterns are also observed at the global level and there are still some overlaps in their approaches.

This article has also shown that one of the key reasons for this phenomenon of competition law convergence across diverse local settings in the ASEAN Case Study Countries was the involvement of intermediaries in the drafting process. Whether these intermediaries were other jurisdictions with competition laws or advisers with relevant subject matter expertise and/or knowledge of the local context, they served a very similar function: to facilitate the processes of translation and adaptation that take place between local settings, on the one hand, and transnational and global competition law ideas and norms, on the other, when a country develops and adopts a law that is new to them. While the references to and uses of intermediaries differed among the ASEAN Case Study Countries, in each of these countries, intermediaries acted as filters through which drafters came to understand more about the concept and basic tenets of competition law itself as well as how to craft a competition law that might be suitable to their country's circumstances.