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Contribution from Ms. Thitapha Wattanapruttipaisan (ASEAN)

-- Session I --

This contribution is submitted by Ms. Thitapha Wattanapruttipaisan (ASEAN) under session I of the Global Forum on Competition to be held on 18 and 19 February 2010.

Contact: H el ene CHADZYNSKA, Programme Manager of the Global Forum on Competition
Tel: +33 1 45 24 91 05; email: helene.chadzynska@oecd.org

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REGIONAL CO-OPERATION IN COMPETITION POLICY IN ASEAN¹

-- Ms. Thitapha Wattanapruttipaisan (ASEAN) --

1. Imperatives and Impulses in Co-operation

1. A historic milestone in regional integration within the ten-member Association of South East Asian Nations (ASEAN) is the “ASEAN Vision 2020” adopted at the ASEAN Summit in Kuala Lumpur, Malaysia, in December 1997. The vision foreshadowed the formation of “a stable, prosperous and highly competitive ASEAN economic region”.

2. This region was subsequently defined as the ASEAN Economic Community (AEC) at the ASEAN Summit in Bali, Indonesia, in October 2003. The AEC, together with the ASEAN Political-Security Community and the ASEAN Socio-Cultural Community, constitutes the three-pillar ASEAN Community which is to be established in 2020.

3. The target year for ASEAN Community formation, however, was sped up to 2015 at the ASEAN Summit in Cebu, Philippines, in January 2007, and subsequently a Blueprint for AEC formation was adopted at the ASEAN Summit in Singapore in November 2007. When established, the AEC will transform ten separate economies into a single market and seamless production base, thus enhancing further ASEAN’s role as an efficient and dependable player in the regional and global supply chains. As such, competition policy plays a critical role in the realisation of one key aspect of the AEC, namely a highly competitive economic region.

4. Meanwhile, globalisation has also opened up new ways and means for ASEAN to engage in intra- as well as extra-regional co-operation in competition policy. There is currently no multilateral treaty on competition although this was one of the four “Singapore issues” raised at the first Ministerial Conference of the World Trade Organisation (WTO) in December 1996.²

¹ This short paper was prepared by (Ms) Thitapha Wattanapruttipaisan, Head of the Division on Competition, Consumer Protection and Intellectual Property Rights, Market Integration Directorate, ASEAN Economic Community Department, ASEAN Secretariat, Jakarta, Indonesia. The views expressed in this paper do not necessarily represent those of the ASEAN Secretariat or ASEAN Member States. The author can be contacted at <thitapha@asean.org>.

² The fourth WTO Ministerial Conference launched multilateral trade negotiation on the Doha Development Agenda (DDA) in November 2001. This agenda includes negotiations on the core principles for a multilateral framework on competition policy, the modalities for voluntary co-operation, and support for the development of competition policy in developing countries. However, the Doha Conference decided that a decision on how to proceed with the four “Singapore issues” (namely investment, competition policy, government procurement, and trade facilitation) would be made at the fifth WTO Ministerial Conference in Cancun, Mexico, in September 2003. The Cancun trade talks broke down, mainly over the resistance by many developing countries to engaging in negotiation on the four Singapore issues. Subsequently, the WTO General Council Meeting agreed in July 2004 that trade facilitation would be on the agenda for DDA negotiation. But the remaining three issues would be referred to various WTO Working Groups and would remain outside the DDA negotiation mandate. A WTO Working Group focusing on the interaction between trade and competition has since been set up at the WTO.

5. However, competition obligations are variously specified within the WTO framework of agreements.³ Nine ASEAN Member States (AMSs) are WTO members (except the Lao People's Democratic Republic). In addition, ASEAN has entered into free trade agreements (FTAs) with six dialogue partners and one of these FTAs have provisions on competition policy.

2. ASEAN Approach and Focus in Intra-regional Co-operation

6. The nature and patterns of ASEAN co-operation at the intra- and extra-regional levels are generally conditioned by the diverse stages of development within ASEAN,⁴ and by the varying amounts of expertise and other resources available for policy design and implementation among AMSs. In particular, only Indonesia, Singapore, Thailand and Viet Nam have at present economy-wide competition policy and competition regulatory bodies (CRBs).

7. Cambodia, the Lao PDR and Malaysia intend to introduce nation-wide competition policy and CRBs soon. In the mean time, these three AMSs and the other AMSs (namely Brunei Darussalam, Myanmar and the Philippines) will rely or continue to rely on sector-level policies, regulations and administrative procedures to achieve competition policy objectives in various domestic factor and product markets.

8. Several AMSs have received considerable technical assistance relating to competition policy from the United States and the European Union Member States, among other sources. Such collaborative assistance provided an impetus for the formation in 2004 of the non-official ASEAN Consultative Forum for Competition. This Forum served as a co-operative network for the exchange of policy experiences, best practices and institutional norms relating to competition policy and CRBs among and between competition-related agencies within and outside ASEAN.

9. ASEAN co-operation then evolved in August 2007 into the official establishment of the ASEAN Experts Group on Competition (AEGC), which first met in March 2008. This intergovernmental body facilitates the development of competition policy that would meet the needs of AMSs at different stages of economic and institutional development. The AEGC also fosters collaboration and networking among and between agencies concerned with competition both inside and outside ASEAN. AEGC work programmes will evolve in parallel with the wider and deeper development and socialisation of competition policy and CRBs in ASEAN.

10. The AEGC has agreed to focus, for the next three to five years, on building up competition-related policy and institutional capabilities, and best practices in AMSs. In addition, the AEGC has been developing the "ASEAN Regional Guidelines on Competition Policy" and the "Handbook on Competition Policies and Laws in ASEAN for Businesses". Both the Guidelines and the Handbook are pioneering activities in this part of the world, and are scheduled for adoption and launching by AMSs in 2010.

11. Specifically, a series of competition-related capacity building and policy dialogue programmes, with the participation of eminent regional and international professionals and practitioners, have been carried out by the AEGC in close co-operation with ASEAN's dialogue partners and donors. These

³ Such obligations are contained, for example, in Articles VIII and IX of General Agreement on Trade in Services; Articles 8 and 40 of the Agreement on Trade-Related Aspects of Intellectual Property Rights; Article 11.1 and 11.3 of the Agreement on Safeguards; Article VI of the Agreement on Anti-dumping, and Article XVII (on state trading enterprises) of the General Agreement on Tariffs and Trade, all dated April 2004.

⁴ In 2008, for example, gross domestic product per head of population was in the range of US\$ 35,000-38,000 in Brunei Darussalam and Singapore, US\$8,000-4,000 in Malaysia and Thailand, US\$ 2,000 in Indonesia and the Philippines, and US\$ 500-1,000 in Cambodia, Lao PDR, Myanmar and Viet Nam.

programmes focus on investigative, enforcement, outreach and advocacy aspects (including anti-competitive horizontal agreements such as price fixing, bid rigging, market division or customer allocation, etc.); on the priorities, organisation and management of newly established CRBs; and on the design and introduction of, and socialisation to mobilise stakeholders' support for, competition policy and CRBs.

12. The Guidelines are a targeted delivery under the AEC Blueprint. It is to serve as a common (but non-binding) reference guide for AMSs as they endeavour to introduce, develop and implement competition policy and law which are customised to the specific legal and economic context of each country. The Guidelines also help to chart the paths for future co-operation to enhance the competitive process in the AMSs.

13. The Handbook, also a targeted AEC Blueprint delivery, aims to inform and raise awareness of the business community and domestic and external investors on competition-related approaches, practices and procedures in AMSs. As such, it would facilitate the development of a competition culture in the business community as well as create a favourable environment for the introduction and enforcement of competition policy in individual AMSs and regionally.

14. ASEAN and the AEGC have received significant donors' collaboration and support, both technical and financial, in all those efforts at capacity building, information dissemination and socialisation, and formation of intra- and extra regional linkages. A multi-year regional programme, for instance, has been developed and implemented with support from Germany through InWEnt (Capacity Building International), and another multi-year programme is currently under design for implementation with support from Germany through German Technical Co-operation (GTZ).

15. Other sources of technical assistance on a regional basis include the Asian Development Bank Institute, ASEAN-Australia Development Co-operation Programme, the European Commission, Japan (Fair Trade Commission), OECD, and the United States (Department of Justice and the Federal Trade Commission).

3. ASEAN Approach and Focus in Extra-regional Co-operation

16. Compared to other regional economic groupings, ASEAN is a late comer to FTAs. Thus far, ASEAN has signed FTAs with Australia and New Zealand, China, India, Japan and Republic of Korea. ASEAN and the European Union have been negotiating an FTA since May 2007 although progress to date has been much slower than expected.

17. The approach and architecture of ASEAN FTAs have some innovative features. Firstly, ASEAN FTAs with East and South Asian dialogue partners are governed by the respective bilateral Framework Agreements signed with China in November 2002, India in October 2003, Japan in October 2003, and Republic of Korea in December 2005. There are no provisions in these Framework Agreements for FTAs in competition policy or government procurement. Instead, competition policy is one of the areas reserved for mutual co-operation and facilitation between ASEAN and India and Japan.

18. Two, the Framework Agreements with East Asian countries have been completed sequentially FTA by FTA. ASEAN and China signed an FTA on goods in November 2004, services in January 2007 and investment in August 2009. Likewise, FTAs in goods (December 2005), services (November 2007), and investment (June 2009) were signed by ASEAN and Republic of Korea. The ASEAN-Japan FTA (signed in April 2008) is comprehensive in scope but the large bulk of this agreement concerns trade in goods. To date, however, ASEAN and India has signed only an FTA on goods (August 2009).

19. Three, the FTA between ASEAN and Australia plus New Zealand (ANZ), signed in February 2009, follows a different approach. It is comprehensive in scope and was concluded as a "single undertaking" (and not sequentially building brick by building brick). In addition, there is chapter 14 on

“Competition”, with four provisions, although government procurement is not within the scope of the ASEAN-ANZ FTA. This chapter, however, does not contain any substantive provisions on competition policy.

20. Specifically, Article 1.1 reaffirms the promotion of competition, economic efficiency and consumer welfare, and the curtailment of anti-competitive practices, as one of the basic principles of competition policy. However, it is also recognised that partner countries have different capacities in competition policy (Article 1.2), and they are free to develop, set, administer and enforce their own competition laws and policies (Article 1.3). Equally important, partner countries are free to develop measures to address anticompetitive practices or to adopt their own policies, for example, to promote domestic economic development (Article 1.4).

21. The remaining three articles in chapter 14 of the ASEAN-ANZ FTA relate to a range of measures for technical co-operation and facilitation between the FTA partners in various competition-related matters.⁵ Notably in addition, Article 4 of this chapter specifies that Chapter 17 on “Consultations and Dispute Settlement” does not apply to any matter arising under chapter 14 on “Competition”

4. Going Forward: Challenges and Opportunities Ahead

22. Business competition and consumer interests have been significantly impacted by the increasingly dynamic, an innovative and interlinked global economy, and by the changing operational models in technology, commerce and industry across the value chain. A case in point is the on-going business consolidation and integration for more secured supplies and market access, and for greater scale economies, productivity and competitiveness.

23. As such, the design, implementation, review and re-prioritising of competition policy as well as the roles and functions of CRBs have become much more complicated and multi-dimensional in nature. A compounding factor is that government everywhere has worn several hats, and policy tensions and conflicts are inevitable at the interface between different policy domains (e.g., competition policy and intellectual property rights, and consumer protection, and industrial development policy, etc.).⁶

24. Clearly, the early movers have gained a variety of useful and proven lessons and insights. These apply not just to the design and development competition policy and CRBs, and the resolution of policy interface difficulties and problems. There are also highly pertinent lessons and insights in ensuring the balanced and effective implementation, functioning and (self) evaluation of competition policy and CRBs for gainful, dynamic, equitable and inclusive change in different technological and industrial contexts.

25. Equally clearly, many of those lessons and perspectives are of critical relevance to virtually all AMSs which, with an exception or two, are new comers to the fields of competition policy and consumer protection. The ASEAN Secretariat thus stands ready to collaborate and network with donors of competition-related technical assistance and with CRBs regarding policy dialogues and information exchange on policy matters of mutual focus and concern.

⁵ Such mutual collaboration covers programmes and activities for capacity building, awareness promotion and advocacy and for the mutual exchange of policy experience and information (Article 2). The designation of focal points for technical co-operation and information exchange is covered in Article 3.

⁶ Public action includes the regulation of strategic sectors and industries; reform through privatisation, liberalisation and deregulation; the provision of subsidies to business undertakings of national priority; and commercially significant procurement and selling activities. Moreover, governments have to engage often in negotiation of international, plurilateral and bilateral commitments and obligations for compliance by business and industry.