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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Indonesia

-- Session II --

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POTENTIAL COOPERATION FOR CARTEL ENFORCEMENT IN ASEAN

-- Indonesia¹ --

Introduction

1. Cartel in simple term is an agreement between competing enterprises². The existence of an agreement determined whether an action can be classified as cartel agreement or not. In line with increased acknowledgement of international competition law, cartel has become a tacit collusion where enterprises set an agreement over thin air or without any lead to cartel existence.

2. Antitrust laws in the United States and some other countries expose cartelists to criminal and civil penalties. Due to their severe impacts to consumer, some countries experienced high-profile cartel indictment, including large fines and imprisonment for corporate executives. For scholars, antitrust studies have identified a range of conditions that tend to make forming and defending a cartel harder in particular industries, and practically impossible in some. By analyzing cartel experiences within and across industries, experts have learned that cartels tend to be less likely to form and less likely to endure in industries where (i) numerous small sellers; (ii) low start-up cost for new entrants; (iii) complex sold product; (iv) infrequent purchases by small number of large customers; (v) frequent price negotiation; and (vi) frequent new products³.

3. Cartel has been gain interest for many countries, especially with their early implementation of competition law. But when we speak of ASEAN, we will learn that not all ASEAN member countries have their competition law in place. Sometime regional cartel is created intentionally to protect domestic business and consumers. Different variety of their economic structure and development have lead ASEAN member countries to have their own unique competition law that craft based on their past experience, and sometime executed in very short time to meet foreign pressure.

1. Cartel regulation in Southeast Asia

4. There was news on 2009 in ASEAN which raised interest by certain countries to form cartel in rice production and distribution⁴. This issue was raised by major ASEAN rice-producers from Thailand, Vietnam, Laos, Cambodia and Myanmar (five countries of the Ayeyawady-Chao Praya-Mekong Economic Cooperation Strategy/ACMECS) by their plan to form an association (ACMECS Rice Traders Association) to create a sustainable system for trading and production. The agenda for regional cartel will comprise of price stabilization, food security in the region and rice development, with upcoming objective

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² In economic sense, cartels define as agreements between most or all of the major producers of a good to either limit their production and/or fix prices (<http://economics.about.com>).

³ Andrew R. Dick, Cartels, the Concise Encyclopedia of Economics.

⁴ Business in Asia Today; ASEAN states plan to establish rice cartel; 19 August 2009.

of price stability in the following year. There was also a view by Indonesia and Malaysia in 2006 to form a joint body to regulate international palm oil (bio-fuel) prices, fight tariff barriers in developed countries and promote palm oil as a feedstock for bio-fuel production. This was due to large market share of Indonesia and Malaysia (85%) in the world's palm oil, with 40% lower production costs⁵.

5. These cartel attempts are indeed show that in many ASEAN member countries, cross border cartel are issues that may take part beyond the implementation of their national competition law. To check how this issue is addressed, this paper will show you how far are cartel regulation in several countries in ASEAN and whether cross-border cartel enforcement cooperation can be made.

1.1 Cartel provisions in Vietnam

6. First, without any particular reason, let move to how Vietnam sees cartel behavior in their regulation. Vietnam competition law (Law No. 27/2004/QH11) is passed in 2004 by the 6th Session of the 11th National Assembly of the Socialist Republic of Vietnam. Cartel regulations are stipulated by Section I of Article 8 and 9 (Competition Restriction Agreements). Although it is not use term "Cartel", the behaviors are form of cartel agreements. The prohibited behaviors consist of price fixing, market allocation, controlling of production/purchased/sell, restricting innovation and investment, tying sales, entry barrier, abolishing non-cartelist, and bid rigging.

7. The last three behaviors (entry barrier, abolishing non-cartelist, and bid rigging) are per se illegal, while others are rule of reason by which it should be met combined market share of 30% at minimum. Interestingly, the rule of reason behaviors can be applied for exemption if they meet one of the following conditions:

- Rationalizing the organizational structure, business model, raising business efficiency;
- Promoting technical and technological advances, raising goods and service quality;
- Promoting the uniform application of quality standards and technical norms of products of different kinds;
- Harmonizing business, goods delivery and payment conditions, which have no connection with prices and price factors;
- Enhancing the competitiveness of small- and medium-sized enterprises;
- Enhancing the competitiveness of Vietnamese enterprises on the international market.

8. Fines on cartel in Vietnam are limited to up to 10% of total turnover earned in fiscal year proceeding the year they violated the law. Since 2007, they only handled 1 (one) cartel case on Vietnam Insurance Association who signed agreement on cargo insurance, vessel insurance, vehicle insurance, and terms on insurance premium rates for physical damage to cars. Most of cases at Vietnam Competition Agency involving unfair competition practices.

1.2 Cartel provisions in Thailand

9. Then, let's move to Thailand. This country has been implemented competition law called Trade Competition Act B.E. 2542 (1999) since the year of 1999. The law with 57 sections is regulated cartel offences as part of Chapter on Anti Monopoly. The section regulate that any business operator shall not enter into an agreement with another business operator to do any act amounting to monopoly, reduction of

⁵ Asia Sentinel; Indonesia, Malaysia push a bio-fuels cartel; 14 December 2006.

competition or restriction of competition in the market of any particular goods or any particular service in several manners. These will include price fixing, bid rigging, market allocation, reducing the quality of goods/services, selecting sole distributor, and exclusive dealing (tying). As mentioned, all behaviors are rule of reason, where they need to show the impact of monopolization, restriction of competition, or reduction of competition in the market. Any impeachment shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six million Baht or to both, and, in the case of the repeated commission of the offence, the double penalty will be plausible.

10. In addition to the rule of reason approach, the Law also provides room for business to apply for an exemption to certain business behavior, specifically on market allocation, reducing the quality of goods/services, selecting sole distributor, and exclusive dealing (tying). This application shall meet several conditions by which the applicant must at least explain adequate reasons and specify necessity for the exemption, as well as specify the intended procedures and duration. The Commission then will assess the necessity based on several criteria including its impact to business promotion and potential harm to the economy and consumers.

11. At the implementation level, the Commission has filed more than 20 cases (complaints) from many sectors such television, processed latex, and cement distribution. However, there are no decision is made to date.

1.3 *Cartel provisions in Singapore*

12. Singapore has more active enforcement in cartel case than those of Vietnam and Thailand, even though they just implement their competition law in 2007. The Section 34(2) of the Competition Act (Chapter 50B) stipulate list of prohibited agreements, including price fixing; limit or control production, market, technical development, and investment; market allocation; discrimination; and tying sales. These behaviors can be excluded in the Third Schedule and or exempted based on certain criteria⁶. Fines imposed to the cartel impeachment may reach up to 10% of enterprises' turnover for each year of infringement up to a maximum of 3 (three) years.

13. Exclusion is given to certain enterprises that operate services of general economic interest or having the character of a revenue-producing monopoly. It is also given to specific agreements, namely agreement to implement certain law; agreement related to international obligation; agreement based on compelling reasons of public policy and order by the Minister; IPR; agreement related to clearing house; vertical agreement based on the Minister's order; agreement with net economic benefit; agreement to implement merger; and agreement in essential facilities such postal service, pipe water, wastewater management, scheduled bus, rail services, cargo terminal operation⁷. Block exemption on cartel agreements can be provided as long they meet several conditions of (i) improving production or distribution; and (ii) promoting technical or economic progress.

14. Enforcement process on cartel infringement at the Competition Commission of Singapore (CCS) is well-defined compare to the previous countries (Vietnam and Thailand). The agency has decided three cartel cases since their establishment, namely bid-rigging case against six pest control companies (procurement of termite treatments project); price fixing agreements by 16 (sixteen) coach operator offering Singapore-Malaysia bus services through their association; and price fixing agreements by 11 (eleven) modeling agencies in coordinating and collectively raising rates for a wide range of modeling services in Singapore.

⁶ Competition Commission of Singapore (CCS) Guidelines on the Section 34 Prohibition, page 3.

⁷ Competition Commission of Singapore (CCS) Guidelines on the Section 34 Prohibition, page 13.

1.4 *Cartel provision in Indonesia*

15. Indonesia has a very interesting law that sometime beyond international practices, especially for cartel provisions. The competition law No. 5/1999 concerning Prohibition of Monopoly and Unfair Business Practices provides specific provisions for each type of cartel agreements, such price fixing (Article 5), pricing below cost (Article 7), market allocation (Article 9), boycott (Article 10), trust (Article 12), and bid rigging (Article 22). Cartel is specified as single provision (Article 11) separate from other type of cartel agreements. This provision rules that any competing enterprises must not make an agreement to affect price *by controlling production and or marketing* of goods or services which may cause monopolistic practice and unfair business competition. There are some issues can derived from this article. First, the cartel is limited to activity in affecting price by controlling production or marketing, and second, different from many jurisdictions; cartel in Indonesia uses a rule of reason provision. The sanction for any infringement vary from administrative fines (up to IDR 25 billion), compensation, to criminal prosecution by Court.

16. Exclusion and exemption also largely acknowledge in Indonesia. Among other, exclusions are made to activities to implement certain Law; small medium enterprises; cooperative; agreements related to intellectual property rights, franchise, research and development; and export. Exemption can be made to activities related to public interests which implemented under certain law.

17. Most of cases by Indonesian competition authority (Commission for the Supervision of Business Competition/KPPU) are related to bid-rigging type of cartel. For the first semester of 2011, the Commission has decided 6 (six) bid-rigging case. Price fixing type of cartel is rather small compared to bid-rigging cases handled by the Commission. To date, the Commission decided price fixing cases in several sectors, including fuel surcharge, pharmaceutical, cooking oil, short text message service, cargo shipping, salt trade, and cement distribution.

2. **Challenges in Regional Cooperation**

18. ASEAN member countries clearly agree that cartel agreement is one of the serious infringements to competition law. But each country has different approaches in dealing with one. Some countries put several types of cartel as a per se regulation, while some are need further reason to conclude it. This variety of approaches surely will halt effective competition enforcement between countries. To get clearer picture of how cooperation in cartel enforcement possible in ASEAN member countries, we have identified several challenges that commonly occurs in considering whether cooperation is possible.

2.1 *Different level of competition policy status*

19. Level of economic system and development sometime plays significant role in deciding whether to adopt competition policy and even, a national competition law. There are some facts that in some developing countries, competition policy is not part of their national priority, and thus leading to a resistance to comply with trade commitment or even trying to bend the commitment by finding a loop hole for take benefit of incomplete agreement or commitment. Moreover for developing countries with competition policy, the benefits of competition policy have yet to emerge visibly, because enforcement has been hampered by lack of resources, reliable data, or sufficient information about production costs, market shares and consumer behavior.

20. Conditionally, now there are only five ASEAN member countries with their own national competition law. Malaysia, the latest, will implement her competition law in early 2012. Notwithstanding the existence of some issues related competition policy were raised beforehand in several industries, such cement (1999), ferry services (2003), haulage industry (2003-2004), and beef cartel (2007). Interestingly,

Malaysia is the only country establishing national competition law after the ASEAN Leaders agreed to form common market or economic integration in 2007.

21. In sufficient or imbalance competition statutory provisions in ASEAN member countries may affect the potency to cooperate for competition law enforcement, even an international cartel. Therefore, it is important to ASEAN member countries to swiftly establish their competition policy and or national competition law before 2015 to create precaution or enforcement mechanism to create strong legal condition to all business who doing trade across ASEAN.

2.2 Trade and investment in ASEAN

22. Trade (export and import) between ASEAN member countries until mid of July 2010 showed significant number of USD 376,207 million or 24,5 % of total ASEAN trade⁸. Moreover, intra-ASEAN trade is dominated by Singapore, Malaysia, Thailand, and Indonesia consecutively. Singapore herself occupy 37.4% of intra-ASEAN trade, compare to other three countries that jointly accounted for 48.8%. For investment, most of intra-ASEAN investment goes to Indonesia USD 5,904 million (or 48,8% of direct investment in flow), follow by Singapore (27.9%) and Vietnam (10.7)⁹. Unfortunately, this foreign investment only accounted for not more than 20% of foreign investment by ASEAN member countries.

23. This indicates that most of international trade from ASEAN member countries goes to non-ASEAN member countries, especially China and United States. Investment also mostly comes from non-ASEAN member countries. Conditionally, trade and investment within ASEAN countries are dominated by Indonesia and Singapore. Therefore, by definition, only these countries are facing larger competition problems amongst ASEAN, and thus, probably only these countries will concern about enforcement cooperation in the region. Other countries at this stage may not benefited by certain enforcement cooperation in preventing cross-border cartel infringement.

2.3 Different legal system and institutional aspects

24. Another problem to cooperation in competition area will be different legal and institutional system among ASEAN member countries. To date, not all ASEAN member countries have their national competition law. Those with national competition law also show different approaches in their competition enforcement for cartel. As mentioned before, each ASEAN member countries show different approach to cartel. Each country uses different scopes and articles on cartel. One cartel agreement by businesses in certain ASEAN member country may not be a violation (or even exempted) in other ASEAN countries. Indonesia put a “quite” different approach by putting cartel agreement as per se rules. Each cartel violation also threatens with different level of sanctions and ways of calculating sanction across ASEAN. Experiences in cartel enforcement are also different. Indonesia who currently placed as the most developed competition regime in ASEAN did not have many experiences on non-bid rigging cartel enforcement.

25. Institutional aspects, including different tasks and authorities, capacity of human resources, and approaches used will also affect how cooperation shall work. Sanction is one problem, as each country uses different approaches to impose their sanction, including administrative fines. Execution or collecting cross-border fines will be another problem. Even now, other than European Union, I believe there is no room for collecting cross border fines by bilateral agreement as they will be limited by different authority and legal system between agencies in both countries. There is one good sign of business compliance between Indonesia and Singapore. Because there is an example of competition case in Indonesia involving

⁸ ASEAN Statistic on Trade, 2010 (<http://www.aseansec.org/stat/Table18.pdf>)

⁹ ASEAN Statistic on Investment, 2010 (<http://www.aseansec.org/stat/Table25.pdf>)

Singapore's big multinational company where they agreed to pay fines imposed by Indonesian competition agency (KPPU). Certainly, after the case was being decided up to Supreme Court level.

26. This different cartel regime certainly will increase legal uncertainty for those invested in ASEAN, and thus, without doubt, demand for harmonization of regulation in ASEAN surely will escalated after the achievement of economic integration objective in 2015.

3. Is there any room to cooperate?

27. Cooperation in competition between ASEAN member countries is still possible, if each country has common understanding on how to deal with the issues. Even, cooperation in enforcement is still possible, if, member countries have similar needs. Currently, cooperation between ASEAN member countries is conducted through the existence of ASEAN Experts Group on Competition (AEGC), a sectoral body within ASEAN structure. However, the objective is still limited to the promotion of competition policy in 2015, a reasonable target that might be achieved. Cooperation in enforcement between ASEAN countries is hard to achieve without proper harmonization on competition policy and law between member countries, and without proper establishment of regional body to deal with cross-border competition issues.

28. Then, is there any room to cooperate for cartel enforcement in ASEAN? The answer is yes, for certain countries with certain condition. Considering trade and investment between ASEAN member countries, the existence of effective competition enforcement and potential benefit, then most likely, Indonesia and Singapore can start to consider for cooperation in enforcement. The cooperation can be limited to certain behaviors (such cartels, mergers, and abuse of dominants) and certain industry that can be monitored or supervised by both agencies. The scope also can be limited due to different legal system by both countries. This cooperation can be limited to notification, endorsement, and exchange of information in competition enforcement, including cartel. In considering such cooperation, each country shall take prudent consideration on several issues, such the authorities of each agency, the exemption and exclusion given by each law, and the legal systems and procedures.

4. Conclusion

29. Cartel in ASEAN is considered one of the harmful business behaviors, that can be identifies by each competition law. Currently, there are only five ASEAN member countries with national competition law. Each of those is having its own unique characteristics in treating cartel provisions, including sanctions. Cartel activities in several countries are detected but with uneven cartel enforcement across countries and over time. Other countries are still considering promoting competition policy by 2015. Their common problems are mostly related to low public acceptance and political support to endorse competition principles. However, there is still potency for a cooperation between Indonesia and Singapore, since they both have significant trade and investment among them, and each have national competition law, agency, and experience in handling cartel cases. But still, this potential cooperation shall be take prudent consideration on how each agency able to address cross-border issues.