

Editors

Nicolas Charbit  
Elisa Ramundo

Assistant Editors

Anna M. Pavlik - Jessica Rebarber

# William E. Kovacic

## An Antitrust Tribute *Liber Amicorum* - Volume II

Donald I. Baker, Jonathan B. Baker, Caron Beaton-Wells, Margaret Bloom, John DeQ. Briggs, George S. Cary, Andy C.M. Chen, Daniel A. Crane, Elaine Ewing, Eleanor M. Fox, Damien Geradin, Laurie-Anne Grelier, Omar Guerrero Rodríguez, Doris Hildebrand, Merit E. Janow, Joseph Kattan, Molly Kelley, Bruno Lasserre, Robert C. Marshall, Leslie M. Marx, Robert Ian McEwin, Andreas Mundt, Ali Nikpay, Maureen K. Ohlhausen, Julián Peña, Alan Ramírez Casazza, Patrick Rey, Simon Roberts, Jan M. Rybníček, Jacques Steenbergen, John Terzaken, Thibaud Vergé, Florian Wagner-von Papp, Wouter P.J. Wils, Marc Winerman, Chris Wood, Joshua D. Wright.

# Editors' Note

Nicolas Charbit

Elisa Ramundo

Following the success of William E. Kovacic *Liber Amicorum*—Volume I published in 2012, the Institute of Competition Law is proud to release the second volume of this book within the European tradition of *Liber Amicorum*.

In witnessing the constant growth of antitrust regimes around the world and in recognizing the significant role played by William Kovacic in favoring the antitrust dialogue at the international level, this Volume II pays tribute to Professor Kovacic's outstanding career offering a unique combination of theoretical insights and practical knowledge of competition and antitrust law issues worldwide.

In this Volume II, thirty-seven prominent authors signed twenty-seven contributions that tackle some of the most stimulating and current topics in competition policy and antitrust laws.

**PART I**, entitled “**THE INTERNATIONAL DIMENSION OF COMPETITION POLICY**,” includes twelve articles that offer a dynamic overview of international competition policy. Thus, **Jonathan Baker** reviews Kovacic's work on the design of antitrust enforcement institutions analyzing how antitrust norms exhibit continuity over the time; **Doris Hildebrand**, stemming from Kovacic's advocacy for convergence, discusses how the US/EU divide can be surpassed by superior norms; **Florian Wagner-von Papp** delineates a comparison between the US antitrust laws and EU competition law pointing out some thoughts on the importance of defining the relationship between antitrust law on the federal (or EU) level and antitrust laws on (Member) state level; **Jacques Steenbergen** offers some reflections on legitimacy, accountability and independence of competition authorities; **Maureen Ohlhausen** discusses the recommendations in the “FTC at 100 Report” for improving agency performance; **John Briggs** and **Donald Baker** suggest a critical revision of the US antitrust policy and administration to join the rest of the world; **Marc Winerman** steps into the past discussing the international issues arising when the FTC first opened its doors and even before; **Bruno Lasserre** highlights successes and challenges of the European Competition Network; **Wouter Wils** gives a retrospective

analysis of the EC Regulation 1/2013, after ten years since its enactment; **Ali Nikpay** tries to assess the OFT's performance by reference to the analytical framework set down by Kovacic on agency effectiveness; **Julián Peña** outlines the role of international cooperation in the development of competition law in Latin America; **Ian McEwin** delves into the existing connection between business, politics and competition law in Southeast Asia.

The fifteen articles of **PART II**, entitled “**COMPLEXITIES OF ANTITRUST RULES AROUND THE WORLD**”, guide readers through some of the intricacies in the application of antitrust rules in different countries around the world. In Part II, **John Terzaken** and **Molly Kelley** analyze the expanding role of behavioral remedies in cartel enforcements; **Damien Geradin** and **Laurie-Anne Grelier** offer some critical considerations on the EU Directive on Antitrust Damages Claims; **Omar Guerrero** and **Alan Ramírez** explore how effective criminal cartel provisions could be to deter cartel behavior; **Robert Marshall** and **Leslie Marx** discuss compliance with Section 1 of the Sherman Act from an economic perspective; **Caron Beaton Wells**, drawing on the Australian experience, tests effectiveness of a range of leniency policies; **Eleanor Fox** and **Merit Janow**, by examining the Vitamin C cartel case, set forth the main points at which trade and competition ought to meet; **Andy Chen** analyzes impacts and implications arising from the LCD cartel case for the Taiwanese competition policy; **Simon Roberts** reviews the approach of the South African Competition Commission to uncovering collusion in the construction sector and draws out some lessons for establishing new institutions; **Patrick Rey** and **Thibaud Vergé** outline vertical restraints treatment in the EU; **Andreas Mundt** conducts an insightful digression on some forms of vertical restraints vis-à-vis the rapid development of the Internet economy; **Daniel Crane** provides some analytical clarity on the legal rules governing predatory innovations claims; **Joseph Kattan** and **Chris Wood** explain the standard-essential patents and the related problem of hold-up; **Margaret Bloom** discusses convergence and cooperation in international merger control; **Joshua Wright** and **Jan Rybníček** advocate for a more committed consideration of the evolution of out-of-market efficiencies in the US and around the world; **George Cary** and **Elaine Ewing** consider what can the US/EU experience in the merger context tell us about convergence with MOFCOM.

Volume II, with its 27 papers, takes readers around the world providing them with provoking reflections, insightful thoughts, and learning experiences on competition policy and antitrust laws. This is the same world that Bill Kovacic has traveled so much to share knowledge and favor dialogue among different players in the international antitrust arena.

The editors would like to give their sincere thanks to the thirty-seven authors for their hours of labor in dedication to the Volume II of this *Liber Amicorum* and to Anna Pavlik and Jessica Rebarber for their precious editorial assistance.

# Contributors

**Donald I. Baker**

*Baker & Miller*

**Jonathan B. Baker**

*American University Washington  
College of Law*

**Caron Beaton-Wells**

*University of Melbourne*

**Margaret Bloom**

*King's College London*

**John DeQ. Briggs**

*Axinn, Veltrop & Harkrider*

**George S. Cary**

*Cleary Gottlieb  
Steen & Hamilton*

**Andy C.M. Chen**

*Department of Financial and  
Economic Law, Chung Yuan  
Christian University*

**Daniel A. Crane**

*University of Michigan*

**Elaine Ewing**

*Cleary Gottlieb  
Steen & Hamilton*

**Eleanor M. Fox**

*New York University  
School of Law*

**Damien Geradin**

*Covington & Burling*

**Laurie-Anne Grelier**

*Covington & Burling*

**Omar Guerrero Rodríguez**

*Barrera, Siqueiros y Torres  
Landa*

**Doris Hildebrand**

*University of Brussels – EE&MC*

**Merit E. Janow**

*Columbia University*

**Joseph Kattan**

*Gibson, Dunn & Crutcher*

**Molly Kelley**

*Allen & Overy*

**Bruno Lasserre**

*Autorité de la Concurrence*

**Robert C. Marshall**

*Penn State University*

**Leslie M. Marx**

*Fuqua School of Business,  
Duke University*

**Robert Ian McEwin**

*University of Malaya  
Malaysian Centre of Regulatory  
Studies – Chulalongkorn  
University*

**Andreas Mundt**

*Bundeskartellamt – International  
Competition Network*

**Ali Nikpay**

*Gibson, Dunn & Crutcher*

**Maureen K. Ohlhausen**

*US Federal Trade Commission*

**Julián Peña**

*Allende & Brea –  
University of Buenos Aires*

**Alan Ramírez Casazza**

*Barrera, Siqueiros y Torres  
Landa*

**Patrick Rey**

*Toulouse School of Economics  
- Institut d'Economie Industrielle*

**Simon Roberts**

*University of Johannesburg*

**Jan M. Rybníček**

*US Federal Trade Commission*

**Jacques Steenberghe**

*Belgian Competition Authority*

**John Terzaken**

*Allen & Overy*

**Thibaud Vergé**

*Centre de Recherche en  
Economie et Statistique  
and ENSAE*

**Florian Wagner-von Papp**

*UCL Institute of Global Law  
– UCL Centre for Law  
and Economics*

**Wouter P.J. Wils**

*European Commission –  
King's College London*

**Marc Winerman**

*Formerly US Federal Trade  
Commission*

**Chris Wood**

*Gibson, Dunn & Crutcher*

**Joshua D. Wright**

*US Federal Trade Commission*

# Table of Contents

Editors' Note .....	III
Contributors .....	V
Professor William E. Kovacic Biography .....	XI
Contributors' Bios .....	489

## PART I: The International Dimension of Competition Policy

Channeling and Contending with Bill Kovacic .....	1
Jonathan B. Baker	
Bill's Advocacy for Converging Economic Schools of Thought in the US and EU .....	11
Doris Hildebrand	
Comparative Antitrust Federalism and the Error-Cost Framework or: Rhetoric and Reality: You Protect Competitors, We Protect Competition – Except When We Protect Competitors.....	23
Florian Wagner-von Papp	
Some Reflections on Legitimacy, Accountability and Independence .....	93
Jacques Steenbergen	
The Federal Trade Commission at 100: Recommendations for Improving Agency Performance .....	101
Maureen K. Ohlhausen	

Rethinking US Antitrust Policy and Administration: Joining the Rest of the World in the 21 <sup>st</sup> Century .....	115
Donald I Baker, John DeQ. Briggs	
International Issues in the FTC's First Decade (1915-1925)—and Before .....	133
Marc Winerman	
The European Competition Network: Past Successes and Challenges for Its Second Decade .....	149
Bruno Lasserre	
Ten Years of Regulation 1/2003—A Retrospective.....	161
Wouter P.J. Wills	
Kovacic on Agency Effectiveness: How Does the OFT Measure Up?.....	175
Ali Nikpay	
The Role of International Cooperation in the Development of Competition Law in Latin America .....	195
Julían Peña	
Business, Politics and Competition Law in Southeast Asia.....	217
Robert Ian McEwin	

## PART II: Complexities of Antitrust Rules around the World

You're Fired! The Expanding Role of Behavioral Remedies in Cartel Enforcement .....	243
John Terzaken, Molly Kelley	
Cartel Damages Claims in the European Union: Have We Only Seen the Tip of the Iceberg? .....	257
Damien Geradin, Laurie-Anne Grelier	
Cartel Criminalization: A New Old Story .....	277
Omar Guerrero Rodríguez, Alan Ramírez Casazza	
Section 1 Compliance from an Economic Perspective .....	293
Robert C. Marshall, Leslie M. Marx	

Leniency Policies: Testing for Effectiveness .....	303
Caron Beaton-Wells	
China, the WTO, and State-Sponsored Export Cartels: Where Trade and Competition Ought to Meet .....	319
Eleanor M. Fox, Merit E. Janow	
The LCD Cartel: Impacts and Implications for the Competition Policy of Taiwan .....	325
Andy C.M. Chen	
Establishing New Institutions: A Note on the Role of Strategy and Economic Analysis in Uncovering Collusion in the South African Construction Sector .....	351
Simon Roberts	
Vertical Restraints in European Competition Policy .....	365
Patrick Rey, Thibaud Vergé	
Vertical Restraints and the Internet Economy .....	383
Andreas Mundt	
Legal Rules for Predatory Innovation .....	395
Daniel A. Crane	
Standard-Essential Patents and the Problem of Hold-Up .....	409
Joseph Kattan, Chris Wood	
Convergence and Cooperation in International Merger Control .....	425
Margaret Bloom	
Outside In or Inside Out? Counting Merger Efficiencies Inside and Out of the Relevant Market .....	443
Joshua D. Wright, Jan M. Rybníček	
Divergence Then and Now: What Does the US/EU Experience Tell Us about Convergence with MOFCOM? .....	463
George S. Cary, Elaine Ewing	

# Business, Politics and Competition Law in Southeast Asia<sup>1</sup>

ROBERT IAN McEWIN

mcewin@me.com

*Khazanah Nasional Chair of the University of Malaya Malaysian Centre of Regulatory Studies (UMCoRS)  
and Visiting Professor, Chulalongkorn University, Bangkok*

## Abstract

Southeast Asia is integrating economically and all Association of Southeast Asian Countries (“ASEAN”) have agreed to introduce competition laws by 2015. Considerable differences in levels of economic development as well as legal and political institutions means that competition law integration is unlikely to follow the same path as in Europe. Considerable differences in existing and proposed competition laws reflect local circumstances. However, there are considerable similarities in the way business operates in the region. This chapter considers one important feature of the way business operates in Southeast Asia – the dominance of family-owned business groups and conglomerates that control substantial parts of all economies in Southeast Asia. Some implications for competition law are drawn.

---

<sup>1</sup> Bill Kovacic could never be accused of ignoring local conditions when advising on competition law. This chapter is dedicated to a wonderful and generous friend whose insights will be with us for a very long time, both in practice and academia—a rare double. The themes in this chapter are expanded upon in R. IAN McEWIN, *COMPETITION LAW IN SOUTHEAST ASIA* (forthcoming 2014).



... differences in culture predispose Anglo-American investors to assume an individualistic stance and place their trust in contract (which makes accredited financial institutions the most appealing alternative) while Chinese and Indian investors place greater value in kinship networks and communal affinities (which make the use of informal gold shops, “*guanxi*” or “*caste*” investment an option to formal contractual relationships) and use this social capital to complement their investment strategies.<sup>2</sup>

## I. Introduction

Do differences in culture, business practices and organizational forms mean that the design of competition laws should differ? Or that legal advice about anti-competitive agreements, abuse of dominance or anti-competitive mergers needs to be adapted to take account of these differences? This chapter uses a Chicago School/Transaction Cost Economics (“TCE”) approach to start to try and answer these questions with respect to Southeast Asia. Standard Chicago School analyses competition business practices “through the lens of price theory” to examine market power but also incorporates “the insights of NIE [New Institutional Economics] and its focus on comparative institutional analysis and transaction costs.”<sup>3</sup> TCE recognizes that persisting business practices depend on “tried and true” or efficient ways of doing things given the resources constraints faced, the costs of operating in the market (transaction costs) and the institutions—defined as the “set of rules, compliance procedures, and moral and ethical behavioral norms designed to constrain the behavior of individuals in the interests of maximizing the wealth or utility of principals.”<sup>4</sup> Business practices and organizational forms that were developed to suit particular local circumstances at a point in time may be passed on over generations and so become part of the *culture* in business and more generally. Business culture is seen, therefore, as originating as economizing behavior given a particular economic environment.<sup>5</sup>

Initially, the chapter provides some background on Southeast Asia. Then the relationship between business and government in the region is discussed, followed by some cultural factors that make business practices and business organization different from developed Western countries, in particular the dependence on social networks. This is followed by a discussion of how business networks give Overseas Chinese a comparative economic advantage in Southeast Asia. Then the importance of family businesses,

---

2 Darryl Crawford, *Chinese Capitalism: Cultures, the Southeast Asian Region and Economic Globalisation*, 21 (1) THIRD WORLD QUARTERLY 69, 76 (2000).

3 Joshua D. Wright, *The Chicago School, Transaction Cost Economics and the Roberts Court’s Antitrust Jurisprudence*, in THE ELGAR COMPANION TO TRANSACTION COST ECONOMICS 1, 6 (Peter G. Klein & Michael E. Sykuta eds., 2009), available at <http://ssrn.com/abstractid=1144883>.

4 DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY (1981), at 201-202.

5 THOMAS K. CHENG, *How Culture May Change Assumptions in Antitrust Policy*, in THE GLOBAL LIMITS OF COMPETITION LAW (Ioannis Lianos & D. Daniel Sokol eds., Stanford University Press 2012 - argues that the Chicago Schools ignores culture. This is not so. For most economic analysis, culture, which only slowly evolves, can be assumed to be constant. Empirical work can assess how different cultural factors impact on demand and supply conditions and so the efficiency of resource use.

followed by big business groups and conglomerates are discussed. Finally, the implications for competition law are examined focusing on issues of control that have important implications for whether agreements are within the firm or not and whether business groups and conglomerates are to be regarded as a single economic entity for abuse of dominance provisions.

## II. Background to Southeast Asia

Straddling the equator, Southeast Asia is an area of considerable language and geographical diversity. With a combined population of about 600 million people it has a land-mass slightly smaller than the Indian sub-continent but a sea area about three times larger. Colonialism not only drew national boundaries but also transformed the former processes and institutions of political control in Southeast Asia.

Reflecting traditional village structures, Southeast Asian societies are still mainly hierarchical. Networks of superior-subordinate relationships underpin family, business and political structures. Reflecting these relationships, considerable inequalities in wealth, education and social status persist. Increasing domestic competition and expanded international trade and improving institutions puts these patronage systems at risk. In addition, gradually improving standards of education and increased wealth inevitably leads to calls for greater accountability, transparency and political and economic rights. Traditional elites, fearful of a loss of position and wealth, naturally defend these traditional patronage systems against wealth-destroying incursions like competition law.

Prior to colonization, absolute rulers (kings and sultans) raised revenue mostly by taxing international trade or by revenue farming where they sold the monopoly right to collect taxes in a geographic area or on specific commodities or activities such as opium, gambling or prostitution—often to Overseas Chinese. Colonial powers initially promoted free trade and took over tax administration—abolishing trade-related taxes as well tax farming by the beginning of the 20th century. But, in an about face from their free-trade position, colonial governments increasingly during the 20th century relied more on state-owned monopolies for revenue—again using Overseas Chinese “compradors” or middlemen. Even “as late as 1938 opium accounted for 15 percent of the total revenues of French Indochina, with alcohol, tobacco and salt making up another 24 percent.”<sup>6</sup> Many of these monopolies continued with independence and were often transferred into private hands, particularly in Indonesia.

While Southeast Asia had not been recognized as a separate region until World War II, it is now integrating its economies to develop a region that can compete with China and India. The Association of Southeast Asian Nations (“ASEAN”) was formed in 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand to primarily promote regional security. Brunei, Cambodia, Laos, Myanmar, and Vietnam

---

6 *Id.* at 216.

subsequently joined. ASEAN has a loose structure based on ideals of non-interference in each other's affairs, minimal institutions and reliance on consultation and consensus.

ASEAN agreed to set up a free trade area in 1992 ("AFTA"). Members agreed to set tariffs on goods originating in other AFTA member countries to 0-5% but, unlike the European Union, did not include a common external tariff. ASEAN now seeks regional integration by 2015—the key features including: a single market and production base; a highly developed economic region; equitable regional economic development and a region integrated into the world economy. In the ASEAN Economic Community Blueprint, Member States agreed to “endeavor to introduce competition policy in all member countries by 2015.”<sup>7</sup>

One of the most important distinguishing features of Southeast Asian business is the major contribution and dominance of the Overseas Chinese. Several explanations compete to explain their success. Some argue that Chinese capitalism has its own distinctive *cultural* features and that the dominance of family owned and controlled firms reflects Confucian values. As Fukuyama puts it:

The fact that a similar pattern of economic behavior emerges whenever governments allow Chinese communities to organize their own affairs suggests that is in some sense a natural outgrowth of Sinitic culture.<sup>8</sup>

Cultural practices may have their roots in historical resource constraints and institutional deficiencies in China. Practices that work at a particular point of time are passed down over generations until changing circumstances mandate modifications. Undoubtedly, the traditional Chinese business practices and forms of organization described below are adapting to more sophisticated markets where market information flows are just as fast as existing networks and where greater transparency is required.

Other explanations place less emphasis on culture and place greater emphasis on the ability of the Overseas Chinese to adapt to and take advantage of weak local institutions. An inability to enforce long-term contracts both back in China and in Southeast Asia meant Chinese businessmen only dealt with people they could trust. Starting with the family, networks of trust based on clan groups and kinship ties developed to trade successfully.<sup>9</sup> These “trust networks” provide economic advantages such as risk reduction, lower transaction costs, better co-ordination of inputs within the clan group, and better information between members about short-term opportunities as they arise—in situations where undeveloped markets failed to transmit price information efficiently. These “trust networks” also facilitated the provision of ready availability finance where markets were incomplete and obtaining credit was both costly and time-consuming.

---

7 ASEAN Secretariat *ASEAN Economic Community Blueprint*, available at <http://www.asean.org/archive/5187-10.pdf>.

8 Fukuyama, Francis *Trust: The Social Virtues and the Creation of Prosperity* (1995) The Free Press: New York, at 71.

9 Daniel M. Shapiro, Eric Gedajlovic & Carolyn Erdener, *The Chinese Family as a Multinational Enterprise*, 11(2) THE INT'L J. OF ORG'L ANALYSIS 105, 105-122 (2003).

Another explanation for Overseas Chinese business success focuses not on culture or institutional factors but rather on their ability to develop close ties with indigenous political elites. Yoshihara, for example, argues that their success is derived from the fact they are “ersatz capitalists.”<sup>10</sup> That is they make monopoly profits through alliances with political elites. But their relationship with political elites was mixed. Often facing hostile political environments and fears of expropriation, Overseas Chinese also got together for self-protection within clan groups. As Owen puts it the overseas Chinese “largely governed themselves through ‘secret societies’ and other institutions of their own, dealing with the ruling powers through leaders.”<sup>11</sup>

Close relationships between Overseas Chinese (mostly now locals) and political elites persist today. The Quek family in Malaysia and Singapore is a good example. Kwek Hong Png migrated from China to Singapore in the 1920s. Studwell describes Kwek Hong Png as a “rubber-smuggler-made-good.”<sup>12</sup> Kwek Hong Png expanded into Malaya and sent his brother Kwek Hong Lye there in 1963. Hong Lye’s son Quek Leng Chan then took over in 1973. The Malaysian Holding Company is called Hong Leong Company (Malaysia), which is owned by both the Malaysian and Singapore parts of the family.

... Hong Leong Company (Malaysia) is fairly evenly spread between both sides of the family. Family members exclusively control the group through a series of family-owned holding companies and interlocking directorates. The Groups has the appearance of being quite Western in its outward appearance but decision-making is still tightly controlled by a small circle of family members. ... Quek is well connected to senior members of Malaysia’s Government and has a close relationship with companies controlled by Malaysia’s dominant political party UMNO.<sup>13</sup>

Kwek Hong Png’s son, Kwek Leng Beng, controls the Singapore side of the family’s wealth. Indicating his close relations with government, he was one of the Committee Members of the Singapore Economic Review Committee that recommended “[e]nacting a generic competition law to institutionalise a regime where no company enjoys unfair privileges, and must compete on equal footing in the market with others.”<sup>14</sup>

---

10 KUNIO YOSHIHARA, *THE RISE OF ERSATZ CAPITALISM IN SOUTHEAST ASIA* (1988).

11 NORMAN G. OWEN, *THE EMERGENCE OF MODERN SOUTHEAST ASIA* (2005), at 209.

12 JOE STUDWELL, *ASIAN GODFATHERS: MONEY AND POWER IN HONG KONG AND SOUTHEAST ASIA* (2007), at 72.

13 EAST ASIA ANALYTICAL UNIT, AUSTRALIAN DEP’T OF FOREIGN AFFAIRS AND TRADE, *CHINESE BUSINESS NETWORKS IN ASIA* (1995), at 332-333.

14 ECON. REV. COM., MINISTRY OF TRADE & INDUSTRY OF SINGAPORE, *NEW CHALLENGES, FRESH GOALS – TOWARDS A DYNAMIC GLOBAL CITY* (2003), at 119.

### III. Business and Government in Southeast Asia

Chalmers Johnson used the term “development state” to describe the relationship between government and business in Japan.<sup>15</sup> The government he argued was “plan rational” in that it coordinated business through government-industry councils, by directing investment through the state-owned Postal Savings Bank and “administrative guidance” to tell firms what it wanted. While using markets to send price signals and match demand and supply, Ministry of International Trade and Industry (“MITI”) also sanctioned cartels to promote development, i.e., ensuring all companies progressed successfully. Murakami<sup>16</sup> said several hundred MITI recognized cartels operated at any one time.

While other Northeast Asian countries like South Korea and Taiwan followed the “development state” model with extensive state intervention, the models were not the same. An important ingredient for economic success in Northeast Asia was the separation, for various reasons, of a professional bureaucracy from day to day pressures. So the bureaucracy could focus on long-term development goals. Evans described this as the “embedded autonomy.”<sup>17</sup>

The economic success of Northeast Asia naturally attracted attention from countries in Southeast Asia. Booth compared economic growth in Taiwan and South Korea with Southeast Asia.<sup>18</sup> Booth found some similar features of Northeast Asian growth: high levels of investment (mainly from domestic sources); some countries tried to establish “embodied autonomy” for its bureaucracy; and there was a focus on export-led growth. But, by comparison, Southeast Asia is well-endowed with resources and national objectives differ as well. Some governments in Southeast Asia *promoted certain group interests* rather than trying to maximize national wealth. For example, following ethnic Chinese success, indigenous interests were favored in Malaysia, Indonesia, Thailand and Vietnam. Part of the reason for this was that the colonial powers did not foster local entrepreneurship—instead relying on the ethnic Chinese.<sup>19</sup> While the state has retreated to some degree in most countries in Southeast Asia, it is still important in the nominally communist states of Laos and Vietnam.

---

15 JOHNSON, CHALMERS (1982) MITI AND THE JAPANESE MIRACLE. STANFORD, CALIF.: STANFORD UNIVERSITY PRESS.

16 Yasusuke Murakami, *The Japanese Model of Political Economy*, in THE POLITICAL ECONOMY OF JAPAN: THE DOMESTIC TRANSFORMATION (K. Yamamura & Y. Yasuba eds., 1987), at 52.

17 PETER EVANS, EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION (1995).

18 Anne Booth, *Initial Conditions and Miraculous Growth: Why is Southeast Asia Different from Taiwan and South Korea*, 27(2) WORLD DEV'T 301-21 (1999).

19 Frank Tipton, *Southeast Asian Capitalism: History, Institutions, States and Firms*, 26 ASIA PAC. J. MGMT. 401, 401-434 (2000).

Evans also identified two kinds of government—a “predatory” state (where those in power extract wealth for themselves) or a “developmental” state (which promotes industrial development). Witt and Redding<sup>20</sup> argue that, in Southeast Asia, Indonesia, Laos, and the Philippines are clearly predatory states while Singapore is a developmental state. The other countries of Southeast Asia combine elements of both.

Apart from Thailand, all the countries in Southeast Asia are former colonies. Colonial powers saw Southeast Asian countries as both sources of raw materials and as markets for their exports. While relying on former rulers for political governance, when it came to business, colonial governments generally upset former longstanding pre-colonial commercial arrangements, reserving for themselves the most lucrative sectors of the economy. Indigenous business was crowded out and largely replaced by colonizers and Chinese immigrants. Tipton argues this colonial impact is still with us today:

The inheritance of colonialism and colonial nationalism continues to affect state capacity and continues to influence management style in both the public and private sectors. The autocratic rule by narrow elites that marks government administration parallels a top-down management style in business firms. . . . Markets have not always functioned effectively. Low state capacity has led government officials to use private firms to achieve their goals, but at the same time elite dominance, a culture of dependence, and corruption and inefficiency in administration have led private firms to pursue rent-seeking strategies instead of innovative activity.<sup>21</sup>

One of the implications of this kind of colonization is a legacy of ineffective state capacity. Apart from Singapore and unlike Northeast Asia, governments in Southeast Asia have low levels of state capacity. One reason for this is the fact that the civil services is often closely connected to ruling parties through political appointments—a normal part of patronage networks. Low levels of state enforcement capacity combined with business distrust of government (of asset confiscation for example) are reflected in the high relative level of the informal sector in Southeast Asia. Table 1 provides estimates of the size of the shadow economy.

---

20 Michael A. Witt & Gordon Redding, *Asian Business Systems: Institutional Comparison, Clusters, and Implications for Varieties of Capitalism and Business Systems Theory*, INSEAD Business School Faculty and Research Working Paper (January 15, 2013), available at <http://ser.oxfordjournals.org/content/11/2/265.full.pdf+html>.

21 Tipton, *supra* note 19, at 403.

**Table 1: Size of Shadow Economy as % of GDP<sup>22</sup>**

Country	2007	Average 1999-2006
Singapore	14.0	13.3
Vietnam	16.8	16.1
Indonesia	20.9	19.9
Brunei Darussalam	31.0	31.3
Malaysia	32.6	31.3
Lao PDR	33.2	31.6
Philippines	48.4	45.1
Cambodia	54.2	51.5
Thailand	57.2	54.7
Myanmar	-	54.9
Average 151 Countries		35.5

The study defines the shadow economy to include all market-based legal production of goods and services that are deliberately concealed from public authorities to avoid taxes or social security contributions, to avoid labor market standards such as minimum wages, maximum working hours, safety standards, or to avoid complying with administrative and regulatory procedures.

Firms may prefer to operate in the shadow economy because regulations are too burdensome or inappropriate, or business registration procedures are costly and time consuming. Importantly, regulations may restrict competition officially. For example, operating hours may be restricted, which provides opportunities for non-regulated firms to compete. Firms may operate outside the official regulatory avenues where predatory governments are present, preferring to pay bribes to corrupt officials.

For competition law, the size of the shadow economy may mean that the number of firms that actually compete in identified product markets will be underestimated. As well, the size of the geographic market may be underestimated—in some countries in Southeast Asia competition will also come from illegal smuggling. Market power in the official economy will be overestimated due to a combination of an underestimation of actual competitors and also, if regulatory standards are lax, the cost advantages obtained from lack of compliance with labor or safety standards. In some markets, the informal sector may put considerable competitive constraints on lawful firms.

22 Friedrich Schneider, Andreas Buehn & Claudio E. Montenegro, *Shadow Economics All Over the World: New Estimates for 162 Countries from 1999 to 2007*, in World Bank, Development Research Group, Policy Research Working Paper 5356 (July 2010).

## IV. Culture, Business Practice and Organization in Southeast Asia

A number of important cultural factors distinguish Southeast Asia to some degree from the West, which potentially impacts on or has implications for the way business operates and which could impact on competition law and its enforcement.<sup>23</sup> Firstly, while families are obviously important everywhere, in Asia they have considerable influence both in politics and on business organization and practice. Families control politics and government in several Southeast Asian countries. A high proportion of the biggest corporations in Southeast Asia are also family owned (see below). Apart from the Chinese, other cultures in Southeast Asia also place prime emphasis on the family and so on hierarchies in society. As Mulder puts it: “The model the family provides is the same basic one for Thai, Javanese and Filipino social organization. Its cardinal elements are hierarchy, moral inequalities, debt of gratitude and obligation . . . [hierarchy] implies consciousness of status.”<sup>24</sup> In Thailand, for example, the traditional *sakdina* system set out a code of rank to which everyone belonged. Following on from Buddhist notions of *karma* where one’s position in life depended on good works in previous lives, the higher the person’s status, the greater the person’s worth and trustworthiness.

Secondly, there is a greater acceptance of hierarchies than in the West. Acceptance of hierarchies means accepting inequalities even within the family (older brothers have higher status than younger brothers, for example) but also in politics and business. Sometimes this acceptance is based on religion as with Buddhist belief in rebirth and *karma*. Confucian belief that stability only comes about from an acceptance of one’s role in a hierarchical society is important to ethnic Chinese businessmen and politicians.

Thirdly, Southeast Asian societies place considerable importance on social relations that are accompanied by gift-giving to show respect. This is particularly important for the Chinese who place great value on connections (*guanxi*) and who, because they believe in putting family first, necessarily see relations outside the family as being opportunistic. Gifts are then seen as a way of developing trustworthy relations outside the family in societies where the ability to enforce contracts is limited. Trust developed through goodwill over time helps to expand the number of people one would otherwise deal with. Of course, drawing the line between *guanxi*—used to develop long-term relationships in an uncertain world and that reduces transaction costs—and corruption, where the gift is given in the expectation of a specific reward, is difficult.

---

23 For an interesting discussion of culture and competition law see THOMAS K. CHENG *op.cit.*

24 NIELS MULDER, *INSIDE SOUTHEAST ASIA: RELIGION, EVERYDAY LIFE, CULTURAL CHANGE* (1996), at 78-79.



Fourthly, an integral part of a hierarchical society is “face.” Park and Luo say:

Chinese society places great stock on the importance of face (*mianzi*). *Guanxi* dynamics emphasize the enjoyment of prestige without the loss of face and the saving of others’ face. . . . The Chinese have traditionally compared “losing face” to the physical mutilation of an eye, the nose, or the mouth.<sup>25</sup>

*Mianzi* is a form of social capital that is determined by social position and wealth. It does not necessarily involve friendships. To develop a business or social network requires a certain level of *mianzi*.<sup>26</sup> The more *mianzi* one has the more influence one has in the network. It is highly unlikely that a network participant with lower *mianzi* will make a complaint to a competition regulator, unless a calculation is made that defecting from the network will give greater economic rewards. Losing face within the network is important not because of any emotional attachment to the network but because of the loss of future favors and deals. So economic motives form the basis of *guanxi* networks.

Fifthly, there are differences in the way Western and Asian minds think. Hofstede and Bond<sup>27</sup> see Western societies as “uncertainty avoiding” societies that seek absolute truth (at least on part because they are derived from Judean, Christian and Muslim religions). Eastern societies, on the other hand, based on the teachings of Confucius, are more concerned with virtue than truth. Uncertainty-accepting societies in the East are more relativist and thus:

. . . [R]epresented by Confucianism but also by Hinduism, Buddhism, Taoism and Shintoism, [do]not assume that any one human being can have the Truth. . . . It is surprising that Chinese scholars, despite their high level of civilization, never discovered Newton’s laws; they were simply not looking for them . . . We could say that Western thinking is analytical, while Eastern thinking is synthetic. . . . With the results of Western, analytically derived technologies freely available, Eastern cultures could start putting these technologies into practice according to their superior synthetic abilities. What is true or who is right is less important than what works, and how the efforts of individuals with different thinking patterns can be coordinated toward a common goal.<sup>28</sup>

Sixthly, reflecting both the influence of Indian religions and philosophies and Confucianism, Southeast Asian societies are also more concerned in general with groups and the role of individuals and their status within those groups, rather than with the individual as a separate entity as in Western countries. In Southeast Asia, personal, reciprocal ties between individuals or groups in superior-inferior relationships, with

---

25 Seung Ho Park & Yadong Luo, *Guanxi and Organisational Dynamics: Organisational Networking in Chinese Firms*, 22 STRATEGIC MGMT. J. 455, 457 (2001).

26 Yeung I.Y. & R. L. Tung, *Achieving Business Success in Confucian Societies: the Importance of Guanxi*, 3 ORGANIZATIONAL DYNAMICS 54, 54–65 (1996).

27 Greet Hofstede & Michael Harris Bond, *The Confucius Connection: From Cultural Roots to Economic Growth*, 16(4) ORGANIZATIONAL DYNAMICS 5, 5-21 (1988).

28 *Id.* at 20.

different access to resources form the basis of political and social structures. Southeast Asian countries are organized into networks of patron-client (superior-subordinate) relationships. These networks underpin both politics and business. In return for providing benefits to the client, the client is expected to provide political or business support, protection or the supply of labor. Individual networks can span business, politics, the bureaucracy, and the military.

In a seminal article, James Scott describes patron-client relations in the following way:

The basic pattern is an informal cluster consisting of a power figure who is in a position to give security, inducements, or both, and his personal followers who, in return for such benefits, contribute their loyalty and personal assistance to the patron's designs. . . . Nominally modern institutions such as bureaucracies and political parties in Southeast Asia are often thoroughly penetrated by informal patron-client networks that undermine the formal structure of authority. If we are to grasp why a bureaucrat's authority is likely to depend more on his personal following and extra bureaucratic connections than on his formal post, or why political parties seem more like ad hoc assemblages of notables together with their entourages than arenas in which established interests are aggregated, we must rely heavily on patron-client analysis.<sup>29</sup>

And as Neher points out:

In the West institutions carry out government's functions but in societies where institutions such as bureaucracies, political parties pressure groups, legislatures, and the like are not available or are highly restricted personalist bonds become the primary intermediaries and the most important organizational unit for policy making. Personal alliances do what impersonal laws and institutions are supposed to do in the West.<sup>30</sup>

Colonial governments mostly left a country's administration to pre-existing elites and as a result, pre-existing political patronage systems usually continued under largely informal colonial administrations and which continue today. Influenced by ethnic Overseas Chinese, business in Southeast Asia is also highly networked (through patronage).

Patronage networks can affect the way competition law is administered and enforced (or not enforced). For example, both Indonesia and Thailand introduced competition law about the same time in 1999. While there have been many cases in Indonesia, there has not been one successful case in Thailand. One possible explanation is the fact that all penalties in Thailand are criminal and must be referred to the Attorney-General's Office. Invariably, the Attorney-General refers the case back to the Office of Trade Competition on the basis that there is insufficient evidence to meet the higher

---

<sup>29</sup> J a m e s C . S c o t t ,  
*Patron-Client Politics and Political Change in Southeast Asia*  
, 66(1) THE AM. POLITICAL SCI. REV. 91, 92 (March 1972).

<sup>30</sup> Clark D. Neher, *Asian Style Democracy*, 34(11) ASIAN SURVEY 949, 951-952 (November 1994).

standards for criminal prosecution. Other possible explanations include the “loss of face” involved with a criminal offence and the fact that those involved may belong to the same patronage network as the bureaucrats enforcing the law.

While networks are common in business elsewhere, they are so important in Asia that many writers conclude that Asian capitalism is different. For example, Witt and Redding conclude:

Asian business systems (except Japan) cannot be understood through categories identified in the West . . . [and that] business systems theories need to incorporate and conceptualize social capital, culture, informality and multiplexity.<sup>31</sup>

Family political dynasties are also common in Southeast Asia. For example, Lee Hsien Loong followed his father Lee Kuan Yew to become Prime Minister in Singapore, President Corazon Aquino’s political power came from her marriage to Senator Benigno Aquino. Yingluck Shinawatra followed her brother Thaksin Shinawatra to become Prime Minister of Thailand. Parliaments are commonly composed of family members from the elite.<sup>32</sup>

Overseas Chinese in Southeast Asia mainly came from the provinces of Guangdong and Fujian in Southeast China. They maintain close economic and family ties within their dialect clan groups overseas and back in China. Contributing to group cohesion has been the hostile environment they faced in most countries in Southeast Asia. Faced with insecurity and mistrust of government and local businessmen forced overseas Chinese to amass and control wealth to ensure both economic survival and to have the funds to develop good political connections.

Overseas Chinese generally adhere to Confucian values that emphasize the importance of the family, which impacts on the way business is organized and practiced. For example, traditionally, the Chinese divided the father’s estate equally among each son. To facilitate division, Chinese businessmen often invest in networks of small and middle-sized firms, rather than large firms. These firms operated in “trust networks” that went beyond the family and built on personal relationships with other businessmen from the same region in China who spoke the same Chinese dialect. The importance of informal trust within the Chinese networks means that Chinese businessmen are afraid to “do the wrong thing” within the network—the consequence of abusing trust is being shunned by the Chinese community and losing long-term economic opportunities. These networks extend to politics.

But from the 1980s these traditional Overseas Chinese businesses started to internationalize. One important reason was China’s opening up to the outside world in 1979 (through special economic zones and open coastal cities, replacement of administrative restrictions on exports and imports with tariffs, quotas, and loosening of foreign

---

31 Witt and Redding (2013) *supra* note 20, p. 265.

32 For the Philippines, *see* <http://www1.up.edu.ph/index.php/it-runs-in-the-family-the-making-of-political-dynasties-in-the-philippines>.

exchange controls) that created opportunities for the Overseas Chinese. Networks built up through trust over the years by Overseas Chinese in Southeast Asia and back in China facilitated Overseas Chinese entry back into China from the 1980s. As a result, Southeast Asian Chinese business networks now extend back into China.

## V. Networks and Competitive Business Advantage

A man not thoroughly embedded in a network of kinship cannot be completely trusted because he cannot be dealt with in the normal way. If he behaves improperly, one cannot discuss his behavior with his brother or seek redress from his parents. If one wants to approach him about a delicate matter, one cannot use his uncle as a go-between to prepare the way. Wealth cannot make up for this deficiency any more than it can make up for the loss of arms and legs. Money has no past, no future and no obligations. Relatives do.<sup>33</sup>

Networks provide benefits through savings in production and transaction costs as well as expanded market power. Networks allow members greater access to human and financial resources, knowledge, and management expertise and long-term contracting. This can be particularly important in underdeveloped and transition economies where markets do not work properly and so market information is distorted. A *guanxi* network allows for better information to make both short-term and strategic decisions. As well, networks allow for more opportunities to influence political elites, to control valuable information and resources, to set selling and other regulatory standards.

TCE sees business networks as an alternative governance mechanism to markets, the firm (hierarchies), franchises—all of which are designed to reduce the costs and risks of transacting. TCE examines unusual and complicated business practices as deliberate attempts to reduce transaction and costs and govern more effectively. Two behavioral assumptions are made—opportunism and bounded rationality.<sup>34</sup>

TCE challenged many of the standard competition law conclusions about vertical restraints in the 1960s and 1970s. Then, vertical restraints were seen as evidence of market power and antitrust agencies in the United States pursued them with zeal. TCE turned that on its head by arguing there were market failure explanations for vertical restraints such as tying, exclusive dealing contracts. Coase complained in 1972 that: “when an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation.”<sup>35</sup> Increasingly TCE has made its way into competition law. Before joining the bench, Frank Easterbrook

---

33 MARGERY WOLF, *THE HOUSE OF LIM: A STUDY OF A CHINESE FARM FAMILY* (1968), at 23.

34 See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985).

35 RONALD H. COASE, *Industrial Organisation: A Proposal for Research*, in 3 *ECONOMIC RESEARCH: POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANISATION* 59, 67 (Victor R. Fuchs ed., 1972).

commented that: “[t]he dichotomy between cooperation inside a ‘firm’ and competition in a ‘market’ is just a convenient shorthand for a far more complicated continuum.”<sup>36</sup>

While TCE has influenced, considerably, the competition law approach to vertical contractual practices and vertical integration, it has had less impact on horizontal agreements and integration.

Networks based on trust only work if the benefits of long-term trust exceed the benefits of cheating once (the network will punish the cheat by ostracizing him from the network). Reputation is everything when there are no legal remedies. Traders and others will only deal with those they trust. But it is not the reputation of individuals that counts—rather it is the family reputation—which can be inherited. This may create entry barriers into established networks—new access to a network will depend on sponsorship that vouches for the new entrants trustworthiness—new entrants from an existing family in the network already have the reputational capital.

While trust networks can exist purely by passing on information about those who default on contracts, a network may also have formal mechanisms for punishing recalcitrants. If so, the mechanism is potentially an agreement to boycott (refusal to deal with recalcitrants) between competitors that breach competition laws in most jurisdictions, often *per se* illegal as in the US. Such arrangements may be conducted through clan associations, e.g., Teochew, Hakka, etc. Shunning a recalcitrant without a formal agreement may also be seen as tacit collusion. In the absence of institutions that can properly enforce contracts, collusion to boycott members of a clan group who fail to perform promises can be socially beneficial—without them there would be less contracting and lower output. Hence such conduct should not breach competition laws, as this kind of boycott is likely to be pro-competitive (assuming there is no other possible courses of action). In fact such conduct could be justified not by market failure but by:

... a “court failure” justification that would evaluate institutional alternatives in light of a public court’s inability to provide the contractual security a merchant group requires. Antitrust law should thus incorporate transaction costs into the efficiency analysis, move beyond the traditional and narrower antitrust inquiry into prices and output, and employ a comparative institutional analysis to determine the relative efficiencies of alternative mechanisms to govern transactions.<sup>37</sup>

Chinese family companies usually obtain a competitive advantage where relational contracting skills are important, including in the newly developing markets of Southeast Asia where the legal infrastructure was not properly developed. However,

... this does not fully explain why Chinese family business did not abandon the relational system even when they operated in business environments that

---

36 Frank Easterbrook, *The Limits of Antitrust*, 63 REX. L. REV. 1 (1984).

37 Barak D. Richman, *The Antitrust of Reputation Mechanisms*” *Institutional Economics and Concerted Refusals to Deal*, 95 VIRGINIA L. REV. 325, 358 (2009).

did develop reliable legal systems and institutions, such as in Hong Kong and Singapore.<sup>38</sup>

Further, Chinese family companies typically avoid:

industries that require extensive, ongoing coordination of operations such as those involving large-scale complex manufacturing (Yoshihara, 1988), since for the most part they do not have the sophisticated internal organization and decentralized decision making that such industries require (Carney, 1998, Redding 1990). The flexibility of the Chinese Family Firm accounts for its prevalence in industries where windows of opportunity open and close quickly, and where start-up costs are relatively low . . . the ability to mobilize capital on short notice through one's personal network is also a source of timing advantages. This capability is crucial in businesses like real estate.<sup>39</sup>

*Guanxi* networks also allow Overseas Chinese firms to form joint ventures with foreign investors. Yeung also says the networks have the ability to *protect existing monopolies* from competition.<sup>40</sup>

## VI. Family Businesses in Southeast Asia

Reflecting the general characteristics of their societies, Southeast Asian businesses are dominated by family companies. Big enterprises, owned by the key Chinese capitalists in Southeast Asia, are not the large-scale firms run along Western lines, but rather a conglomeration of small and medium-scale enterprises in a variety of markets that are not even remotely related.<sup>41</sup>

While family-owned companies dominate small business, as they do in other countries, what is unusual about Southeast Asia is that family companies *also dominate big business*. This is illustrated by a (now dated) survey of corporate ownership by the World Bank following the Asian Financial Crisis in 1997.<sup>42</sup> Claessens, Djankov, and Lang examined the ownership of almost 3,000 Asian companies. They found that a high proportion were family controlled and these firms controlled a large part of many Asian economies. For example, they found the top ten families in Thailand controlled about 46% of assets, with even larger proportion in Indonesia with 58%.

---

38 Daniel M. Shapiro, Eric Gedajlovic & Carolyn Erdener, *supra* note 9, at 118.

39 *Id.* at 111-12.

40 HWC Yeung, *Transnational Economic Synergy and Business Networks: the Case of Two-Way Investment Between Malaysia and Singapore*, 32(8) REGIONAL STUDIES 702 (1998).

41 See e.g., EDMUND TERENCE GOMEZ & KWAME SUNDARAM JOMO, *MALAYSIA'S POLITICAL ECONOMY: POLITICS, PATRONAGE AND PROFITS* (1999).

42 Stijn Claessens, Simeon Djankov & Larry H. P. Lang, *The Separation of Ownership and Control in East Asian Corporations*, 58 J. OF FIN. ECON. 108 (2000).

**Table 2 - Family Ownership of Big Business**

% of Total Value of Listed Assets as % of GDP

Country	Top 1 Family	Top 5 Families	Top 10 Families	Top 15 Families	Top 15 Families
Indonesia	16.6	40.7	57.7	61.7	21.5
Malaysia	7.4	17.3	24.8	28.3	76.2
Philippines	17.1	42.8	52.5	55.1	46.7
Singapore	6.4	19.5	26.6	29.9	48.3
Thailand	9.4	32.2	46.2	53.3	39.3

What is perhaps surprising is the high concentration of top family assets irrespective of level of a country's development, legal or political system, suggesting that networks of patronage ties are more important, as well as difficult to detect and break up.

Family run businesses may put the interests of the family ahead of profitability, which can have implications for competitive conduct. For example, a family business may be more concerned with preserving the business (to employ family members and long-serving employees) than Western firms. This could mean sustaining losses for extended periods of time (made up from other parts of a conglomerate business, wider clan friends or from government) to prevent new entry that could affect market "stability."

Overseas Chinese domination of big business in Southeast Asia had its roots during the colonial period. Western companies often used Chinese intermediaries to gain market access. Colonial governments used Chinese intermediaries for tax collection and other similar purposes. The very rich ethnic Chinese (assimilated into local societies to varying degrees in Southeast Asia) usually gained their wealth by obtaining monopoly licenses, concessions, and tax-farming benefits, from indigenous political elites. The Chinese did not pose a political threat to local political elites and thus were favored over indigenous businessmen.

Ethnic Chinese business practices in Southeast Asia have been influenced by Confucian ethics. Confucius saw families as the fundamental unit in society. He identified five important relationships, three of which were family based. These included the relationship between: ruler and ruled; father and son; husband and wife; elder brother and younger brother; and friends. Social harmony would follow if individuals followed their proper roles within society. Considerable reliance for social order was placed on the head of the family. He was expected to ensure that family members followed their proper roles including their duty to respect the Emperor's decrees. Officials would punish members of families who defied the head's authority.

Families (or larger family groups such as clans) were also expected to contribute to social stability by looking after family members, including material support by younger family members for older ones. The emphasis on the family also means that family

members put family interests above the interest of non-family members, including over the interests of society as a whole. Confucian principles are still important to ethnic Chinese families in Southeast Asia and in Vietnam, long influenced by China. In the case of Vietnam, “. . . a political ruler is supposed to govern like a parent, with wisdom and benevolence; and subjects, like children, must be filial—they are constrained to obey.”<sup>43</sup>

Immigrant Chinese also brought business practices that make the way business is conducted in Southeast Asia different, to some degree, from that currently practiced in developed countries in the West. This has implications for the introduction of competition law and its enforcement. For small and medium size companies, access to Chinese business networks—usually based on where they came from in China—conferred a number of advantages. Firstly, they obtained more timely information about the prices of commodities in different countries than locals and could arbitrage more effectively. Secondly, they dealt mainly with members of their own extended family or clan group—people who they could trust more than locals and other foreigners. In countries with undeveloped commercial laws where promises were difficult to enforce (particularly against locals) they trusted their own for investment, long-term contracting and lending purposes. Reputation within their extended family or clan group served as an important deterrent against commercially bad conduct.

Because the Chinese immigrants were foreigners in somewhat inhospitable circumstances, they also formed extensive business/clan self-help groups that operate similarly to “friendly societies” in Europe. These groups also acted as cartels, setting price and restricting access where possible to markets. Third, because of their lack of trust in local institutions and the possibility of government expropriation, ethnic Chinese companies also tended to form family owned and run conglomerates to control all aspects of their business. Sometimes this included owning a bank where favorable loan terms could be obtained and also often included ownership of wholesale and retail distribution chains. Conglomerates not only allowed greater control but also risk diversification across markets, the ability to move resources quickly between companies, and the ability to maintain a higher level of secrecy about company resources and strategy. However, it was not always felt that traditional Chinese business practices were desirable.

In Singapore until the 1980s the government linked companies formed one of the two officially designated “legs” of development, the other being foreign investment. Government leaders said that Singapore’s own Chinese firms could not lead development because they were held down by the “outdated and superfluous” inheritance of traditional Chinese ways.<sup>44</sup>

---

43 PATRICIA M. PELLEY, *POSTCOLONIAL VIETNAM: NEW HISTORIES OF THE NATIONAL PAST* (2002), at 159-60.

44 Tipton, *supra* note 19, at 427.



## VII. Big Business and the Role of Business Groups and Conglomerates

In examining potentially anti-competitive practices by corporations, we typically assume that companies comprise one class of common stock or shares where each share carries one vote. Control depends on numbers of shares, and shareholders with more shares have greater say in the running of the company than those with fewer. Companies are usually assumed to maximize profits or, equivalently, shareholder value. Often, companies are assumed to have widely dispersed ownership, thereby creating agency problems between shareholders as principals and management as their agents. But a concern with immediate ownership masks issues of control, which are particularly important in Asia.

La Porta, Lopez-de-Silanes and Shleifer<sup>45</sup> examined the ownership structure of the 20 largest publicly traded firms in 27 of the richest countries in the world, where the likelihood of widely-dispersed ownership is high. They found, particularly in countries with poor minority shareholder protection, that even large firms tend to have controlling shareholders, with control held sometimes the state, but mostly by a family (either the founder or his—invariably a male—descendants). Of particular importance is the fact that the controlling shareholders usually have a degree of control greater than their rights to the cash-flows or assets of the firm. This is often achieved through pyramid structures or dual class shares.

Furthermore, the Overseas Chinese family businesses often “expand by acquiring an ever-increasing number of companies rather than by expanding existing companies. The overall business group may be large, but its individual components may be relatively small. This tends to mean that ethnic Chinese feature strongly in lists of the wealthiest families or entrepreneurs but are under-represented in lists of the biggest companies.”<sup>46</sup>

In all East Asian countries, Claessens, Djankov, and Lang found that corporate control is usually enhanced through the use pyramid structures and cross-holdings among firms.<sup>47</sup> Control is mostly exercised through cross-shareholdings, pyramids, and dual-class shares. Dual class equity where different votes are attached to different classes of shares helps a shareholder control corporations with less investment than in a single class equity firm. Pyramid control is common in continental European countries and in Asia. Pyramids are usually created through a holding company that has a controlling interest in another holding company that has, in turn, a controlling interest in an operating company. Because both dual-class shares and corporate pyramids are mechanisms to separate cash flow rights and voting rights in a company they allow a

---

45 Rafael Florencio-Lopez-de-Silanes La Porta & Andrei Shleifer, *Corporate Ownership Around the World*, LIV(2) THE J. OF FIN. (1999).

46 EAST ASIA ANALYTICAL UNIT, *supra* note 13 at 153.

47 *Supra* note 42.

party to control corporate assets while contributing only a small proportion of equity capital. A further way of increasing control is by rights issues. Funds are sought from existing shareholders but if not taken up then those that do increase their relative ownership share. As a strategy it can be used to dilute the shareholding of non-network shareholders.

The economic basis for exercising control through dual-class shares and pyramids is essentially the same as for “trust networks”—they can achieve efficiencies and/or increase market power. They may bring efficiencies where institutions such as equity markets are undeveloped. For example, the business group can serve as an internal financial market where cash from profitable firms within the group support those struggling. Just as importantly, where legal institutions are undeveloped (and thus contracts are difficult to legally enforce) then a business group or conglomerate or corporate pyramid can substitute internally for outside contracting—thereby bypassing outside markets and networks. A further advantage is that internal labor resources can be more efficiently employed by moving people between firms and by using trained people in similar roles across the group. A recent empirical study of business groups concluded that “their emergence and early establishment often occur under very difficult institutional conditions and that they played a pivotal role in the early stages of many countries’ and regions’ economic development.”<sup>48</sup>

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

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

Many successful ethnic Chinese families in the region have modernised their business interests along similar lines. Typically, their companies are formed into a squat pyramid format, with a private holding company at the apex, a second tier holding the most prized assets which are usually privately held,

---

48 Michael Carney et. al., *Business Group Affiliation, Performance, Context and Strategy: A Meta-Analysis*, 54(3) ACADEMY OF MGMT. J. 437, 454 (2011).

and a third tier comprising the group's publicly-listed companies. Such a structure makes it easier for the families to implement the maxim: 'what is profitable is 100 per cent mine; what is not is mostly not mine.' Should there be a desire to do so, it also makes it easier to raise funds at the bottom of the pyramid from shareholders in the group's public companies, then pass these up the pyramid.<sup>49</sup>

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

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

Why are business groups so pervasive and important in Southeast Asia? The usual explanation for business groups, as mentioned above, is efficiency. That is, they arise due to market failures or "institutional voids," similar to the economic explanation for networks. But as institutional deficiencies are rectified with increasing standards of living, it would be expected that they would be no longer needed. However, business groups are still important in Southeast Asia even with high levels of economic development, which casts doubt then on this "institutional voids" hypothesis and suggests that creation of the market power may be more important. The advantages and disadvantages of business groups are listed in a useful table from Carney.<sup>50</sup> This is summarized below.

### **Value Creation: Business Groups**

- 1) Have lower transaction costs for affiliated firms;
- 2) Serve as a quasi-internal capital market for affiliates;
- 3) Are a source of scarce entrepreneurship;
- 4) Are a source of management talent;
- 5) Provide reputation that signals quality and helps acquire scarce resources in factor markets;
- 6) Are a mutual insurance device;

---

49 EAST ASIA ANALYTICAL UNIT, *supra* note 13, at 159.

50 Michael Carney, *The Many Futures of Asian Business Groups*, 25 ASIA PACIFIC JOURNAL OF MANAGEMENT 595 (2008).

- 7) Fill ownership voids, effectively monitor subordinates;
- 8) Are a “catch up” mechanism; and
- 9)  
Facilitate economic development in areas lacking public infrastructure.

**Value Destruction: Business Groups**

- 1) Are organized as pyramids designed to loot and plunder their affiliates;
- 2) Concentrate corporate control in the hands of small elite;
- 3) Entrepreneurship is rent seeking;
- 4) Entrench incompetent management;
- 5) Insiders use their complex and opaque corporate structures to exploit outside investors, outsiders demand risk premiums;
- 6) Impose costs on weak firms;
- 7) Inadequate monitoring facilitates moral hazard and inefficient investment;
- 8) Are stuck in the imitation phase; and
- 9) Exercise monopoly power.

What is distinctive about many business groups in Southeast Asia is that they have been state-created. The state has not been distributionally neutral in the privatization processes. Rather than promoting the overall national economic interest, politicians and officials in positions of power have provided entrepreneurs and themselves with the means to make considerable money from industrialization policies. Often, following the end of colonial rule, the state monopolized capital and used it to assist specially selected small group of local entrepreneurs to buy the assets of the departing colonists or they simply nationalized them and transferred control to indigenous entrepreneurs linked to government. Usually, this state-led strategy was accompanied by the grant of domestic monopolies and protection from foreign competition (both by import protection and restrictions on foreign ownership).

Because business groups control much of the wealth in Southeast Asia there may represent a particular challenge for competition law due to:

- Close relations with the government (this is more of a problem in the civil law countries where there are usually fewer private remedies available when state regulators do not act on complaints about anti-competitive conduct).
- Anti-competitive practices within the group that restrict competition through:
  - Market collusion between members of the same group;
  - Abuse of market power achieved through coordination of policies and resources (e.g., impeding entry or driving competitors out by obtaining

preferential prices or terms for inputs from other members of the group, including preferential financing or favorable distribution through cheaper retail outlets).

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

A growing phenomenon among many prominent ethnic Chinese-controlled companies, particularly in South-East Asia, is the degree to which they move together in their quest to jointly dominate markets. This occurs at an international level, emphasising that senior ethnic Chinese business people often treat the region as a single, borderless market.<sup>51</sup>

How can competition law deal with complex interrelated companies, which are the norm in big business in Southeast Asia? This issue has not been fully resolved in the mature competition law countries. For example, in the US it is clear from *Copperweld Corp. v. Independence Tube Corp.*<sup>52</sup> that an agreement between a company and its wholly owned subsidiary is not an agreement that is anti-competitive under the Sherman Act. The US position is not as clear when it comes to less than full ownership or where control is exercised in other ways. Similarly, Europe has the single economic entity doctrine (which is also followed in Singapore, at least by the Competition Commission of Singapore). The European Court of Justice decided in 2009 that parent companies are presumed to be liable for cartel violations committed by their wholly owned subsidiaries.<sup>53</sup>

The difficult issue of business groups has been dealt with by the Indonesian competition regulator. *Law No. 5 of 1999 Concerning the Ban on Monopolistic Practices and Unfair Business Competition* does not specifically state that the law applies to foreign firms. However, the Commission for the Supervision of Business Competition (“KPPU”) has used the single economic entity doctrine to extend the law to foreign firms. The first case involved a holding company (Temasek), [owned by Singapore Government] which held shares, both directly and indirectly, in two Indonesian mobile phone companies. *Law No. 5 of 1999* prohibits cross-shareholdings that create monopolistic practices or unfair business competition. The question was whether Temasek, as a foreign entity, which did not operate itself in Indonesia, is subject to the cross-shareholding prohibition. The KPPU held in 2007 (Case 07/KPPU-L/2007) that Temasek constituted a single economic entity with two Indonesian companies because Temasek was: involved in the management of both companies; was authorized to appoint directors or commissioners; and had access to confidential information.<sup>54</sup> Because Temasek held only 35% of the capital of Telkomsel (the market leader) and 41.9% of Indosat (the second largest player) this decision caused some consternation —

---

51 EAST ASIA ANALYTICAL UNIT, *supra* note 13, at 161.

52 467 U.S. 752 (1984).

53 Case C-97/08 P, *Akzo Nobel and Others v. Commission* (2009).

54 See HADIPUTRANTO, HADINOTO & PARTNERS, GUIDE TO COMPETITION LAW IN INDONESIA (2013 edition) available at [http://www.hhp.co.id/files/Uploads/Documents/Type%202/HHP/bk\\_hhp\\_competitionlawindonesia\\_2013.pdf](http://www.hhp.co.id/files/Uploads/Documents/Type%202/HHP/bk_hhp_competitionlawindonesia_2013.pdf).

at least in Singapore. Temasek also maintained that the Indonesian Government actually held majority stakes in Telkomsel and a golden share in Indosat.” Subsequently, the position has become much clearer in Indonesia with the introduction of *Government Regulation No. 57 of 2010*, which provides that an entity is regarded as having control over another entity:

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

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

## VIII. Final Thoughts

Those who practice competition law across boundaries, when confronted with a particular competition fact situation, will naturally look to the international competition law norms as well as their own experiences, both in their home country and in other established competition law regimes. But how relevant is this international experience? On the surface, it would seem that jurisdictions having similar competition goals, laws or legal processes and values are likely to yield similar regulatory outcomes. That is, similar fact situations will result in similar decisions. This *might* happen if two jurisdictions have the same competition law and both adopt a *black letter* or forms-based jurisprudence where decisions are made solely on the form of the conduct. If the same conduct is proscribed then similar decisions should follow. Similarly, if two countries adopt efficiency as their main competition law goal and both use an economic-effect based approach, then similar *economic* fact situations should also lead to similar conclusions about the impact of the conduct, only differing in degree.

But are competition law principles easily transferable to countries with different business practices, varying levels of institutional sophistication or diverse political systems? Principles of market definition can be easily applied across borders to determine market power. But can international legal standards with respect to collusion or abuse of market power be adopted? Should differences in local conditions mean that competition law advice should take greater account of local circumstances than international practices?

Differing background economic policies may mean that the appropriate role for competition law, the prohibitions and enforcement proprieties should differ from country to country, also taking into account varying levels of economic development and institutional capacity. For example, in developing countries with no government social security, breaking up cartels may adversely impact the long-standing socially acceptable cartel arrangements that ensure economic survival without excessive consumer prices. Ethnic Chinese businessmen in Southeast Asia often formed self-regulating clan associations to ensure their collective economic survival (in countries hostile to their

success), and also to provide help to members in financial need, similar to “friendly societies” in the West. Newly introduced competition laws may conflict with these earlier informal private and government actions designed to serve social ends. As another example, despite being an open, highly competitive economy, Singapore initially encouraged industry self-regulation through industry associations for a number of social ends. As a regulatory strategy, it put the regulatory onus on those in the best position to know what was happening. For example, through the Singapore Medical Association, medical doctors were persuaded to lower their fees. However, these informal collaborative self-regulatory arrangements became illegal when competition law was introduced.

Competition law also fits within the pre-existing institutions. Introducing competition law will not have much impact if pre-existing political interference or bureaucratic corruption continues. This is made worse where no explanations are given for the competition authorities’ decisions. Developed jurisdictions, such as Australia, Europe and the United States, stress economic efficiency as a goal. But in countries long dominated by elites whose wealth has been built on government monopolies, it is more likely that competition law will be introduced in a way that maintains those interests. For example, current plans to use the many sectoral regulators in the Philippines to administer a general competition law may be an indication of this. Another way vested interests can thwart efficiency is to incorporate multiple, mutually inconsistent, goals in a new competition law. This leaves the competition regulator or the courts with wide discretion to achieve whatever desired end they choose, including favoring domestic elite group interests. This creates considerable legal uncertainty, except for those within the “circle.”

Changing to an environment where competition drives efficiency, aided by an effective and transparent competition law, is difficult. To have any chance of promoting overall economic welfare, elite political groups (which in Southeast Asia is mostly synonymous with business elites) need to be persuaded that promoting overall economic welfare is a better policy long-term not only for the country as a whole but also for them in the longer term, i.e., it is better to have a smaller slice of a bigger economic pie driven by economic efficiency. But this is difficult to do in societies where protecting status or having a relatively quiet life are seen as more important. Often, those with political and economic power in Southeast Asia have gained their status in ways unrelated to economic merit or ability. More focus on economic-effect competition law and policies can help to correct this situation.

To improve economic outcomes there may be an important regulatory lesson to learn in Southeast Asia. Given the nature of networked conglomerates and business groups and the lack of transparency in business dealings, rather than regulator’s focusing on ‘market studies’ which are limited to the number of firms, entry barriers, etc. in specific competition law markets, it might be better to focus on important individual corporate groups to try and understand how competition actually works in each economy and in the region as a whole. Simply focusing on markets could leave important issues out of the analysis.

Editors

Nicolas Charbit  
Elisa Ramundo

Assistant Editors

Anna M. Pavlik - Jessica Rebarber

# William E. Kovacic

## **An Antitrust Tribute** *Liber Amicorum* - Volume II

In the wake of William E. Kovacic *Liber Amicorum* - An Antitrust Tribute - Volume I, this Volume II provides, in the European tradition of *Liber Amicorum*, 27 contributions from 37 prominent authors spanning various antitrust topics across the world.

In this Volume II, the authors pay tribute to Bill Kovacic's antitrust career tackling issues such as the international convergence and cooperation, agencies performance and effectiveness, cartels criminalization, vertical restraints, leniency policies, etc. Volume II sheds a light over the antitrust law world offering a unique combination of theoretical insights, practical knowledge, together with some more personal remarks on Bill Kovacic's antitrust career.

**INSTITUTE of  
Competition Law**  
Antitrust databases and resources

**Concurrences**  
Competition Laws Journal

ISBN 978-1-939007-43-8



9 781939 007438