



## **Outlawing Monopoly: A Programmatic Evaluation of USAID's ASEAN Competition and Consumer Protection Program from a Development Perspective**

William M Butterfield  
Team Lead, Program Economist, USAID/Regional Development Mission for Asia

Chanyut Nitikitpaiboon  
Program Development Specialist, USAID/Regional Development Mission for Asia

Thuy Thi Bich Nguyen  
Program Management Specialist, USAID/Vietnam

September 2011

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The authors' views do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

*“In theory, competition policy and law can be considered the Constitution of the market economy. But in practice it only exists on paper and is dependent on enforcement.” - Staff Attorney at the Vietnam Competition Authority (VCA).*

## **Executive Summary**

This paper evaluates the ASEAN Competition and Consumer Protection Program (ACCP), which is managed by the US Agency for International Development (USAID) through its Regional Development Mission to Asia (RDMA) and implemented by the US Federal Trade Commission (FTC) and the US Department of Justice (DOJ) by providing technical assistance to the Association of Southeast Asian Nations (ASEAN) to develop sound Competition Policy and Law (CPL), consumer protection policies, and associated enforcement capacity. Overall, we find the ACCP to have been very effective, especially in Vietnam, as the technical assistance (TA) provided by the project was well received by institutions such as the Vietnam Competition Authority (VCA) and the ASEAN Secretariat. Particular strengths of the project included: (1) The utilization of internal USG technical expertise by contracting with the FTC/DOJ; (2) The method of using a regional approach, in this case by working through ASEAN in order to institutionalize CPL as a key objective in that body and using that to garner interest and create multilateral pressure for the adoption of international best practices in CPL, ultimately shifting focus to an interested member country, in this case Vietnam, on a demand-driven basis; (3) the cost-effective combination of different technical assistance mechanisms such as resident advisors, trainings, and workshops, as well as an internship/fellowship opportunity at the FTC, all of which assisted the VCA and other ASEAN members to learn firsthand about foreign investigation and litigation *processes*.

From a donor perspective, providing technical assistance to develop effective CPL as well as consumer protection in lesser developed countries is important because: 1) CPL is an increasingly important aspect of “21<sup>st</sup> century trade agreements” because it helps define the “rules of the game” for foreign investors and provides some assurances that domestic CPL will not be used to punish successful businesses or protect purely domestic interests, thereby lowering perceived risk; 2) The creation of an independent and adequately funded CPL enforcement agency can signal a commitment to continued liberalization by the government as well as provide a quasi-credible mechanism to enforce such a commitment both through legal means and by creating an institutionalized competition advocate with the government itself; and 3) At minimum, an adequately effective CPL Agency can prevent the worst abuses of incumbent firms and set minimum standards for firm behavior, significantly improving consumer welfare at the margin.

However, the project experienced considerable frustration in attempts to generate interest from Cambodia and Laos and was unable to move draft laws and policies forward in these countries. This is most likely because CPL may not be appropriate for least developed countries (LDCs) given the underdevelopment of the private sector and the presence of higher priority and higher return technical assistance

opportunities. Assisting with establishment and application of best practice CPL in developing countries is a challenging undertaking because: 1) CPL cannot be divorced from the political economy context in which it operates, meaning CPL Agencies can be mere “paper tigers” or worse yet be used for anti-competitive purposes such as protecting incumbent firms; 2) The human capital requirements for effective CPL enforcement are substantial, and most lesser developed countries contain few individuals with advanced law and economics (industrial organization) training and there is unlikely to exist a “culture of competition” among the populace who understand the costs of monopoly; 3) The legal and historical background surrounding the need to create “anti-trust” law in the West vis-à-vis CPL in the developing world are fundamentally different and thus TA is difficult to tailor to fit unique legal, historical, and developmental contexts.

Evidence of project impact is provided in part by the responses to an evaluation survey of recipient institutions that gave the implementing partners very high marks. Higher level evidence of impact at the outcome level is provided by the World Economic Forum’s (WEF) *Global Competitiveness Index* (GCI), in which Vietnam improved its rank for “Effectiveness of Anti-Monopoly Policy” from 100<sup>th</sup> out of 131 countries in 2007-2008 when the ACCP first began its focus there, to 58<sup>th</sup> out of 139 countries in the latest (2010-2011) rankings. However, other variables in which effective anti-monopoly policy should be expected to impact, including scores for “intensity of local competition” and “extent of market dominance”, remained largely unchanged and even worsened somewhat in Vietnam over that period. We hypothesize that the VCA, with assistance from the ACCP, successfully raised awareness of the importance of competition among the local businesses that respond to the WEF survey upon which the GCI rankings are based. This then had the effect of raising the standard for competition enforcement in the economy, potentially causing related indicators to get worse before they get better.

The evaluation recommends that the project begin to phase out its support for CPL in Vietnam where the capacity it has built to date appears to be largely sustainable given the increasing availability of domestic resources and the VCAs committed engagement with ASEAN Experts Group on Competition (AEGC). However, given the rapidly growing staff at VCA, continued introductory/basic trainings by the FTC/DOJ for new staff would be highly valued by the VCA and would not be resource intensive. Continued limited technical support to the VCA for implementing more complex areas of CPL may also be needed and appropriate in the future. Given that Vietnam just recently passed its Consumer Protection Law in 2010, there is need for technical assistance in this area. The ASEAN Secretariat is also largely meeting its goals for CPL, but could potentially use support in the emerging area of regional consumer protection issues. Given that Malaysia just passed a new and comprehensive CPL in 2010 and the Philippines appears set to pass one, the project should explore cost-effective opportunities there. In order to ensure longer term sustainability, human capital in the area of law and economics will need to be built across the region. Therefore, the project should look to engage local universities in the development of an effective curriculum and also engage NGOs across the region as part of an outreach strategy.

## Introduction

According to the Fundamental Welfare Theorem of Economics, competition is *the* precondition to the achievement of an efficient allocation of resources in a market economy. In economic terms, competitive markets maximize consumer welfare by promoting allocative efficiency (making the goods consumers want in the quantities valued by society) and productive efficiency (producing goods at the lowest possible costs), as well as giving rise to dynamic efficiency (stimulating innovation and technological change) (Gelhorn, Kovacic and Calkins 2004). However, established firms have strong incentives to collude with each other in order to create market power and individual firms already possessing market power to use their power to harm competitors and drive them out of business. Firms also engage in “rentseeking” and collude either explicitly or implicitly with government in order to create market power and legally prevent entry by competitors through tariffs, regulations, exclusive contracts, and other means (Tullock, 1967) (Krueger, 1974)).

These anti-competitive practices tend to result in less production, lower product quality and variety, lack of technology adoption, and higher prices for consumers (see, for example, (Harberger, 1954); (Laitner, 1982), and (Parente & Prescott, 2005)). Ultimately, monopoly power leads to persistent market inefficiency and ultimately less development. It may therefore be necessary to legislate against such practices and explicitly prohibit the acquisition of undue market power as well as protect consumers directly from the abusive practices of firms with market power through the enforcement of “competition laws”/“antitrust laws”/“antimonopoly laws” or Competition Policy and Law (CPL)<sup>1</sup>, the term that will be mostly used throughout this paper.

The objective of this paper is to evaluate the Association of Southeast Asian Nations (ASEAN) Competition and Consumer Protection (ACCP) Program in order to: (1) identify what worked and what didn’t in the program and attempt to measure its overall development impact for the resources expended; (2) Determine future priorities for the program in terms of focus, method, and whether to scale up or scale down investments; and (3) Using the ACCP as a reference point, generate broadly applicable lessons on providing Official Development Assistance for implementing and enforcing CLP in a developing country context. This was done through a series of interviews with project implementers at the FTC, project beneficiaries in Vietnam, Indonesia, Malaysia, Cambodia, and the ASEAN Secretariat in Jakarta, as well as through an extensive literature review on experiences providing technical assistance (TA) for CPL.

## Background

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<sup>1</sup> Among CPL experts, the “*policy*” part of CPL usually refers to privatization, trade liberalization and deregulation policies. The FTC/DOJ CPL capacity building emphasized the role that a competition and consumer protection law enforcement authority can have as an advocate within the government and in society at large for such policies.

The ACCP was funded by the US Agency for International Development (USAID)<sup>2</sup>, managed by USAID's Regional Development Mission to Asia (RDMA), and implemented by the US Federal Trade Commission (FTC) and the US Department of Justice (DOJ).<sup>3</sup> ACCP is a nine year program in two parts, Part I (2003-2006) was a \$600,000 component which focused assistance on the ASEAN Secretariat in Jakarta and Part II (2006-2011) is a \$1.44 million component which is focusing technical assistance to help ASEAN's members, with a particular focus on Vietnam, and a lesser focus on Cambodia and Laos. From summer 2002 through December 2004, the FTC also provided technical assistance to Indonesia's competition authority, the Komisi Pengawas Persaingan Usaha (KPPU), which was funded by USAID's Bilateral Mission in Jakarta.<sup>4</sup>

The goal of the ACCP is to "encourage the further development of sound competition and consumer protection policies and enforcement and to foster regional cooperation." FTC/DOJ provides technical assistance by providing expert commentary on draft laws and regulations, training enforcement authorities, and helping to sustain a region-wide networking forum that promotes: (1) independent analysis and decisions based on sound legal and economic principles; (2) timely and efficient investigations that do not unduly burden private enterprises; (3) open and transparent enforcement decisions; (4) support from the public and NGOs, and understanding by the judiciary; and (5) regional convergence on competition and consumer protection policy and law enforcement in order to facilitate regional economic integration.

At the time that the FTC and DOJ began work with ASEAN, only two of its members had CPL and associated independent enforcement agencies, Indonesia and Thailand. Since then, Singapore, Vietnam, and Malaysia have passed competition laws. The Philippines continues to discuss reform of its laws which are scattered throughout their legal code but are not enforced, yet the country appears set to finally pass a law sometime in 2011-12. Laos and Cambodia are in the midst of drafting laws and discussing enforcement institutions, but have not been willing to move forward quickly in this area.

Efforts at creating regional Consumer Protection standards are more recent and may be regarded as the next step in regional cooperation for ASEAN. At present, only Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam have principal consumer protection acts. The remaining ASEAN Member States are planning or are in the process of drafting their consumer protection policies and laws. The ACCP has undertaken only limited work in this area to date and discussion of consumer protection in this evaluation is therefore limited. However, as discussed below, consumer protection could constitute the bulk of the work in any potential next phase of the ACCP project.

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<sup>2</sup> Specifically USAID/RDMA and USAID/Vietnam

<sup>3</sup> In addition, beginning in 2008, the FTC supplemented USAID funds with its own resources after receiving Congressional approval to do so.

<sup>4</sup> Since this earlier component was not a part of the current ACCP, this evaluation does not focus attention here.

### *Efforts at the Regional Level*

At the region-wide level, following on two years of resident advisors at the KPPU in Jakarta, the FTC sent resident advisors for nine months to the ASEAN Secretariat in Jakarta. These advisors were able to continue on a part-time basis to provide bilateral assistance to the KPPU and participate in APEC and United National Development Programme (UNDP) training programs in the region. The FTC/DOJ also helped to sponsor and organize four regional programs for ASEAN.

When the program began in 2004, ASEAN did not have competition on its agenda as an issue to be addressed in its plans for economic integration. The Secretariat advised the ACCP that some members were not yet at a point where they would be open to making competition a formal topic to be included in regional integration discussions. The ACCP therefore set out to raise the awareness of the members through training programs in individual member countries. Interest increased and took on a regional dimension through the ASEAN Consultative Forum for Competition (ACFC), an informal mechanism that the FTC/DOJ was instrumental in creating for the purposes of training and networking on competition among the ASEAN members.

In 2007, the project saw some major breakthroughs. At the Cebu Summit in January 2007, ASEAN leaders agreed to take concrete steps towards building the second pillar of the ASEAN Economic Community (AEC) – a highly competitive economic region. One of the action items under this pillar was “establishing a network of competition authorities to serve as a forum for discussing and coordinating common competition policies [and] developing a regional policy framework on competition policy by 2010.” At the instigation and recommendation of the ACFC and its members, the ASEAN Economic Ministers (AEM) established an ASEAN Experts Group on Competition (AEGC) during the 39<sup>th</sup> AEM Meeting held in Makati, City, Philippines on August 24, 2007. This ensured that competition policy would be given recognition and would receive resources and Secretariat support. The AEGC was tasked to study and, where appropriate, make recommendations for promoting and protecting competition consistent with the goal of regional economic integration.

To bring about this recognition for the need to address CPL enforcement issues and to raise the capacity to address these issues, in 2007 the FTC/DOJ created a five-pronged strategy: (1) resident advisors living in the region; (2) training workshops for individual countries; (3) region-wide training workshops; (4) in-depth assessments of the competition policy and enforcement; and (5) an annual conference of the heads of competition agencies/ministries from the ASEAN member countries. The initial resident advisors lived in Jakarta and commuted once a month for a week to Hanoi. For twelve months, beginning in April 2006, the FTC sent two resident advisors to Jakarta for six months to provide assistance to the ASEAN Secretariat and its members. They were also available to respond to requests for assistance from other ASEAN members and to participate in Asia-Pacific Economic Cooperation (APEC) training programs in the region. In both places they assisted the staff in analyzing

matters under investigation, conducted classes for the staff and helped draft procedural manuals. FTC staff also traveled to the region to conduct short term (usually one week) training programs for the staff of the agencies and ministries.

In 2008-2009, ASEAN began negotiating a Free Trade Agreement (FTA) with the EU, which in turn joined the Asian Development Bank Institute (ADBI) and the U.S. in working with the Secretariat to provide training for the ASEAN Experts Group on Competition (AEGC). The U.S. continued to be the main source of competition and consumer protection assistance for ASEAN and its members.

### *Vietnam*

In December 2004, a Competition Law was passed by the National Assembly of Vietnam and the Vietnam Competition Administration Department (VCAD) was set up under the Ministry of Trade with functions similar to the FTC in the US, yet with an initial staff of just seven people. Consultants for the ACCP reviewed several drafts of the law before it was passed and made comments, of which it was estimated that one-third were accepted and incorporated into the final law. In 2007, the name of the Agency was changed to the Vietnam Competition Agency (VCA) and it began investigating its first anticompetitive case. The Vietnam Competition Council (VCC) was also set up as a separate judicial tribunal that decides cases brought to it by the VCA and makes fines based on the VCA's recommendation.

In 2008, because of Vietnam's serious commitment to building the VCA into a first rate competition and consumer protection authority, the ACCP shifted its focus there and directed more of its regional competition and consumer protection resources to Vietnam than to any other single country in Southeast Asia. In 2009, the FTC resumed having a resident advisor in Southeast Asia after a two year hiatus, this time residing in Hanoi, with his office in the VCA. The advisor, Mr. Timothy Hughes, spent about three-quarters of his time servicing both the competition and consumer protection needs of the VCA. The remainder was used working on competition matters with the ASEAN Secretariat, the Cambodians and the Indonesians. From September through December 2010, Cao Xuan Quang, an attorney from the VCA, interned in the FTC's Division of Anticompetitive Practices of the Bureau of Competition as part of an exchange program.

In 2009, the VCA brought its first competition case, an action against a state-owned airport fueling monopoly for abuse of power. In 2010, Vietnam brought its first cartel case against several auto insurance companies, including four state-owned companies. In the consumer protection area, it had been investigating some of the largest and most powerful Vietnamese private retailers for deceptive advertising, and had assisted in the drafting of a greatly expanded consumer protection law which the Vietnamese National Assembly subsequently passed in 2010. Much of this drafting took place in 2009 and 2010 when the resident advisor was in Hanoi and assisted with consultations and comments on draft provisions.

As of mid-2011, the VCA had grown to almost 100 staff (with an average age of 28) and its budget had increased from 7 billion VND ( $\approx$ US\$450,000) in 2007 to 19 billion VND ( $\approx$ US\$925,000) in 2010. Also in 2010, the VCA was investigating 28 “unfair competition” cases and 1 “competition restriction” case and had received decisions on 24 and 4 such cases respectively. By 2015, the VCA hopes to have 200 employees and 500 employees by 2020, while it expects its budget to continue to grow.

### *Indonesia*

While Vietnam replaced Indonesia as the country toward which FTC technical assistance was directed around 2008, Indonesia and the other ASEAN member countries continued to receive assistance as part of the project’s regional efforts to bolster a culture of competition and lay the groundwork for regional economic integration through the AEGC, the official competition entity within ASEAN. After enforcing its competition law against anticompetitive agreements and abuses of dominance, in 2009 Indonesia began to enforce merger control. The ACCP participated in one program for the KPPU: over June 22-24, 2009, Tim Hughes was part of a three-person team (the others were from Canada and Australia), who conducted a workshop organized by the OECD on its “competition toolkit” which sets out a program to review legislation and regulations for any impact on competition.

### *Cambodia and Laos*

Working with the Cambodian government was a documented challenge for the ACCP. The resident advisor was able to have two productive sessions with the Cambodian Ministry working on competition issues in 2009 and 2010 where he zeroed in on some problems and afterwards provided written comments on the draft competition law. In order to raise the profile of competition policy in Cambodia, the project scheduled an ASEAN Regional training program there in June 2010 and invited a large contingent of Cambodians. Several Cambodians came, but reportedly participated very poorly. Laos also participated in the regional trainings but did not show interest in pursuing CPL either.

The project was left wondering if Cambodia and Laos are ready to adopt a competition law given that they were not able to provide a few qualified staff to work in the area. Burma, of course, presents a different problem where severe political repression and state-control over the economy make it unlikely that efforts at instituting CPL there would be of any use. Yet ASEAN still wants to proceed with its desire for every member to have at least some basic competition law in place.

The project continued to not see serious interest or progress in sending draft laws forward to the Council of Ministers that it had been promised. However, Cambodian officials began working with the ADB as well as the UN in 2010 and there are currently two new separate draft laws for which the FTC was asked to provide comments. It remains to be seen if the law will finally be voted on in 2011, and

even if so, whether or not CPL is necessary and/or proper for a Least Developed Country (LDC) such as Cambodia.

### **Key Areas of Program Effectiveness**

#### *Complementarity with broader USAID/RDMA regional integration and trade facilitation efforts*

The ACCP fits well within RDMA's broader objective of promoting the regional economic integration of Southeast Asia through ASEAN, in large part by supporting the goals of the ASEAN Economic Community (AEC) through their Technical Assistance and Training Facility (TATF) project. The goals of the AEC are to move beyond the ASEAN Free Trade Agreement (AFTA) which mostly focused on the elimination of most formal tariffs. This is because "21<sup>st</sup> century trade agreements" are not about tariff preferences; they are about deep integration through the liberalization of foreign investment, trade in services, and trade in technology, with the ultimate purpose of making it easier to do business internationally. From a development perspective, the achievement of an AEC should ultimately result in faster convergence of poorer member states to standards of living in richer ones as well as raise the overall level of development in the region, which is ultimately in the US interest for both political and economic reasons.<sup>5</sup>

To this end, regulatory integration is a critical component of AEC and other regional integration goals, and RDMA's TATF is focused on providing assistance in critical areas to meet ASEAN's expressed needs. One increasingly important aspect of 21<sup>st</sup> century trade agreements and deep integration is competition policy and consumer protection, as most recent regional trade agreements have included provisions addressing these areas, albeit to different degrees.<sup>6</sup> A need for technical assistance in these areas was therefore identified and the ACCP proved to be an effective complement to the broader efforts of the TATF.

Agreement on CPL principals is an important component of 21<sup>st</sup> Century trade agreements for several reasons. First, local competition agencies will always be incentivized to protect their own domestic companies in the event of a dispute. Foreign investors want some institutionalized guarantee that existing laws will not be used by domestic incumbent firms to punish them for taking some market share. The establishment of international best practice CPL also provides investors with a signal of sorts that the government is committed to a liberal market structure. In the

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<sup>5</sup> See "Realizing the ASEAN Economic Community: A Comprehensive Assessment" (2009). The collected studies estimate that under a standard computational general equilibrium model, "ASEAN economic welfare rise by 5.3%, or \$69 billion relative to the baseline – more than six times the effect estimated for AFTA, even under conservative assumptions."

<sup>6</sup> The ASEAN-EU FTA (which has been stalled since 2010) has an entire chapter on competition policy, while the ASEAN-Australia-New Zealand FTA (completed in 2009) has a competition component, but mostly just pledges more cooperation in technical assistance in this area. The Trans-Pacific Partnership (TPP) between APEC Member Economies is considered by many to be the model 21<sup>st</sup> Century trade agreement, and CPL is a *required chapter*.

case of Vietnam, the government wants to be recognized as a market economy and saw the adoption of CPL as a signal of seriousness to continue to de-monopolize its formerly near completely state-dominated economy.

Second, CPL provides foreign investors some guarantee against abuse of dominance by local incumbent firms that are important input suppliers to the investor. For example, the first abuse of dominance case that the VCA successfully brought was against the state-owned airline (Vietnam Airlines) which used its position as the monopolist supplier of fuel to airlines in Vietnam to raise the price of this obviously key input to punish its competitors. Such potential for abuse could exist for a number of key industry inputs in developing countries and investor fears are understandable. The creation of a CPL enforcement agency at least offers foreign investors a quasi-independent outlet to take complaints and possibly seek redress.

Third, CPL lays down the “rules of the game” for foreign investors and firms. That is, CPL provides general guidelines for acceptable behavior in the local market so firms know more what to expect before making business and investment decisions. This is also true in the area of consumer protection, since clear legal standards for firm behavior toward their customers creates transparency and lowers perceived risk. Consumer protection standards are also becoming increasingly important for international product recalls as well as cross-border consumer redress.

#### *The importance of regional approaches*

The ACCP is an excellent example of using a regional approach to more effectively further development objectives at an individual country level. The ACCP was able to work through a regional forum (ASEAN) to first attract interest in a new development topic and then worked to institutionalize the issue through that forum, both through assisting in the creation of the ACFC and then the AEGC along with the insertion of formal CPL objectives into the broader AEC goals. The achievement of these regional objectives then generated further interest in the topic and created pressure for conformance among ASEAN member states. Vietnam officials, who had participated in these regional activities supported by the project then made a specific request for assistance to the FTC for the development of its brand new CPL Agency. Given this demand-driven need, the ACCP switched its focus specifically to Vietnam by providing more tailored technical assistance.

From the FTC’s own assessment of its programs:

We encourage regional programs when that is feasible because they facilitate transparency between similarly situated neighboring countries and encourage the application of the same analytic principles to similar conduct. Regional programs can also spawn regional networking and, eventually, co-operation. To facilitate these goals, we have begun a program of mentoring at regional conferences, where more advanced nations that have already benefited from U.S. assistance co-host events with the U.S. and offer approaches that are indigenous to conditions within a region. (FTC, 2009)

In this particular case, the workshops sponsored by the project through the AEGC were instrumental in gaining the support for CPL in Vietnam, which led to the specific request to the FTC for support in 2007. The AEGC also played a key role in pressuring other countries such as Malaysia (which just passed their first formal CPL in 2010) and the Philippines (which is likely to pass a law sometime in 2011-12) to move forward in this area. In both these latter cases, key drafters of the law had previously participated in regional trainings sponsored by the ACCP.

These region-wide programs are especially important for forming a harmonized approach to CPL in the region. While CPL needs to be tailored to individual country needs and contexts, the basics of CPL are fairly standardized and are broadly applicable. For example, detecting price-fixing and collusion is universally similar. However, topics such as vertical integration, horizontal mergers, bundling, resale price maintenance, etc., are highly technical in nature and may need to be tailored around individual preferences of member countries.

Regional approaches also create the networks needed to share experiences on a number of related issues in a complex technical field such as CPL. Learning differing foreign CPL systems through this network can also provide complementarity and integration of international best practices. The ASEAN regional networks between Member Country competition agencies facilitated through the AEGC is a key factor ensuring the sustainability of the ACCP's efforts and promoting further development. According to VCA staff, these interactions with other agencies from the region help ensure that they continue to adhere to best practices and provide a channel through which they can feel comfortable directing their questions.

#### *Cost Effectiveness of Project Methodology*

There is little doubt that the FTC/DOJ was the best choice of implementing partner for this activity given their experience in providing technical assistance to competition and consumer agencies in the developing world. From the FTC's own evaluation:

“The comparative advantage of a program operated by the U.S. government agencies is that it can draw on its own long-term expertise in the investigation, prosecution, and, in some cases, adjudication of competition matters. The career legal and economic experts of the agencies are expert in the practical and analytic skills that are most likely to be lacking in newly formed competition agencies. The strength of the U.S. program is its ability to provide human resources to strengthen the ability of new competition agencies to investigate and resolve competition cases in a way that supports the development of functioning market economies” (FTC, 2009).

Overall, the FTC itself as well other studies (Nicholson, Sokol, & Stiegert, 2006) find that the presence of long-term technical advisors working within an agency is the most cost effective form of TA for CPL. Indeed, VCA staff that the evaluation team

interviewed expressed nearly uniform consensus that having an expert in-house was highly valued. The agency stressed the importance of learning practical application of CPL rather than theory, and especially benefited from role-playing/simulation in mock trials. Collecting evidence, which is key for guarding against political backlash, was also cited as a critical area in which the project supported the VCA to improve its effectiveness. Other than TA that builds the effectiveness of a CPL agency to bring a case forward, the ACCP realized that equally if not more important for a young agency to learn is what cases *not* to bring.<sup>7</sup>

Other forms of TA included short-term trainings, study tours, and internships. Short-term trainings and study tours on CPL involve relatively large amounts of resources because representatives must be flown in from around the region and boarded at hotels. Given the highly technical nature of the subject matter, it is difficult to train individuals in a meaningful way in such a short timeframe. Representatives from the recipient agencies that the evaluation team interviewed expressed similar views, finding short-term trainings and study tours to be the least effective form of TA because there is never sufficient time to learn material in a non-superficial manner. However, the real benefit of short-term trainings may not be the actual practical working knowledge gained by the participants, but rather the ability of the event itself to attract interest in the topic and generate demand for more in-depth and specific TA on a bilateral basis.

Longer-term internships/fellowships are also a relatively expensive use of project resources due to the need to commit travel, hotel and per diem, and work accommodations. Over a three month period in 2010, the FTC hosted Cao Xuan Quang, an attorney from the VCA, as an intern, with the goal of giving the agency hands-on experience working in an advanced CPL agency such as the FTC. According to the VCA beneficiary of this internship, the major benefit was the ability to learn foreign *processes* of initiating an investigation and following up through the court system. It was also highly valuable to learn foreign legal *concepts*, how they are applied, and how they could be applied in a Vietnamese context.<sup>8</sup>

However, the benefits of the internship program were admittedly more limited because the beneficiary found little that was directly applicable to the Vietnam context. Given the vast differences in legal systems, opportunities to use the beneficiary for “train the trainer” purposes (i.e. to share his experiences and impart the knowledge gained with others in VCA) were more limited. In the US, for example, there is a vast legal precedence in CPL, whereas in Vietnam there is none

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<sup>7</sup> In Vietnam, for example, investigations against a private TV cable company, K+, were initially launched on grounds of abuse of monopoly power. The claim was based on some popular outrage that the company had purchased exclusive rights to broadcast Champions League Football (soccer) games and charged viewers on a subscription basis. Such is very common and acceptable practice world-wide, however, as owners of major sporting leagues often auction off the rights to broadcast their content. The VCA, with input from the ACCP resident advisor, made what was most likely a proper determination that no laws were violated and did not pursue the case. In doing so, the VCA effectively resisted considerable public pressure to intervene where unnecessary.

<sup>8</sup> One example of this provided was the issue of “leniency” in which fines are reduced based on mutual agreements between the CPL agency and the cooperation of the defendant.

and it is difficult to translate US experiences to a Vietnamese context. Given this vast difference in legal context, the beneficiary did not feel as if three months was sufficient time to learn a completely different system of law.

In this case as well, however, the benefits of the internship program might have been more indirect. According to interviews, the availability of a prestigious three month long internship opportunity at the FTC sparked significant competition within the VCA to “win the prize” and motivated effective job performance. Using an internship opportunity such as this can therefore be a very effective way to incentivize and affect agency performance, over and above the direct benefits gained through learning during the actual internship.

In most cases, the ACCP made efforts to leverage project funding by coordinating with other donors and CPL experts, most importantly the Organization for Economic Cooperation and Development (OECD) and the Asian Development Bank Institute (ADBI). Legal restrictions on the use of USG foreign assistance funds made these partnerships especially valuable. For example, the FTC, using USAID funds, was able to pay the transportation and lodging costs for USAID eligible countries for regional training events while the OECD and ADBI were able to pay the transportation and lodging costs for non-eligible countries such as Burma and Thailand.

### **Constraints to Implementing Competition Policy and Law in a Developing Country Context**

#### *Political Commitment*

According to FTC/DOJ’s own account (USAID internal report - 2010), “we fell short of doing what we had hoped to do in Cambodia and Laos. Generating interest from Cambodia and Laos in competition has been difficult. The ADB funded a retired FTC attorney to spend one month in Cambodia working with the government to draft a competition law. He returned to DC very frustrated.” It is important to discuss potential reasons why Cambodia, and to a lesser extent Laos (where the project did not focus its resources but courted interest), lacked the will to move forward in this area and whether or not CPL is even necessary or proper in the context of a Least Developed Country (LDC). It is also important to understand why some countries with the capacity to move forward on developing CPL have chosen not to, and how CPL agencies can become “paper tigers” if political will is not present to follow through on competition promotion.

Little is known about the medium to long run impact of competition law regimes on the development of a market economy in low-income countries. However, it is clear that a few preconditions need to be met in order for competition law to be effective; the most important being that there must be political will to enforce such laws in a manner that effectively promotes competition. That is, the incentives of government actors need to be compatible with even-handed and transparent enforcement of the law with the overriding objective of protecting and enhancing consumer welfare. Countries with entrenched interests of dominant firms (which in

a LDC context normally mean State-owned enterprises (SOEs)) and those without independent and low-corruption judiciaries are much less likely to see progress, and efforts at promoting effective CPL are likely to be wasted. In Cambodia, SOEs are still dominant in most major sectors, corruption is pervasive, and the judiciary is not seen as independent. According to one report, “the executive branch usually dominates the legislature and the judiciary.”<sup>9</sup> When these conditions are present, a country might not be ready for CPL, and even if they were implemented, could quickly become “paper tigers” without any real enforcement powers.

Some relatively advanced countries in the ASEAN region, such as Malaysia and Singapore, eschewed the passage of comprehensive CPL until the 21<sup>st</sup> Century. Malaysia passed its first comprehensive CPL in 2010, 18 years after efforts to do so were first begun. This is because Malaysia was still committed to its industrial policy and “managed competition” between SOEs and the private sector. In Singapore as well, where a comprehensive CPL was not passed until 2004, it may be said that the government was honest with itself that it was not yet ready to commit to competition as a formal policy.

Governments can also establish what appear to be independent CPL agencies, yet at the same time create built-in institutional checks to protect its interests against enforcement actions. In Vietnam, for example, the government separates the investigative and enforcement components of some CPL. The VCA serves as the investigative arm that brings formal collusion and abuse of dominance cases to the Vietnam Competition Council (VCC), which is the separate council that conducts a trial, renders judgment, and sets penalties. A clear conflict of interest exists on the VCC though, as its members are appointed by the President’s office. A good example is the 2009 VCA case against 16 auto insurance companies for price-fixing, four of which were SOEs. While the VCC ultimately agreed with the VCA and ruled against the insurance firms, the amount of the fine was relatively small. This possibly reflects that fact that the VCC was composed of a representative from the Ministry of Finance, the ultimate owners of the SOEs. Creating conflicts of interest such as this whereby the government appoints the members of the enforcement arm is one method the government can use to weaken the authority of the CPL agency and protect its interests. Ultimately, a diversified private sector is needed in order to achieve a more perfectly competitive marketplace, and economies which are dominated by SOEs such as Vietnam will need to continue with privatization efforts in order to achieve sustainable outcomes.

Worse than impotent CPL agencies are CPL agencies that use the law in a perverse manner that protects incumbent firms and ultimately works against competition and a consumer-friendly environment (i.e., the stated goal of CPL should always be “first, do no harm”). (McAfee & Vakkur, 2004) review seven ways in which anti-trust laws can and have been strategically abused in the US and elsewhere. One of the main ways that CPL can be abused is by punishing innovative and successful new entrants

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<sup>9</sup><http://www.heritage.org/index/country/cambodia>

into the market at the behest of existing firms using older models.<sup>10</sup> Such cases have been brought in Indonesia, Thailand and even advanced economies such as Japan (which still prohibits most large retailers), whereby the competition authority claims that the lower prices offered by large retail shops by taking advantage of their economies of scale represents an “unjust low price” (or “predatory pricing” as it is more popularly called in the West).<sup>11</sup>

Such is a perfect example of the type of vague language/terms that are not good practice in CPL. Allowing CPL agencies wide discretion to determine what constitutes business practices that are “unfair” opens the agency up to political pressures, which in turn are normally up for capture by rent-seekers, especially in developing countries. Without a mature enforcement and legal system and without a relatively long history of cases providing legal precedence such as is enjoyed in the US, it is often better for CPL to be more statutory and prescriptive, leaving less room for discretion and thus less room for the law to be abused. This potential for political abuse is also a reason why the “abuse of dominance” and “mergers and acquisitions” areas of CPL are better suited for more advanced economies (discussed below) and why immature CPL Agencies should instead focus primarily on price fixing and the prevention of cartels where much less technical expertise is needed and costly mistakes are less likely. Also, given that it is impossible to write a comprehensive CPL that covers all contingencies, especially for a newly promulgated law, revisions are likely to be needed after the law becomes effective for a certain initial period (e.g. 5 years).

Ultimately however, if political will is indeed present, the establishment of CPL and complementary enforcement institutions can be part of a quasi-credible commitment on the part of government to continued liberalization. If a government is able to institute best practice CPL and establish an enforcement agency that is sufficiently independent and well-resourced and has sufficient authority, it can make changes at the margin that signal a broader change in the larger, economy-wide “rules of the game”, ultimately affecting behavior at a general level. In general, the effect of the establishment of CPL in a developing country will be marginal, but small steps can be exactly what are needed in order to move a country forward. This is exactly what is hoped for in Vietnam through the VCA which has indeed showed significant potential and progress through its willingness to take on SOEs and challenge (to a limited extent) entrenched government interests. In this sense, the CPL agency needs to become an institutionalized “gadfly” within the government for competition and liberalized markets.<sup>12</sup>

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10 The KPPU in Indonesia, for example, brought suit against Indomart, a modern Seven-Eleven type retailer. The emerging retailing giant was beginning to open up shops in Jakarta and elsewhere, generally offering consumers lower prices on goods. Due to apparent political pressure from “mom and pop” stores that were losing market share, in 2001 the KPPU issued an order to Indomart to cease expansion into traditional markets on the ground that such conduct violated Indonesia’s prohibition against “unfair” competition.

11 [http://www.research.kobe-u.ac.jp/gsics-publication/jics/thanitcul\\_15-3.pdf](http://www.research.kobe-u.ac.jp/gsics-publication/jics/thanitcul_15-3.pdf)

12 According to the World Bank/OECD (1998):

. . . [C]ompetition may be lessened significantly by various public policies and institutional arrangements as well. Indeed, private restrictive business practices are often facilitated by various

### *Creating a “culture of competition” in society*

One of the keys to overcoming political economy constraints described above is outreach and advocacy to the public. Successful CPL Agencies must be able to communicate the benefits of competition to the wider public with the aim of educating consumers and instilling a “culture of competition” because the government isn’t the only entity that needs to commit to competition as a goal. Explaining the role and benefits of competition to a society where it has historically been absent can be just as challenging of explaining the benefits of trade to those without any formal economics background. Where there is no “culture of competition” the populous will likely have many misconceptions about how effective market economies operate. If the breakup of local monopolies leads to short-run job losses, significant popular backlash can be expected and many can quickly come to view competition as a threat to their existing benefits. Negative reactions to competition promotion have been common across the globe as public sector employees feel their livelihoods threatened by the breakup of protected industries and the private sector fears that CPL is merely an excuse for additional government meddling and oversight.

Outreach to the private sector, media, and the consumer are therefore critical components of any CPL development strategy. Indeed, the competition agencies interviewed by the evaluation team all stressed outreach as one of the most critical components to effective enforcement and the development of an outreach strategy as one of their most pressing needs. Competition agencies must therefore constantly make decisions about how to allocate its scarce resources between its law enforcement and advocacy functions.<sup>13</sup>

According to interviews with the VCA Director, the project, through the presence of the resident advisor, provided critical assistance to the agency in dealing with the press and raising issues with the public. The ACCP also made attempts to involve the private sector and academia through its workshops, but most activities were specifically geared toward the government. Tim Hughes, the resident FTC expert, gave a speech to a local Vietnamese law school on CPL, and also attempted to recruit private sector participation where possible, but ultimately project focus apart from government officials was limited, in large part due to funding limitations.

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government interventions in the marketplace. Thus, the mandate of the competition office extends beyond merely enforcing the competition law. It must also participate more broadly in the formulation of its country’s economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace.

<sup>13</sup> In Vietnam, the VCA helped to establish the Competition Network of Vietnam in 2011, a monthly forum held at various locations throughout the country. Topics are selected at the request of the Vietnamese business community and government, NGO, and academic sector actors are all encouraged to attend and participate.

Given a larger budget, a more comprehensive approach to CPL TA project would have included a separate private sector, academic, and media component which focused on outreach and learning in an effort to shape and prepare the culture for liberalization and competition. However, the most important first step in creating sustainable capacity for a CPL agency to conduct its outreach functions are to ensure that it has the necessary credibility to do so, and this means focusing scarce resources on the development of the new agency itself (VCA) was a wise use of project resources.

### *Competition Policy's Place in the Development Process*

Whether or not political incentives to institute effective CPL are present, perhaps a more important question is whether or not CPL is appropriate in the Cambodian and Laos context at all. In Cambodia, agriculture accounts for over 70% of employment and the informal sector is estimated to comprise over 80% of GDP and 95% of employment. The informal sector is made up mostly of unregistered farmers and agricultural enterprises which are not registered with the Ministry of Commerce.<sup>14</sup> When private sector activity is so largely agriculture based and informal, the need for CPL lessens because neither sector is likely to become concentrated and single firms are unlikely to become dominant. Agriculture involves the production of commodities which cannot be monopolized and are normally close to “perfectly competitive” in markets. Similarly, informal firms cannot become market dominant because their operations are small in scale almost by definition (thus their ability to avoid paying most formal taxes). The benefits of CPL, therefore, are not at all clear for a country such as Cambodia at its current stage of development.

The sequencing of economic reforms matters and technical assistance priorities need to be considered. Competition law can be considered a second order issue premised on a legal system that functions reasonably well. The first order requirements for an effective competition law system include secure property rights, a contractual regime that functions and enforcement of these rights. According to (Nicholson, Sokol, & Stiegert, 2006):

...competition policy is not a stand-alone, narrow technical area of law. Rather it is part of a much broader array of policy, legal, and economic issues such as privatization, regulation, private property, contract, corporate governance, foreign investment and trade, business licensing and registration, etc. The key question is where competition policy and law (CPL) fits into this set of interconnected issues and how it will complement or possibly detract from generalized efforts at economic reform.

Clement, Gavil, Korsun and Kovacic (2001) outline the following conditions as principal barriers to the successful implementation of competition policy: limited government resources; history of excessive government regulation;

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<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CAMBODIAEXTN/0,,contentMDK:20771323~menuPK:293886~pagePK:1497618~piPK:217854~theSitePK:293856,00.html>

corruption; limited physical infrastructure (such as with underdeveloped transportation or telecommunications capacity); lack of independent judiciary; lack of expertise; and near absence of legal infrastructure necessary to facilitate private sector growth. What has emerged is that competition policy in a vacuum does not work. As Boner (1995) and Gal (2004) argue, competition policy is just one piece of a larger puzzle, and at best it exists as a complement to more structural reforms such as rule of law and the control of corruption. The interrelationships between various market-based policies, from government procurement to antidumping enforcement to antitrust, require many similar self-enforcing mechanisms. The underlying culture to support market-based economies and a competitive environment is often a fundamental requirement for support. The standard for interventionist enforcement needs to be higher in countries that lack developed market supporting institutions, although the risk of improper enforcement increases in those regimes.

Implementation of CPL only matters if there is a need for such laws to begin with and there exists the capacity for adequate enforcement of these rules. The variables associated with effective CPL outlined above are largely absent in Cambodia, Laos, and other least-developed countries.

### *Human Capital*

Since market and economic impact analysis is highly complex and technical in nature, a minimum level of human capital capacity within a country is necessary for effective application of CPL. The VCA reported that human capital was indeed their biggest constraint to agency effectiveness. While the practical applications learned from the ACCP were important in terms of learning on the job processes, long-term sustainability will require a staff that has more formal academic training in law and economics (industrial organization). Other than enforcement agencies, it is critical that the judiciary, including private lawyers, have sufficient knowledge and expertise in this area. Even if laws are well drafted, the interpretation of these laws into guiding standards plays an important role. Without well-functioning application of rules by the judiciary and without adequately trained lawyers to argue for their clients and the government's interests, CPL may be meaningless because of uncertain and potentially contradictory outcomes.

Given this constraint, the application of CPL often has to be broken up into phases depending on the level of human capital development in the country and experience with CPL (Hughes, 2004). The first and most straight forward application of CPL is the detection and enforcement against anti-competitive agreements. Collusion among would-be competitors in order to artificially raise/fix prices and drive other competitors out of business is relatively easy to identify once detected, and most of the time a CPL agency will simply "know it when they see it." That such agreements are harmful to consumers and on net are harmful to society is one of the most basic tenants of economics 101.

The second and more complex phase of CPL application is “abuse of dominance” cases. This area is more complicated because “abuse” and “dominance” are both subjective terms. First, one needs to be able to determine if the market share of a particular firm is dominant, but this goes beyond a simple “Herfindahl index”<sup>15</sup> calculation because some sectors are naturally more competitive than others and multiple other market factors may be at play. The third and most advanced phase of CPL application is merger and acquisition (M&A) analysis. Not only does this type of analysis require knowledge of how to measure industry concentration, but also the dynamic market effects of both horizontal as well as vertical combinations. M&A cases therefore require complex economic analysis and are very resource intensive; Malaysia’s new CPL, for example, has no M&A component. According to (FTC, 2009), “All too often, a proposed acquisition is seen as a threat to incumbent firms or employment, rather than something that might enhance efficiency and expand output in the long run. Concerns about employment or the closing of antiquated facilities may be a political reality, but we counsel the conduct of a sound competitive analysis in all merger proposals being examined.”

Therefore, one of the most effective long-term approaches to building capacity for investigation and enforcement is supporting the development of educational programs that focus on law and economics. Also, a well conceptualized and implemented commitment to continued technical assistance for young agencies should serve to reduce regulatory and judicial uncertainty and assist agencies to reach pragmatic goals. Doing so in phases as a function of available human capital normally makes sense.

### *Legal Context*

“Antitrust law” was first established in the US in the late 19<sup>th</sup>/early 20<sup>th</sup> Century based on the perceived need to control the behavior of and/or break up private sector monopolistic firms (or “business trusts”) such as Standard Oil. But CPL is fundamentally different from antitrust in that the historical and institutional context in which it is being developed is completely different. While antitrust largely focuses on preventing abuse of dominance by private sector firms, competition policy in a developing country context frequently aims at regulating the behavior of and/or reducing the dominance of state-owned enterprises and state-backed private incumbent firms. While the Sherman Act aimed to prohibit “*restraint of trade or commerce*”, CPL is more often employed to enable and promote trade and commerce where it did not previously exist.

Translating and imparting the US experience in a developing country context is therefore not an easy, and task and how to tailor competition law around specific

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<sup>15</sup> The Herfindahl index (also known as Herfindahl–Hirschman Index, or HHI) is a measure of the size of firms in relation to the industry and one of the indicators of the amount of competition among them. The major benefit of the Herfindahl index in relationship to such measures as the concentration ratio is that it gives more weight to larger firms.

social-political conditions is perhaps the biggest challenge in providing TA for CPL. According to the FTC's own report (FTC, 2009),

Our program focuses on the development of sound competition policy principles and institutions, taking account of distinctive national conditions. We recognize that no single model of substantive commands and institutions is suitable for all circumstances, and we give considerable attention to establishing the institutional capacity that supports effective enforcement in established antitrust systems. Many countries use civil law systems, which may require greater specificity than is characteristic of most U.S. antitrust laws. For example, the FTC Act makes it unlawful to engage in "unfair methods of competition in or affecting commerce," leaving to the agency and the courts the delineation of such "methods." A civil law country requires more specificity, and we adjust our advice accordingly. Likewise, we encourage other nations to benefit from the views of others, particularly the European nations that aspire to membership in the EU.

...We do not profess specific knowledge of conditions in foreign nations, and we have no preconceived notions of what enforcement priorities should be set. Nonetheless, our experience informs us in important ways that may have value to our foreign counterparts.

As noted above, some aspects of competition law are relatively easy to standardize, while others require not only more human capital, but also more tailoring around specific country realities. This inability to perfectly map experiences onto differing legal histories was apparent from the internship the program supported for the VCA staff member, whereby the beneficiary admitted that while he learned valuable lessons regarding procedures, processes, and concepts, he had difficulties finding appropriate applications at home.

### **Measuring Project Impact**

In terms of general feedback, the ACCP received very high marks on the survey designed by the evaluation team (see Annex 1).<sup>16</sup> Most everyone that responded was very positive about the usefulness of the project and professionalism of the implementers from the FTC. Yet while positive anecdotal feedback and programmatic indicators such as "number of people trained" are necessary to keep track of short-run inputs, in order for a project to be successful it must ultimately be able to translate project inputs into measurable impacts and results. To measure impact, higher-level *outcome based indicators* are needed. While moving from input based indicators to outcome based indicators is problematic in terms of establishing

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<sup>16</sup> One responder from the VCA wrote "...the technical assistance from US FTC under the financial supports [sic] from USAID is one of the best projects that Vietnam Competition Authority has ever received. The project assisted in building the capacity of the agency, enhancing the effectiveness of law enforcement and improving the ability and knowledge of VCA' staffs on competition issues. One of important thing is that the professional and friendship relations continue – a network established."

attributability between the two, we believe that it is necessary to at least look at such indicators as one potential method of quantitatively measuring project impact.

One of the most popular institutional indicators/rankings is the Global Competitiveness Report (GCR) of the World Economic Forum. In this annual publication based on survey responses of private sector companies, one section of indicators attempts to measure the extent of “market efficiency.” Under this category, there is a sub-category for “competition” under which there are three relevant indicators for competition policy and enforcement: “Intensity of local competition”; “Extent of Market dominance”; and “Effectiveness of anti-monopoly policy.”<sup>17</sup>

We now take a close look at the evolution of these indicators over time where the program’s resources were most focused: Vietnam. The focus and resources of the ACCP shifted to Vietnam beginning in 2008. We therefore compare the indicator rankings in 2007-2008 to the most recent rankings. As can be seen from Figure 1, Vietnam saw highly significant improvement in its “Effectiveness of anti-monopoly” ranking in just three years, lending some support to the notion that the TA provided was beneficial or at least not harmful. Of course, the improvement of this high level indicator cannot scientifically be attributed to the impact of the project. The direction of causality also runs from commitment to reform/improvement on the part of Vietnam to demand for the services of the FTC and DOJ.<sup>18</sup> Even so, it can be claimed that the initial demand for assistance with CPL had its genesis in the initial work that the ACCP did through ASEAN in helping to institutionalize CPL as a formal goal under ASEAN’s economic pillar, which placed pressure on member states to adopt international standards.

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<sup>17</sup> All of the following questions asks executives to rank their country according to the following statements: (1) How would you assess the intensity of competition in the local markets in your country? [1 = limited in most industries; 7 = intense in most industries]; (2) How would you characterize corporate activity in your country? [1 = dominated by a few business groups; 7 = spread among many firms]; and (3) To what extent does anti-monopoly policy promote competition in your country? [1 = does not promote competition; 7 = effectively promotes competition]. The countries scores are then compiled and they are ranked relative to other countries in the survey. Although these measures are subjective, a number of studies have found them to be robust and very well correlated with objective measures of institutional quality. For this reason, they are used quite often in the literature.

**Figure 1 – Vietnam’s GCR rankings for “competition”**

<b>Vietnam</b>	<b>2007-2008 (out of 131 countries)</b>	<b>2010-211 (out of 139 countries)</b>
<b>Effectiveness of anti-monopoly policy</b>	<b>100</b>	<b>58</b>
<b>Extent of Market Dominance</b>	<b>41</b>	<b>48</b>
<b>Intensity of Local Competition</b>	<b>61</b>	<b>75</b>

While Vietnam’s marks for the effectiveness of their CPL improved, the “intensity of local competition” indicator worsened slightly and the “extent of market dominance” stayed about the same. We can view these latter two indicators as the more “outcome” based, in that an effective CPL should lead to greater observed intensity of local competition and less market dominance by individual firms. This then lends support to the idea that even though Vietnam has been successful in launching competition enforcement and creating awareness of it, it has not yet been able to translate that success into observable improvements in competition outcomes on the ground. One explanation for this is that the VCA has, with the assistance of the ACCP, raised the standards and expectations of the businesses who responded to the GCR survey through their education, publicity, and outreach efforts between 2008 and 2010. It may be that the Vietnamese government has not yet matched those increased standards and expectations by reducing the power of the incumbent SOEs. It may also be that the increased awareness raised standards and expectations among businesses, causing the other two indicators to get worse before they potentially get better. This type of phenomenon is actually quite common. For example, anti-corruption campaigns can create increased awareness of the issue which causes people to recognize the problem and assess it more critically.

If this assistance had not come from the US, it would likely have come from another source, so there is really no “do nothing” counter-factual to compare this outcome against. Even so, it cannot be certain that alternative assistance would have been as high of quality, especially given FTC/DOJ’s considerable experience as the world’s premier source of technical experts in this field. According to the evaluation team’s conversations with the VCA, if the FTC hadn’t been available to offer its assistance, it would likely have hired a private contractor to assist them with their capacity building. But hiring a private contractor is not an ideal source of technical assistance since it is not government-to-government sharing of experiences that creates a sustainable working relationship amongst peers. The potential for bias by private sector contractors is ever present as well since profits and creating the continued need for services can be an objective of consultants. The diplomatic gains obtained

through country to country peaceful exchange of ideas can also not be left out of the measurement of project impact.

In order to fully understand the impact of the ACCP, we would need a better understanding of how markets, private firms, and the government in Vietnam will react in the long run to the enforcement of competition laws. Even though Vietnam has managed to establish sound CPL and is now beginning to enforce it, this cannot be expected to immediately affect the overarching political economy of the country, which is characterized by the dominance of large, incumbent state-owned enterprises. Progress towards further liberalization and privatization will likely take time and this is reflected in the lack of progress in improving the intensity of local competition. Still, it is difficult to conclude that the improvement in anti-monopoly/competition laws isn't a good first start for Vietnam as it continues what appears to be a serious commitment towards further liberalization. The successful implementation in Vietnam may also encourage other ASEAN neighbors to join the discussion and improve their laws, another potential spillover effect.

In terms of ASEAN, the organization met its goals for competition policy and consumer protection as measured by its bi-annual "AEC Scorecard" in 2010. Under the "Competitive Economic Region" pillar, it had achieved 50% of its targets, and was on pace for full achievement by 2015. Currently, ASEAN is shifting its focus towards consumer protection issues, particularly product recall and cross border consumer redress.

### **Assuring Project Sustainability – Next Steps**

While the ACCP was scheduled to close out in September 2011, as of June 2011 there were still resources left in the project pipeline and the FTC was preparing to file for an extension in order to conduct additional work with the VCA. As of this writing, USAID/Vietnam had committed to a one-year extension of the project worth \$90,000 for additional work with the VCA (FTC was also going to commit some of its own resources to the project now that it has gained the authority to spend money overseas for foreign assistance purposes). However, given recent general budget pressures, resources are likely to be quite limited for the project going forward and the impact of these limited resources will need to be maximized.

For that reason and others, this evaluation recommends a phased withdrawal of support to the VCA given the apparent sustainability of the capacity already built and the increasing level of resources being dedicated to this new agency by the Government of Vietnam. However, the growing number of staff will create a need for increased basic training in CPL. Given additional resources, the project should look to create a sustainable entry-level training program for new VCA staff that reviews the basics of CPL.<sup>19</sup> This should be done by assisting the VCA to create a permanent internal budget for such trainings if none exists. As the VCA continues to

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<sup>19</sup> The VCA's own priorities in order of preference are 1) Internships/fellowships; 2) Training for new staff; and 3) long-term (3 month) resident advisor.

develop, it will likely require technical assistance on the more sophisticated areas of CPL such as vertical integration, horizontal mergers, bundling, resale price maintenance, etc.. These are highly technical areas in nature and the VCA may need assistance to translate US experiences in these areas to fit the Vietnamese context. Given that Vietnam just passed its first comprehensive Consumer Protection Law in 2010, the VCA will need, and has requested, technical assistance in this relatively new and emerging area of law, similar to the type of assistance it received in CPL.

The project should look to create a system for measuring the direct impact of its trainings, possibly by administering before and after tests designed to estimate the gains in knowledge among trainees. It would be interesting to compare training formats to see which resulted in the most knowledge gains. Such a system would also allow the project to determine where potential exists and where it does not. For example, it was noted that the Cambodians “did not participate well” in some trainings, so a more quantitative approach to measure this might help prioritize assistance and identify problems (lack of interest) early on.

Continued engagement with the VCA is highly recommended as a means to ensure sustainability of results, but additional long-term resident advisors are no longer needed and visits of shorter duration (2-4 weeks) are more appropriate at this point. The project should also look to engage the VCC as well, as they apparently felt as if they had been ignored by the project. While engagement with the VCC could be beneficial and help ensure sustainability, working with this group would be more difficult than working with the VCA given its small, rotating, and politically determined membership.

ASEAN claims that its priority for assistance continues to be outreach and advocacy. It also requests assistance incorporating competition principals into the growing number of free trade agreements (FTAs) it is cementing (e.g. the ASEAN-China FTA, the ASEAN-Australia-New Zealand FTA). However, it appears that the AEGC is now adequately resourced and capable and no longer in need of significant levels of TA from USG sources. If the project does continue, it will of course make sense to stay engaged with ASEAN and work through them to the extent possible, through the need for direct technical assistance on CPL is no longer apparent. However, the organization could use additional assistance on emerging consumer protection issues, specifically product recall and cross boarder consumer redress. If there are opportunities to replicate the project’s successful work on regional CPL, the project should explore engagement in these regional consumer protection areas. Given that the Philippines is on the verge of passing a comprehensive CPL, this is a country that could potentially use FTC support going forward, especially since legal structures there are similar to those in the US given past US influence. The ACCP should continue to explore potential opportunities there and make a formal proposal given identified needs and demand.

The project could achieve a high-impact in the area of improving the human capital levels for implementing CPL by assisting local universities with curriculum design for law and economics (“industrial organization”) courses. The lack of capacity at the

university level was mentioned several times, and sustainable progress is unlikely if countries cannot develop their own internal supply of experts in law and economics. Equipping local universities with the capacity to teach in this area is especially important because they can tailor the content to the specific legal context of the country. In terms of promoting outreach, which was the other key identified constraint, the project might look to working with local NGOs to a greater extent.<sup>20</sup>

Based in part on these recommendations, the project should create a formal plan for sustainability in Vietnam and phase-out as well as detail any proposals for interventions in the Philippines or other countries.

The ACCP's efforts in Southeast Asia have largely been a success story and should be shared among development practitioners. Key to its successes were the use of a regional approach, complementarity with ongoing development efforts, and effective methodology of supplying government-to-government technical assistance through a combination of resident advisors, study tours, and awards for fellowships. As the development community continues to learn about what constitutes effective TA for CPL creation and enforcement, it must also continue to learn about the socio-political preconditions necessary for effective CPL and which factors are most likely to lead to greater impacts of CPL at the outcome level of a well-diversified private sector based economy. Because of the rising importance of CPL and consumer protection in regional 21<sup>st</sup> Century trade agreements, such knowledge will become increasingly valuable and further research on the role of these areas of law in the development process will be needed.

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<sup>20</sup> The evaluation team met with one NGO, the Consumer Unity and Trust Society (CUTS), that was active at the local level in promoting consumer welfare.

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## ANNEX 1 – Statement of Work

### Program Evaluation of FTC/DOJ ASEAN Competition Policy and Consumer Protection Program

#### I. Background

RDMA's General Development Office (GDO) and USAID/Vietnam's Office of Economic Growth (OEG) intend to conduct a Program Evaluation of its ASEAN Competition and Consumer Protection Policy Program (ACPP), implemented by the Federal Trade Commission (FTC) and the Department of Justice (DOJ), from June 1-10, 2011, in the program focus countries of Vietnam, Malaysia, and Cambodia, as well as in the ASEAN Secretariat in Jakarta. The evaluation will assess program performance and effectiveness against program goals and indicators, provide recommendations to enhance program sustainability, and provide general lessons learned that assist the Mission, USAID, and our development partners in deciding future directions of similar programs.

ACPP is a nine year program in two parts, Part I (2003-2006) was a \$600,000 component which focused assistance on the ASEAN Secretariat in Jakarta and Part II (2007-2011) is a \$700,000 component which is focusing technical assistance to help ASEAN's members, in particular Vietnam, Malaysia, Laos and Cambodia, to develop and implement sound competition and consumer protection policies and enforcement mechanisms. At the regional level of ASEAN, three new entities emerged since the FTC/DOJ first began working with the Secretariat in 2004: the ASEAN Consultative Forum for Competition (ACFC), the ASEAN Experts Group on Competition (AEGC), and the ASEAN Coordinating Committee on Consumer Protection (ACCCP). ACPP continued to support these regional entities and offered some opportunities for shared region-wide training to take place.

In Vietnam, the technical assistance is largely directed to the Vietnam Competition Authority (VCA), which enforces what the Vietnamese call their "Competition Law" (approved in 2004), had specifically requested assistance in a project to redraft its consumer protection law, which was approved in 2010. ACPP provided this assistance and other specific requests as they arose. In addition to working with the VCA, ACPP provided assistance to institutions that support the inculcation of competition in the Vietnamese economy. In Cambodia, technical assistance was to be focused on ensuring that a newly instituted competition law promoted consumer welfare and that the institutions created to enforce the law had the capacity to do so. However, despite support from the Asian Development Bank (ADB) and UNDP, the program encountered significant disinterest on the part of the Cambodians and efforts to assist with the final drafting and implementation of a competition law were frustrated.

The assistance is being delivered through a resident advisor, several short-term missions, and study visits to the U.S. During Part I of the Project, the advisor resided in Jakarta. During Part II, the advisor resided in Hanoi for four months each of the first two years of the program and planned to travel for a week each month to Cambodia.

## **II. Evaluation Objectives**

The objectives of the evaluation include:

- To evaluate program performance and effectiveness against stated goals, objectives, and performance targets, and to describe what program actions worked well, needed improvement, should be discontinued in the future, or should be replicated and/or scaled up;
- To provide recommendations for the design and implementation of a possible follow-on program; and
- To improve policies, programs, and projects by identifying and disseminating the lessons learned from this program experience and by making recommendations drawn from evaluation findings.

## **III. Scope of Evaluation and Key Questions**

The final program evaluation will address six key areas and answer targeted questions in each area:

- The relevance of the project's objectives in relation to each partner country's needs and institutional priorities;
- Its efficacy — the extent to which the development objectives of sound competition and consumer protection policies and enforcement have been (or are expected to be) achieved;
- Its efficiency — the extent to which project objectives have been (or are expected to be) achieved without using more resources than necessary;
- The sustainability of the project — the likelihood that its estimated net benefits will be maintained or exceeded over the life of the project;
- The institutional development impact — the extent to which the project has improved the ability of targeted countries to make better use of its own resources; and
- The performance of USAID and our host country partners (local competition authorities), focusing on how good a job each partner has done at each stage of the project cycle.

In assessing the program's effectiveness and potential areas of improvement, the evaluation team will seek answers to the following illustrative questions:

- Was an initial assessment conducted for each project site?

- How involved were recipient Competition Authorities in the design and implementation of the project’s TA?
- How many draft laws/regulations has the project produced? Where?
- Why is regulatory convergence in the area of competition law important in SE Asia? Is regulatory convergence or harmonization a good idea in this area? Don’t Competition policies need to be tailored around country-specific conditions?
- What progress was made toward regional regulatory convergence or harmonization in this area with FTC/DOJ support? Have the goals of the ACFC been adopted by ASEAN?
- Explain what role, if any, the project had in the passage of the 2010 Consumer Protection Law in Vietnam.
- What were some higher-level indicators (other than number of people trained) that the project was targeting? i.e., how do we measure a pro-competitive environment? From the Global Competitiveness Report indicators –

Vietnam –

2008-2009 (Out of 134 countries)

6.01 Intensity of local competition .....	56	■
6.02 Extent of market dominance .....	44	■
<b>6.03 Effectiveness of anti-monopoly policy.....</b>	<b>91</b>	<b>■</b>

2010-2011 (Out of 139 countries)

6.01 Intensity of local competition .....	75
6.02 Extent of market dominance.....	48
<b>6.03 Effectiveness of anti-monopoly policy .....</b>	<b>58</b>

Is there any explanation for why over two years the anti-monopoly law indicator for Vietnam would have improved significantly while “intensity of local competition law” would have declined so significantly? Can the project in any meaningful way claim some credit for the improvement in this high-level indicator?

- Please describe how the project assisted the VCA to build its capacity and how sustainable improvements to Vietnam’s competition policy are given the country’s unreliable legal system.

- Explain the case against the Vietnamese insurance cartel that the FTC attorney/resident advisor assisted the staff of the VCA to win.
- What progress is being made in the Philippines for the passage of a competition law? What specific role is the project playing here?
- What progress is being made in Malaysia for the passage of a competition law? What specific role is the project playing here?
- Did the project focus at all at increasing the awareness of the public and the private sector to the benefits of Competition Law and understanding how to utilize such benefits?
- It is well documented that quite often, especially in countries with relatively less respect for free-market institutions, anti-monopoly and competition laws can be either poorly enforced or strategically abused for anti-competitive purposes (i.e. either to punish non-cooperative behavior and/or to protect smaller firms by punishing larger and more efficient firms). How did the project take steps to ensure that these laws, once passed, would be implemented and enforced in a positive manner that improves economic efficiency?
- How was a lack of a competition law determined to be a binding constraint to growth in the project's ASEAN focus countries? Does one need competition law in countries as underdeveloped as Laos and Cambodia where most large sectors are dominated by state-backed incumbents? Are competition laws even credible at this stage of development? Doesn't the binding constraint to competition tend to be entry barriers and barriers to trade rather than anti-competitive practices by existing firms at lower levels of development?
- Is sequencing important in legal development or can the imposition of Competition law always be beneficial at the margin?
- What were the specific reasons in your mind for the inability of generating interest in competition law in Laos and Cambodia?
- Given the complexity of market analysis and the application of antitrust rules, are one-off workshops worthwhile? How can donors ensure sustainability and that the legal systems of developing economies have the requisite capacity and knowledge to apply these rules effectively and efficiently without funding continuing and long-term education of implementers?

#### **IV. Key Personnel and Activities**

Due to the small size of the ACCPP, hiring an independent external consultant would make little sense given financial resource constraints as well as RDMA's and USAID/Vietnam's more than adequate capacity to undertake this program

evaluation. Therefore, the evaluation team will be led by an internal RDMA and USAID/Vietnam three-person team including:

- The RDMA Program Economist
- The GDO Program Development Specialist
- The OEG Program Management Specialist

*The RDMA Program Economist and the OEG Program Management specialist, while not outside consultants, played no role and had zero involvement in the management or anything related to the ACCPP project. We therefore believe that the potential for conflict of interest in this evaluation is minimal.*

The USAID/Vietnam Economic Growth (EG) Office will provide in-kind support for this assessment in Vietnam, including helping to arrange meetings, hotel, and transportation as well as translation assistance. The Evaluation Team will review key documentation prior to conducting field work (e.g. SOWs, Work Plans, Annual Performance reports, etc.). Field Work will include site visits to Vietnam (Hanoi), Cambodia (Phnom Penh), the ASEAN Secretariat (Jakarta), and/or the Philippines (Manila), Malaysia (Kuala Lumpur), and Lao PDR(Vientiane) where interviews will be conducted which will likely include the following institutions:

1. The Vietnamese Competition Authority (VCA)
2. The Vietnamese Competition Council (VCC)
3. The Cambodian Ministry of Commerce
4. The ASEAN Consultative Forum for Competition (ACFC)
5. The ASEAN Experts Group on Competition (AEGC), and
6. The ASEAN Coordinating Committee on Consumer Protection (ACCCP).

## **V. Deliverables**

The final document will be a 7-10 page evaluation that summarizes findings and outlines lessons learned for general consumption. The document will be submitted to the USAID/RDMA GDO Director and USAID/EGAT for their review and comment prior to finalization of the evaluation. The first draft of the document will be completed no later than two weeks following the conclusion of field work.

## **ANNEX 2 – List of Interviewees**

Interviews conducted between June 2 – 10, 2011

1. Mr. Bach Van Mung, Director General, Vietnam Competition Authority (VCA)
2. Mr. Trinh Anh Tuan, Head of International Cooperation Division, VCA
3. Mr. Nguyen Duc Minh, Deputy Head, Anti-trust Investigation Division, VCA
4. Mr. Cao Xuan Quang, Deputy Head of Unfair Competition Division, VCA
5. Ms. Tran Thi Minh Phuong, Officer, International Cooperation Division, VCA
6. Dr. Tran Mai Hien, Director General, Vietnam Competition Council (VCC)
7. Mr. Manuel Rougeron, Executive Director, Vietnam Satellite Digital Television Company Limited (KPLUS)
8. Mr. Jean-Michel Boudet, Deputy General Director, KPLUS
9. Ms. Doan Thi Chien, Legal Director, KPLUS
10. Ms. Alice Pham, Director, Consumer Unity and Trust Society (CUTS) Hanoi Resource Centre
11. Mr. Benny Irzanto, Technical Officer, Agreement and Compliance Unit, ASEAN Secretariat
12. Ms. Hasduna Putri, Technical Officer, Competition, Consumer Protection & IPR Division, ASEAN Secretariat
13. Professor Dr. Ningrum Natasya Sirait, University of Sumatera, Indonesia
14. Mr. Soy Pardede, Chairman, ASEAN Competition Institute
15. Ms. Shila Dorai Raj, Chief Executive Officer, Malaysia Competition Commission

## ANNEX 3 – Evaluation Survey

### ASEAN Competition and Consumer Protection (ACCP) Program Survey

Please answer each of the following 9 questions using a 1-10 scale as indicated in each section. Please also feel free to offer any additional written comments below any question. The answers to these survey questions provide a quantitative measure of the effectiveness of the technical assistance program from the perspective of the recipient agencies.

\*The results of this Survey will NOT be shared with the technical assistance providers\*

#### *Overall effectiveness*

**1 = Very low; 10 = Very high; or NA (“Non-applicable”)**

1. The overall quality of technical assistance provided by the project.
2. The overall quality of the advisers provided by the project.
3. The overall impact of the project on the effectiveness of your Agency in fulfilling its mission or objectives.

#### *Agency operating effects*

**1 = Very insignificant/negative; 10 = Very significant; or NA (“Non-applicable”)**

4. Resulting improvements in the skill levels of your staff.
5. Resulting improvements in the operations of your Agency due to this project.
6. Resulting improvements in your Agency’s ability to conduct competition advocacy due to this project.

#### *Agency work product*

**1 = Very insignificant/negative; 10 = Very significant; or NA (“Non-applicable”)**

7. Resulting improvements in the ability of your Agency staff to handle new types of cases or violations due to this project.
8. Resulting improvements in the quality of decisions or recommendations rendered by your Agency due to this project.
9. Resulting improvements in the enforcement of the law due to this project.

*Appropriateness of technical assistance*

**1 = Strongly Disagree; 10 = Strongly Agree; or NA (“Non-applicable”)**

10. The type of technical assistance provided to your Agency was appropriate to the needs and capacity of your Agency (i.e, the advisors had a good understanding of local conditions in your country and your Agency’s specific needs).

11. The advisors established an appropriate professional rapport with the staff of your Agency and encouraged cooperation and mutual learning.

12. On top of direct technical assistance to your Agency, the advisors worked with supporting institutions in your country such as other government agencies, the judiciary, academic institutions, and the private sector.

*Please use this section to provide any general comments that you may have regarding the technical assistance provided to your Agency.*